

## **SPEED TRAP PAUL REVERES: FIRST AMENDMENT PROTECTIONS AND FLASHING HIGH BEAM HEADLIGHTS 1.8.16**

Up until a few weeks ago, I lived in Oconomowoc, WI. Highway 67 runs right through the west end of Oconomowoc. The highway is under major construction making it a maze for motorists to drive. Even more interesting, Oconomowoc seems to have set the speed limit 10 miles slower than a vehicle needs to go in order to not have to stop at each one of the dozen or so traffic lights that have sprung up at every intersection. The other day, as I was driving along this stretch of Hwy 67, a car flashed its lights at me and sure enough about two blocks further there was a cop clocking for speeders. Luckily, by flashing his lights, the other car told me to check my speed because a cop was clocking on-coming cars. Of course, in case you were wondering, I was not speeding anyway.

However, I wondered about the motorist flashing his lights. I wondered if by flipping her lights on and off like that, the motorist could be cited with some traffic violation or even obstructing. At first, I ran through a Fourth Amendment analysis in my head trying to determine if a driver flashing lights at another driver gave reasonable suspicion or probable cause for an arrest. Of course, Wisconsin Statute 347.12 (1) (a) specifically entitles an operator of a vehicle to intermittently flash the vehicle's high-beam headlamps at an oncoming vehicle but only if the other vehicle's high-beam headlamps are lit. See, *Waukesha County v. Meinhardt*, 2001 WI App 146, ¶¶ 9-10, 630 N.W.2d 277 (holding that Meinhardt did not commit a violation by flashing his high-beam headlights two times at an oncoming vehicle, because the plain language of the statute did not prohibit the quick flashing of high-beam headlights). But what if the other vehicle's high beams are not lit? Can high beam headlights be flashed?

It could be argued that Wisconsin Statute 347.12 (1) (a) should be read like New York Vehicle and Traffic Law Section 375 (3). In New York, the practice of flashing high beams is not illegal. Rather, New York Vehicle and Traffic Law Section 375 (3) merely states that headlamps "shall be operated so that dazzling light does not interfere with the driver of the approaching vehicle." In a 1994 decision, the Appellate Division, Second Department held that flickering high beams do not amount to "dazzling lights." *People v. Lauber*, 162 Misc.2d 19, 617 N.Y.S.2d 419 (2d. Dept. 1994). In 2009, the Fourth Department declared more directly that the flashing of lights by itself is not a violation of the New York Vehicle and Traffic Law Code, and that stopping a vehicle based upon the driver flashing his or her high beams is illegal. *People v. Rose*, 67 A.D.3d 1447, 889 N.Y.S.2d 789 (2009)

The Supreme Court has held that an arrest for the most trivial offense does not violate the Fourth Amendment if state law allows it. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). Officers have the discretion to write a ticket or to arrest and may base that decision upon whether they want to search the motorist and possibly even the vehicle. The law has developed so that the officer need not articulate a legal basis for the search. *United States v. Drayton*, 536 U.S. 194 (2002). When the officer's testimony of the incident indicates an absence of lawful justification for the search, the reviewing and appellate courts will uphold the search if there are other legal grounds for the search. *Id.* The message those courts are sending to the police is search the car now, and a reviewing court will find a lawful justification for the search later.

With the blessing of some members of the judicial branch, the traffic code has effectively become the new general warrant to stop people who are driving for any reason. *Whren v. United States*, 517 U.S. 806, 818 (1996) (“[T]hat the multitude of applicable traffic and equipment regulations is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop.” (internal quotation marks omitted)); David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 559 (1997) (“[W]ith the traffic code in hand, any officer can stop any driver any time. The most the officer will have to do is ‘tail a driver for a while,’ and probable cause will materialize like magic.”). In a series of decisions the United States Supreme Court has shredded any Fourth Amendment protection you have while driving a vehicle. . See *Arizona v. Johnson*, 555 U.S. 323 (2009) (allowing police discretion to remove driver or passenger from a car to pat them down for weapons); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (allowing police discretion to arrest a motorist for minor traffic violations); *Ohio v. Robinette*, 519 U.S. 33 (1996) (allowing police to pull a motorist out of a vehicle to ask questions unrelated to the traffic stop); *Whren v. United States*, 517 U.S. 806 (1996) (holding that officer’s motivation is not determinative in establishing the reasonableness of a lawful traffic stop under the Fourth Amendment). Clearly, multitude of traffic offenses allows a police officer to stop almost any motorist. Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. U.S.*, 24 AM. J. CRIM. L. 627, 628 (1997) (“[The decision in *Whren*] allows the police unfettered discretion to stop motorists for any traffic violation as a pretext to investigate other unrelated offenses. A police officer need have nothing more than an unsubstantiated hunch, or even an illegitimate bias, that a motorist is engaged in drug or other criminal activity to pull him or her over, if even the most minor traffic infraction has been committed.”).

Suddenly, I realized one driver was *communicating* with another driver. After all, some car owner's manuals, which identify the steering column control lever which allows headlight flashing as the "optical horn". Headlight flashing can be used simply to let other drivers know of one's presence and the other car is passing. See, Chevy Sonic Owner Manual 2015, [https://www.chevrolet.com/content/dam/Chevrolet/northamerica/usa/nscwebsite/en/Home/Ownership/Manuals and Videos/02\\_pdf/2015-sonic-owners-manual.pdf](https://www.chevrolet.com/content/dam/Chevrolet/northamerica/usa/nscwebsite/en/Home/Ownership/Manuals%20and%20Videos/02_pdf/2015-sonic-owners-manual.pdf). Some drivers flash their headlights as a signal that they are yielding the right of way to another driver, for example at an intersection controlled by stop signs.

The point is that there is communication going on between drivers by means of vehicle head lamps. Moreover, this communication has a message. “When “[a]n intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it,” it is protected speech. See *Spence v. Wash.*, 418 U.S. 405, 410-11 (1974). So is it possible that flashing headlamps between drivers is protected speech? Moreover, the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). Therefore, the chilling effect of a municipalities’ policy and custom of having its police officers pull over, detain, and cite individuals who are perceived as having communicated to oncoming traffic by flashing their headlamps and then prosecuting and imposing fines upon those individuals is a violation of your First Amendment rights.

Some courts have declared just that. *Commonwealth v. Beachey*, 728 A.2d 912, 913 (1999); *Ellis v. City of Ellisville*, 4:13CV711 HEA (ED Mo. February 3, 2014), [http://www.aclu-mo.org/files/4913/9144/8084/Order\\_Granteeing\\_Preliminary\\_Injunction.pdf](http://www.aclu-mo.org/files/4913/9144/8084/Order_Granteeing_Preliminary_Injunction.pdf). See also, Andrew Rice, "High-Beam Conviction Overturned \ Pa. Supreme Court: Man Broke No Law By Flashing Headlights To Warn Cars of Speed Trap".(The Philadelphia Inquirer. April 23, 1999), [http://articles.philly.com/1999-04-23/news/25519260\\_1\\_speed-trap-beams-police-car](http://articles.philly.com/1999-04-23/news/25519260_1_speed-trap-beams-police-car); Stutzman, Rene, "Sanford judge rules in favor of motorist who flashed his headlights". Orlando Sentinel (Orlando Sentinel May 22 2012), [http://articles.orlandosentinel.com/2012-05-22/news/os-flashing-headlights-ruling-20120522\\_1\\_ryan-kintner-free-speech-headlights](http://articles.orlandosentinel.com/2012-05-22/news/os-flashing-headlights-ruling-20120522_1_ryan-kintner-free-speech-headlights); "Judge: Drivers Allowed to Warn Fellow Motorists of Speed Traps". (Wall Street Journal. 02-04-2014), <http://blogs.wsj.com/law/2014/02/04/judge-drivers-allowed-to-warn-fellow-motorists-of-speed-traps/>. In New Jersey, drivers are allowed to flash their headlights to warn approaching drivers about a speed trap ahead. *Drivers Allowed to Flash Speed-Trap Alerts*, <http://www.nytimes.com/1999/08/01/nyregion/drivers-allowed-to-flash-speed-trap-alerts.html>

The Superior Court of New Jersey Appellate Division held that a statute limiting how far high beams may project is not violated when a motorist flashes his or her high beams to warn oncoming motorists of radar. The Court also concluded that a stop by a police officer based upon high beam flashing is also improper. *State v. Luptak*, A-6074-97T1 (Superior Court of New Jersey Appellate Division July 29, 1999), <http://www.dpdlaw.com/Luptak.PDF>. In Ohio, courts have held that the act of flashing one's headlights so as to alert oncoming drivers of a radar trap does not constitute the offense of obstructing a police officer in the performance of his duties, where there was no proof that the warned vehicles were speeding prior to the warning. *Warrensville Hts. v. Wason*, 361 N.E.2d 546 (1976); *Akron v. Matteson*, 299 N.E.2d 315 (M.C. 1972). In another case, where a driver received a citation under an ordinance prohibiting flashing lights on a vehicle, a court held that the ordinance referred to the noun of flashing lights and did not prohibit the verb of flashing the headlights on a vehicle. *Vill. of Kirtland Hills v. Garcia*, 644 N.E.2d 691 (1994). In a different case, a court held that a momentary flick of the high beams is not a violation of Ohio R.C. 4513.15 (which prohibits drivers from aiming glaring rays into the eyes of oncoming drivers). *State v. Woods*, 621 N.E.2d 523 (1993)