

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2011

A. John Voelker
Acting 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. 2010AP2995
2010AP2996
2010AP2997**

**Cir. Ct. Nos. 2009TR2368
2009TR2663
2009TR2369
2009FO207**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. BUBOLZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County:
TERENCE T. BOURKE, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ In this appeal, we are confronted with the question of whether ignoring a traffic sign warning motorists that a road is closed, except to local traffic, creates reasonable suspicion justifying an investigative traffic stop. We answer the question in the affirmative and uphold Jeffrey L. Bubolz’s first offense drunk driving conviction.

¶2 Sheriff’s Deputy Steven S. Wimmer was specifically assigned to patrol a closed construction zone on STH 42, between the Village of Howards Grove and the City of Sheboygan, because of concerns that drivers were damaging the gravel underlayment and guardrails were not erected on a bridge over the Pigeon River. The zone was marked on each end by lighted barricades, each holding a sign that read, “Road Closed—Local Traffic Only.” Between the two barricades, there were no driveways, intersections, businesses or residences. Near bar closing time on May 5, 2009, Wimmer watched a motorist swerve around one barricade, travel the length of the construction zone and swerve around the other barricade to exit the construction zone. Wimmer stopped the vehicle and identified the driver as Bubolz.

¶3 Bubolz received multiple citations, including first offense operating a motor vehicle while intoxicated, first offense operating with a prohibited blood alcohol concentration, and failure to obey an official traffic sign. Bubolz filed a motion challenging the reasonable suspicion justifying Wimmer’s investigative stop. He asserted that the Road Closed—Local Traffic Only signs were not

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

official traffic control devices, as defined in WIS. STAT. § 340.01(38),² therefore, Wimmer could not have a reasonable suspicion that Bubolz had violated WIS. STAT. § 346.04(2).³

¶4 At the suppression hearing, an employee of the Wisconsin Department of Transportation (DOT) testified that the contract for the construction on STH 42 authorized the contractor to place barricades with signs reading Road Closed—Local Traffic Only. In addition to his testimony detailing his observations, Wimmer also testified that he had consulted with the district attorney who advised that those signs meant a motorist cannot travel between the barricades if he does not have business to conduct in the construction zone. Based on the evidence presented at the hearing, the circuit court held that Wimmer had reasonable suspicion to stop Bubolz.

¶5 After the hearing, the DOT provided the contract to Bubolz and it was discovered that the contract did not authorize any signage reading Road Closed—Local Traffic Only and Bubolz filed a motion for reconsideration. In the

² WISCONSIN STAT. § 340.01(38) provides:

“Official traffic control device” means all signs, signals, markings and devices, not inconsistent with chs. 341 to 349, placed or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning or guiding traffic; and includes the terms “official traffic sign” and “official traffic signal.”

³ WISCONSIN STAT. § 346.04(2) provides:

No operator of a vehicle shall disobey the instructions of any official traffic sign or signal unless otherwise directed by a traffic officer.

motion, he asserted that since the signs were not authorized by the DOT, the signs were not legally sufficient and Wimmer's decision to conduct an investigative stop was based on a "mistake of law" rendering the stop invalid.⁴ The circuit court denied the motion, holding:

Failure to obey official traffic signs is a violation of the law. Deputy Wimmer observed Mr. Bubolz to not obey a traffic sign that looked official. A reasonable officer could believe that the sign observed on Audubon Road in Howards Grove was official. When Deputy Wimmer observed Mr. Bubolz to drive past a sign which said "Road Closed Local Traffic Only" and to continue on past the sign at the other end of the construction zone, it was reasonable for him to suspect that a traffic offense had been committed.

[*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,] involved a decision by an officer who determined that an improvised plastic window on a car was a traffic code violation because it was not safety glass. If an officer's interpretation of the law is incorrect and stops someone accordingly, that's a mistake of law. A lawful stop cannot be predicated upon a mistake of law. *Longcore*, 226 Wis. 2d at 9. In the case at bar, there is no misinterpretation of the law. Deputy Wimmer reasonably believed that an unofficial sign was an official sign. That is a mistake of fact, and the holding of *Longcore* doesn't apply.

¶6 Bubolz appeals from the denial of his suppression motion and his motion to reconsider. He renews the same arguments he made below.

⁴ We note that the authority to close roads under construction comes from the statutes and not any DOT contract. WISCONSIN STAT. § 86.06(1) authorizes those in charge of construction of a highway to close a construction zone with lighted barricades and § 86.06(2) makes it unlawful for any motorist to pass around those lighted barricades.

¶7 When we review a motion to suppress, we uphold the circuit court's findings of fact unless those findings are clearly erroneous. *State v. Horngren*, 2000 WI App 177, ¶7, 238 Wis. 2d 347, 617 N.W.2d 508. The application of constitutional principles to the facts is a question of law that we review de novo. *Id.*

¶8 Temporarily detaining individuals during a traffic stop qualifies as a seizure of persons within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). A traffic stop is therefore subject to the constitutional requirement that the stop is reasonable under the circumstances. *Id.* at 810. Traffic stops are usually reasonable if an officer has grounds to reasonably suspect a violation has been or will be committed. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

¶9 Reasonable suspicion exists when facts and circumstances known to the officer would lead a reasonable officer to conclude that the defendant committed a crime. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. Reasonableness is measured objectively by the totality of the circumstances. *See id.* The observation of unlawful conduct by itself gives a police officer reasonable suspicion for a lawful seizure. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996).

¶10 Bubolz argues that Wisconsin law requires drivers to obey only official traffic signs. Bubolz believes that the Road Closed—Local Traffic Only signs were not official traffic signs and thus he did not violate any laws. Bubolz contends that Wimmer was mistaken in his belief that the traffic signs were official. Bubolz argues that under *Longcore* a lawful stop cannot be predicated on

a mistake of law. *Longcore*, 226 Wis. 2d 1. Bubolz asserts that the basis for the stop was the deputy's mistake of law, and thus there was no reasonable suspicion to stop his vehicle.

¶11 Failure to adhere to official traffic signs is a violation of WIS. STAT. § 346.04(2) and passing beyond lighted barriers closing a construction zone is a violation of WIS. STAT. § 86.06(2).⁵ The deputy observed Bubolz swerve around Road Closed—Local Traffic Only signs that resembled official signs and travel the entire length of a closed construction zone. Nothing indicated that the signs were not official signs. A reasonable deputy could believe the barricade signs closing the construction zone on STH 42 were official traffic signs. Therefore, the deputy had reasonable suspicion to believe Bubolz had committed a crime.

¶12 Bubolz argues that *Longcore*'s mistake of law holding is relevant to this case. See *Longcore*, 226 Wis. 2d at 9. We disagree. In *Longcore*, the officer observed an improvised plastic window covering and thought it was a traffic code violation because it was not safety glass. *Id.* at 4. At issue in *Longcore* was: What facts were required under the statute in order to be in violation of the

⁵ WISCONSIN STAT. § 86.06(2) provides, in part:

Any person who, without lawful authority ... passes over or beyond any barrier so erected, or travels with any vehicle upon any portion of a highway closed by barriers as in this section provided, or walks or travels in any manner upon the materials placed thereon as part of the repair or construction work, shall be liable to a fine of not less than \$10 nor more than \$100, or to imprisonment not less than 10 nor more than 60 days, or both, and in addition thereto shall be liable for all damages done to the highway, said damages to be recovered by such governmental agency.

statute? *See id.* at 8-9. Here the question is: What did the officer reasonably perceive the facts to be? Thus, the *Longcore* court was concerned with a mistake of law. Conversely, believing an unofficial sign is an official sign is a mistake of fact, not a mistake of law.

¶13 We conclude that although Wimmer's belief that the Road Closed—Local Traffic Only signs were official may be mistaken, it was reasonable under the circumstances. As such, Wimmer had reasonable suspicion to believe Bubolz violated WIS. STAT. § 346.04(2). Therefore, we affirm.

By the Court.—Order affirmed.

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

