

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2946

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TOWN OF OCONOMOWOC,

Plaintiff-Respondent,

v.

MAURICE MIHELICH,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

CANE, P.J. Maurice Mihelich appeals a civil conviction for operating a motor vehicle while under the influence of an intoxicant, first offense. His sole argument on appeal is that an arresting officer lacks probable cause to stop a motor vehicle when the stop is made on a mistaken belief. Because this court rejects his argument, the conviction is affirmed.

This case has a somewhat lengthy legal history and dates back to Mihelich's arrest for OWI on September 20, 1992. The case was transferred from the municipal court to the circuit court where Mihelich filed a motion challenging the arresting officer's probable cause to stop Mihelich's vehicle. The circuit court held an evidentiary hearing on the motion and found that the

arresting officer had probable cause to stop Mihelich's vehicle. Mihelich then entered a no contest plea to the charge and was sentenced.

In an attempt to challenge the trial court's ruling on the probable cause question, Mihelich appealed the conviction to this court. This court dismissed the appeal on the basis that Mihelich waived this issue by entering a no contest plea. Subsequently, Mihelich returned to the trial court and filed a motion to withdraw his no contest plea. The court permitted Mihelich to withdraw the plea and, based on the stipulated information submitted by the Town of Oconomowoc attorney, found Mihelich guilty of the OWI charge. Mihelich has again appealed the conviction and challenges only the legality of the stop of his vehicle. He concedes the lawfulness of his arrest for OWI if the stop was legal.

The Town of Oconomowoc argues that Mihelich's appeal must be dismissed as it is barred from review because of the doctrines of res judicata, law of the case and estoppel. Because Mihelich proceeded under our recommended procedure when a motorist enters a no contest plea under the mistaken assumption that he could still appeal the trial court's denial of his motion to dismiss for lack of probable cause to arrest, this court rejects the Town's argument to dismiss the appeal. See *County of Racine v. Smith*, 122 Wis.2d 431, 438, 362 N.W.2d 439, 442 (Ct. App. 1984).

Next, Mihelich argues because the arresting officer was mistaken about his observation that Mihelich's vehicle had inoperable taillights on the evening of the arrest, the officer lacked probable cause to stop him. At about 12:30 a.m., the arresting police officer was stopped at an intersection when he observed Mihelich's car cross in front of him. After the vehicle passed in front of him, the officer observed that the vehicle had no operating taillights. The officer then activated his squad car's emergency lights and stopped Mihelich's car because of the inoperable taillights. Mihelich responded that he had just recently purchased the car, a Saab, and was unfamiliar with its operation. After observing Mihelich during this stop, the officer eventually arrested him for OWI.

Mihelich presented evidence that a week before his arrest, the Saab underwent a predelivery inspection indicating that the electrical and mechanical systems were functioning properly and therefore the taillights had

to be working properly on the evening of the arrest. He also presented evidence that four months after the arrest, his Saab was again checked at the dealership and the taillights were found to be operating properly. Mihelich reasons that therefore the officer could not have observed the Saab with inoperable taillights and was mistaken as to his observations. The trial court, in deciding the probable cause issue, weighed the testimony of the officer, Mihelich and his witness. Without determining whether the taillights were in fact operating on the evening of the arrest, the trial court found that the officer was telling the truth and had a good faith belief that he saw the taillights not operating on Mihelich's Saab when it passed in front of him. It concluded the officer had probable cause to stop the vehicle.

In reviewing an order regarding suppression of evidence, this court will uphold the trial court's factual findings unless they are clearly erroneous. Section 805.17(2), STATS. However, whether a stop meets statutory and constitutional standards is a question of law subject to de novo review. *State v. Krier*, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

Mihelich contends that the trial court had to determine whether the Saab's taillights were operating on the evening of the arrest and that the only factual finding the trial court could make was that the officer was mistaken about observing the inoperable taillights. This court disagrees. Here, the trial court found that the officer was being truthful and in good faith believed he saw Mihelich's car operating without operable taillights. The court added that even if the officer was mistaken as to his observations, it was made in good faith and did not invalidate the stop.

In *State v. Lee*, 97 Wis.2d 679, 681, 294 N.W.2d 547, 549 (Ct. App. 1980), the court held that evidence is properly admissible against a person mistakenly arrested as long as: (1) the arresting officer acts in good faith, and (2) has reasonable, articulable grounds to believe that the suspect is the intended arrestee. Similarly, it stands to reason that when an officer acting in good faith observes a car operating in the evening without operable taillights, these are articulable facts sufficient to stop the vehicle.

Whether Mihelich was innocent of operating a car with inoperable taillights is not the question. Probable cause does not mandate that it is more likely than not that he committed the offense. See *State v. Mitchell*, 167 Wis.2d

672, 684, 482 N.W.2d 364, 368 (1992). However, if the arrest is a sham or front for making a search, the arrest and ensuing search are illegal. Here, the trial court found that the officer was acting in good faith and belief. The arrest was not a sham. This court agrees with the trial court that if the officer in good faith observed what he thought was a car operating in the evening without operable taillights, that is a sufficient basis for stopping the car. This court, therefore, affirms the conviction for OWI.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.