

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2008

David R. Schanker
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. 2008AP556-CR

Cir. Ct. No. 2006CT935

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER M. RITCHEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Christopher M. Ritchey appeals his conviction for operating a vehicle while intoxicated—3rd offense. The police officer's discovery

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

of this offense arose out of an initial stop for driving without headlights on. Ritchey claimed at his motion to dismiss/motion to suppress hearing, and again by his postconviction motion, that he had his headlights on and so there was no reasonable suspicion to stop him. But the judge who presided over the pretrial motion, Judge James Carlson, found the police officer more credible. And that is what this appeal is about: a credibility determination. We will not reverse a credibility determination of the trial court unless it is clearly erroneous, and that is not the case here. We affirm.

¶2 At the motion hearing, Judge Carlson heard the following facts: On October 26, 2006, at about 2:30 a.m., a police officer for the Town of Delevan observed a darker colored pickup truck pass him with its headlights off. The officer saw that the pickup continued to travel with its headlights off after the officer passed by. The officer did a U-turn, began following the pickup and turned on the squad emergency red and blue lights. The pickup continued to travel on with the headlights off for a half-mile. The pickup eventually pulled into a gas station and the officer observed, as the pickup was put in park, that the headlights came on. The officer approached the vehicle, introduced himself to the driver, who turned out to be Ritchey, and informed him that he had been stopped because his headlights were off. Ritchey claimed that his headlights were on. Thereafter, the officer noted certain markers indicating that Ritchey had been drinking, which warranted further investigation resulting in his eventual arrest for operating a vehicle while intoxicated.

¶3 Ritchey testified that his pickup has a “control lamp mechanism” that, when switched on, automatically turns on the headlights. He said that he bought the pickup, new, in 2003 and has never had occasion to switch the

mechanism from automatic. He testified that the headlights were on when the officer began following him and remained on when he stopped at the gas station.

¶4 The trial court noted that it was faced with a credibility question and believed the officer's testimony. Thereafter, a jury trial was held with Judge Michael Gibbs presiding and the jury found Ritchey guilty of operating while intoxicated and operating with an illegal blood alcohol content but not guilty of operating a vehicle without headlights illuminated. *See* WIS. STAT. § 347.06(1). Based on this not guilty finding, Ritchey asked Judge Gibbs to reconsider Judge Carlson's pretrial decision finding the officer's testimony that Ritchey was driving without his lights on to be more credible than Ritchey's denial. Judge Gibbs denied the reconsideration motion and we now have this appeal.

¶5 Nowhere does Ritchey cite the proper standard of review in this case—whether Judge Carlson's credibility determination is clearly erroneous. *See* WIS. STAT. § 805.17(2). Instead, he discusses Fourth Amendment jurisprudence as it relates to reasonable suspicion of unlawful activity. In particular, Ritchey cites the undisputed law that the test for a valid *Terry*² stop is “reasonableness.” This discussion is all fine, well and good, but begs the question: if Ritchey was driving with his lights off, the stop was reasonable, and if Ritchey's lights were on, it is unreasonable. So, the real question is, which was it? Judge Carlson made this determination. The judge believed the officer. Based on our review of the officer's testimony, we cannot find the officer's testimony to be incredible.

² *Terry v. Ohio*, 392 U.S. 1 (1968).

¶6 Ritchey appears to argue that, because a jury subsequently found him not guilty of the headlamps charge, this somehow puts Judge Carlson's credibility call into doubt. He cites no authority for his seemingly novel proposition that a jury determination may nullify a court's earlier credibility call and we could leave it go at that. See *State v. Lindell*, 2000 WI App 180, ¶23 n.8, 238 Wis. 2d 422, 617 N.W.2d 500, *aff'd*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223 (arguments unsupported by references to legal authority will not be considered). But it is worth noting, as the State cogently points out, that the State's burden of proof to show the reasonableness of the initial stop differed from the burden of proving to a jury that Ritchey drove with his lights off. For the former, the State needed only to prove that the officer had reasonable suspicion to believe that Ritchey was committing a violation of driving with his lights off. For the latter, the State had the burden to prove the offense to a reasonable certainty by evidence that is clear, satisfactory and convincing. See WIS JI—CRIMINAL 140A. Thus, the jury verdict in no way gives any material support to Ritchey in so far as Judge Carlson's factual findings are concerned.

By the Court.—Judgment affirmed.

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

