STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP000162 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EMILIANO CALZADAS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Jefferson County Circuit Court,
the Honorable Jennifer L. Weston, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Was Mr. Calzadas' constitutional right to be free from unreasonable seizure violated when the deputy demanded and ran his identification even though the deputy knew before speaking with Calzadas that the justification for the stop – reasonable suspicion that the car was being driven by its unlicensed, female owner – had evaporated?

The circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Calzadas does not request oral argument because it is anticipated that the issue will be fully addressed in briefing. Publication is not appropriate because this appeal will be decided by one judge.

STATEMENT OF THE CASE AND FACTS

A sheriff's deputy was on routine patrol at about 3 a.m. in Johnson Creek when he noticed a car traveling on one of the village's streets. (24:6; App. 111). He did not see the vehicle commit a traffic violation, nor was it being driven in any sort of suspicious manner. Nevertheless, the deputy, Thomas Klemke, decided to run the license plate. (*Id*.). The information he received back showed that the registered owner was female and she did not have a valid driver's license. (*Id*. at 7, 12, 16; App. 112, 117, 121). Only later, after conducting a traffic stop, would the deputy discover that

the driver was a man, Emiliano Calzadas. (12:2; 24:10; App. 104, 115).

The deputy followed the car as it drove into a Kwik Trip parking lot. (12:1; 24:6-7; App. 103, 111-12). It was dark and the deputy could not see if the driver was a man or a woman, although he could see there was only one person in the car. (*Id*. at 6, 15; App. 111, 120). The car backed into a parking stall and the deputy, who was in full uniform and with a gun at his hip (*id*. at 29; App. 134), pulled his squad car "in front of the subject vehicle." (*Id*. at 7, 13; App. 112, 118). The deputy parked the squad at an angle in front of the other car. (*Id*. at 14, 22-23; App. 119, 127-28). Although he did not activate the squad's emergency lights (*id*. at 8; App. 113), Deputy Klemke shined one or more lights on the car. Klemke testified that he shined his headlights on the car (*id*. at 7; App. 112), and he was not "100 percent certain" about whether he also shined a spotlight on the car as Mr. Calzadas described. (*Id*. at 27, 29-30; App. 132, 134-35). The court found that the deputy shined a spotlight on the car. (12:2; App. 104).

The deputy did not know that the driver was a man until both he and the driver – Mr. Calzadas – were outside their vehicles. (24:8, 16; App. 113, 121). As the deputy walked up to the car, with the squad's lights shining on it, the driver got out of the car and the deputy knew at that point that the driver was not a woman and, consequently, could not be the registered owner whose license was invalid. (24:16-18; App. 121-23). The deputy acknowledged that he could have simply ended the encounter by telling the driver he thought he was someone else. (*Id*. at 25-26; App. 130-31). Instead, the deputy chose to continue the encounter "[t]o identify him, to ensure that, in fact he did have a valid driver's license being

that I was already there making contact with him." (*Id*. at 18; App. 123).

Deputy Klemke told the driver "the reason for the stop and asked if he had ID on him …." (*Id*. at 8; App. 113). Mr. Calzadas complied and gave the deputy his Wisconsin identification card. (*Id*. at 10, 15; App. 115, 120). The deputy testified that he had no basis to hold Mr. Calzadas other than to run the information "to see whether or not any wants or warrants or perhaps didn't have a valid driver's license." (*Id*. at 25; App. 130). The deputy took the card, returned to his squad and ran his information, which showed that Mr. Calzadas did not have a valid driver's license. (*Id*. at 10-11, 25; App. 115-16, 130). Mr. Calzadas was arrested and taken to the police department. (*Id*. at 31; App. 136).

The state charged Mr. Calzadas with driving without a license as a third or subsequent offense within three years, a violation of Wis. Stat. § 343.05(3)(a) and (5)(b)1. (2). Mr. Calzadas filed a motion to suppress all evidence obtained following the stop. (8). Following an evidentiary hearing and the filing of briefs, the court issued a written decision denying the suppression motion. (10; 11; 12; App. 103-05).

The circuit court held that Deputy Klemke had reasonable suspicion to conduct a traffic stop based upon information that the registered owner of the vehicle did not have a valid driver's license. (12:1; App. 103). The court further held that the stop occurred when Klemke parked his squad at an angle in front of Mr. Calzadas' car and shined a spotlight on the driver. (*Id*. at 2; App. 104). At that point, the officer realized the driver was a man, not the registered owner, and, consequently, "reasonable suspicion dissipated." (*Id*.). Nevertheless, the court concluded that the deputy could

lawfully continue the seizure in order to ask for identification and verify the driver's status. (*Id*.).

Shortly after the denial of the suppression motion, Mr. Calzadas pled no contest to the charge. (25:8). The court imposed a $50.00 fine and stayed the sentence pending appeal. (16; 25:11; App. 101-02).

ARGUMENT

Mr. Calzadas Was Subject to an Unreasonable Seizure When the Deputy Demanded and Ran His Identification Even Though the Reasonable Suspicion That Justified the Stop Had Evaporated Even Before the Deputy Spoke with Him.

A. Introduction and standard of review.

Mr. Calzadas does not contest the circuit court's conclusion that Deputy Klemke had reasonable suspicion to conduct the traffic stop based upon information that the registered owner – a woman – did not have a valid license. That determination is consistent with ***State v. Newer***, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923. The circuit court also correctly recognized that reasonable suspicion dissipated once the officer realized the driver was a man, and that realization occurred before the officer had any conversation with the driver. Nevertheless, the court determined the deputy could continue the stop to request identification and verify the driver's status. Mr. Calzadas challenges that determination.

As shown below, that ruling is incompatible with the limitations on police authority set forth in ***Newer*** and, more fundamentally, with the constitutional guarantee against unreasonable seizures. It allows police to demand a driver's

identification, take the identification from the driver and back with the officer into the squad car, where the officer can then run the driver's information on a computer to determine whether the driver has a valid license or outstanding warrants. All this is allowed to occur even though the legal justification for the stop – reasonable suspicion that the driver is the female, unlicensed owner of the car – not only dissipated but disappeared entirely when, before having any communication with the driver, the officer could see that the driver was a man. The circuit court's ruling unreasonably expands police authority when making a "***Newer*** stop" so as to violate the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution.

The constitutionality of a seizure is a question of constitutional fact. ***State v. House***, 2013 WI App 111, ¶4, 350 Wis. 2d 478, 837 N.W.2d 645. This court upholds a circuit court's findings of historical fact unless clearly erroneous, but whether those facts "pass constitutional muster" is a question of law reviewed de novo. ***Id***.

B. Although the stop was lawful at its inception, the deputy's request for identification after he knew conclusively that Mr. Calzadas was not the unlicensed, female owner undermines ***Newer***'s limitations.

The temporary detention of individuals during a traffic stop, even if only for a brief period and for a limited purpose, constitutes a "seizure" within the meaning of the Fourth Amendment and Article I, § 11. ***Whren v. United States***, 517 U.S. 806, 809-10 (1996); ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. An automobile stop must not be "unreasonable," meaning the officers must have probable cause to believe that a traffic violation occurred or

reasonable suspicion that a violation has or will be committed. ***Popke***, 317 Wis. 2d 118, ¶11, *citing* ***Terry v. Ohio***, 392 U.S. 1 (1968).

At issue in ***Newer*** was whether the officer had reasonable suspicion to stop a vehicle because he knew the registered owner had a revoked license, even though the officer did not know who was actually driving the vehicle. ***Newer***, 306 Wis. 2d 193, ¶1. There, the officer ran the license plate of a vehicle that was going three miles over the speed limit and discovered that the vehicle was registered to Newer and his license was revoked. ***Id***. at ¶3. The officer stopped the vehicle, although he did not know whether Newer was the driver or even the driver's gender. ***Id***. at ¶¶3-4.

The court of appeals held that knowledge that the owner of a vehicle has a revoked license constitutes reasonable suspicion of criminal activity when the officer sees the vehicle being driven because it is reasonable to assume that the person driving the vehicle is the vehicle's owner. ***Id***. at ¶¶5-7. Recognizing that the assumption is not infallible, the court adopted limitations on an officer's authority to make a stop based upon the assumption that the owner is the driver.

> If an officer comes upon information suggesting that the assumption is not valid in a particular case, for example that the vehicle's driver appears to be much older, much younger, or of a different gender than the vehicle's registered owner, reasonable suspicion would, of course, dissipate. There would simply be no reason to think that the nonowner driver had a revoked license.

Id. at ¶8.

Applying ***Newer***, Deputy Klemke had reasonable suspicion to conduct the traffic stop, as the circuit court

concluded. But the legal authority for the stop – reasonable suspicion that the driver was the unlicensed registered owner – evaporated when the deputy realized the driver was a man and, given his gender, could not be the owner. Upon that realization, which occurred before any personal contact or communication with the driver, the officer knew conclusively that the driver was not the owner. At that point, the legal justification for the seizure ended, and the seizure should have ended as well.

Relying on ***State v. Ellenbecker***, 159 Wis. 2d 91, 464 N.W.2d 427 (Ct. App. 1990), the circuit court concluded that, although reasonable suspicion dissipated, the officer was justified "in not only asking for identification, but in then taking the next step to return to his squad and verify driver's status." (12:2; App. 104). But ***Ellenbecker*** is a community caretaker case and does not involve a stop based upon reasonable suspicion, much less suspicion that had evaporated before any interaction between the officer and driver.

In ***Ellenbecker***, an officer pulled behind an obviously disabled vehicle parked on the shoulder of the road. ***Id***. at 93. During the encounter with the driver and passenger, the officer asked for the driver's license, called dispatch and learned the license was revoked. ***Id***. at 94. If any seizure occurred when the officer asked for the license, the court emphasized that the reasonableness of the seizure "must be determined in light of the fact that the inspector's request for Ellenbecker's license and status check came under the community caretaker function of the police." ***Id***. at 96. In that context, the court balanced the public need and interest furthered by the police conduct against the degree and nature of the intrusion.

Notably, given that the vehicle was disabled, the court concluded that the officer's action did not intrude on Ellenbecker's freedom of movement. ***Id***. at 98. The same is not true here, where the seizure of Mr. Calzandas occurred not during a "motorist assist" involving a disabled car but due to reasonable suspicion of criminal activity that dissolved *before* the deputy asked for identification and *before* the deputy and driver had any direct contact or communication. Although the legal justification for the stop was gone, Mr. Calzadas was not free to go because the deputy demanded identification.

The courts of this state have not addressed in a published case the question presented here, which is whether an officer may continue a seizure for the purpose of obtaining and running a driver's identification when the reasonable suspicion that justified the stop terminated even before the officer had any personal contact with the driver. The closest published case is ***State v. Williams***, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462, but that case is readily distinguishable as the request for identification occurred as part of a more complicated investigation into a more serious crime.

In ***Williams***, 258 Wis. 2d 395, ¶¶2-3, a police officer stopped a vehicle matching the description of a vehicle belonging to an armed suspect in a domestic abuse case. The driver of the vehicle (Williams) gave a different name than the suspect the officer was looking for (Phillips), and the officer therefore summoned a second officer who was able to verify that it was indeed Williams. ***Id.*** at ¶¶3-4. Upon running a check on Williams, the officers learned that he lacked a valid driver's license. ***Id.*** at ¶4. This court determined that even if the officers knew that the driver was not Phillips before asking for identification, they were still reasonable in

doing so. ***Id.*** at ¶22. The reason this court gave, relying on ***Ellenbecker***, was that the officers might want to make a report of the incident. ***Id***.

The need for police to make a report that was present in ***Williams*** is absent here. The officer in ***Williams*** had stopped the suspect's vehicle, asked the suspect's name, and then continued to detain the suspect while waiting for another officer to arrive, all before she could be certain that he was not the man she was looking for. ***Id***. at ¶¶3-4. A person subjected to this sort of treatment would be far more likely to file an administrative complaint or lawsuit against a police officer than would a person who was simply pulled over and then immediately let go. *See* ***Ellenbecker***, 159 Wis. 2d at 97 (officer may need written report to defend against citizen complaint). Further, the crime under investigation in ***Williams*** was a domestic abuse incident whose suspect was believed to have a gun. ***Id.*** at ¶2. Though the police may have a need to extensively document their investigation of a crime like that one, the same concern does not justify a continued curtailment of liberty where the crime being investigated was driving without a license *and* reasonable suspicion of that crime terminated even before the officer had any communication with the driver.

Williams and ***Ellenbecker*** should not be extended to ***Newer*** traffic stops where the officer conclusively knows even before speaking with the driver that the driver is not the registered owner, whether based on the driver's gender, as here, or his or her race or age. To allow the seizure to continue for purposes of asking for identification and then taking the identification away from the driver and running it undermines the limitations this court established in ***Newer***.

Specifically, the court directed that an officer may not make the stop if the officer "comes upon information suggesting" that the assumption sanctioned in ***Newer*** – that the registered owner is the driver – is not correct. ***Newer***, 306 Wis. 2d 193, ¶8. Consistent with that directive, an officer should not be able to continue the seizure after having acquired conclusive information that the driver is not the registered owner, thereby establishing that the ***Newer*** assumption was incorrect. Holding otherwise sanctions a continued seizure incompatible with the Fourth Amendment.

C. Continuing the detention after reasonable suspicion had evaporated, for the purpose of obtaining and running Mr. Calzadas' identification, violated the constitution.

In ***Williams*** and ***Ellenbecker***, the court of appeals noted that Wis. Stat. § 343.18(1) authorizes police to require a driver to display his or her license on demand. ***Williams***, 258 Wis. 2d 395, ¶20; ***Ellenbecker***, 159 Wis. 2d at 97. But that statute must be applied in conformity with the Fourth Amendment and Article I, § 11. And it is well established that police may not stop vehicles to make random spot checks to determine if the driver is licensed and the vehicle registered. ***Delaware v. Prouse***, 440 U.S. 648, 659 (1979). Consequently, Deputy Klemke could not have lawfully stopped Mr. Calzadas to check whether he had a valid license. The legality of the stop was dependent on reasonable suspicion that the car was being driven by its unlicensed owner. The authority for the stop and the deputy's authority to demand Mr. Calzadas' license ended when the officer realized that the driver was not the registered owner.

"An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply

because the automobile and its use are subject to government regulation." ***Id***. at 662. Accordingly, the Supreme Court held that without reasonable suspicion that a driver is unlicensed or an automobile is unregistered, "stopping an automobile *and detaining the driver in order to check his driver's licens*e and the registration of the automobile are unreasonable under the Fourth Amendment." ***Id***. at 663 (emphasis added). Similarly, detaining the driver in order to check his driver's license after reasonable suspicion evaporated and before the officer had any communication with the driver also amounts to an unreasonable seizure under the Fourth Amendment.

Even where reasonable suspicion is present at the outset, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." ***Florida v. Royer***, 460 U.S. 491, 500 (1983); *see also* ***House***, 350 Wis. 2d 478, ¶6 ("Where the reasons justifying the initial stop have ceased to exist because the purpose of the stop has concluded, further seizure is beyond the scope of the initial stop.").

Once the deputy learned the driver was male, the purpose of the stop, which was to investigate whether the unlicensed female owner was driving, had been effectuated. Without any basis for continued detention, the Fourth Amendment required the deputy to terminate the stop. The deputy was not permitted to further detain Mr. Calzadas, demand identification and run the identification to check if he had a valid license or if there were any outstanding warrants.

Numerous cases confirm this. In ***United States v. McSwain***, 29 F.3d 558, 559-60 (10th Cir. 1994), a Utah trooper stopped a vehicle that lacked license plates and had a temporary registration sticker in the rear window. The sticker initially appeared to have been tampered with, but on

approaching the vehicle on foot the trooper realized it was valid. ***Id.*** at 560. Nevertheless, the trooper requested identification and registration from the driver. The driver lacked a license, leading the trooper to continue his investigation, eventually discovering a gun, drugs, and drug paraphernalia. ***Id.***

The Tenth Circuit suppressed the evidence, holding that the detention, though justified at its inception, should have ended once the trooper saw the valid sticker. ***Id.*** at 561. The court rejected the government's argument that the trooper's demand for a license and registration and questioning about travel plans were "minimally invasive" conduct not triggering a Fourth Amendment violation. ***Id.*** It also distinguished cases in which such questioning occurred while reasonable suspicion was still present:

> [The cases] all involve situations in which the officer, at the time he or she asks questions or requests the driver's license and registration, still has some objectively reasonable articulable suspicion that a traffic violation has occurred or is occurring. Such cases stand in sharp contrast to the facts of the instant case: Trooper Avery's reasonable suspicion regarding the validity of Mr. McSwain's temporary registration sticker was completely dispelled prior to the time he questioned Mr. McSwain and requested documentation. Having no objectively reasonable articulable suspicion … Trooper Avery's actions in questioning Mr. McSwain and requesting his license and registration exceeded the limits of a lawful investigative detention and violated the Fourth Amendment.

Id. at 561-62.

Courts around the nation have likewise held that an officer may not demand a license or identification from a

stopped motorist after reasonable suspicion has dissipated. ***State v. Penfield***, 22 P.3d 293 (Wash. Ct. App. 2001), is identical to this case in every relevant respect: the officer pulled over a vehicle registered to a woman with a suspended license. ***Id.*** at 294. On approaching the vehicle, the officer realized that the driver was a man. ***Id.*** He nevertheless asked the man for a driver's license, to which the man responded with incriminating information. ***Id.*** The court reversed the conviction. ***Id.*** at 296.

Holly v. State, 918 N.E.2d 323, 325-26 (Ind. 2009), is also directly on point and reached the same result: once the officer realized a woman was driving the vehicle, rather than the suspended male owner, he violated the Fourth Amendment by requesting identification. *See also* ***People v. Cummings***, 6 N.E.3d 725, 731 (Ill. 2014) (male registered owner of van had outstanding warrant; unlawful for officer to request license from driver once he learned her to be female).

There are many other examples: ***People v. Redinger***, 906 P.2d 81, 82, 85 & 86 (Colo. 1995) (unlawful to request identification when, on approaching stopped vehicle, officer realized he had been mistaken about absence of license plate); ***State v. Diaz***, 850 So. 2d 435, 438-40 (Fla. 2003) (same); ***State v. Hickman***, 491 N.W.2d 673, 675 (Minn. Ct. App. 1992) (unconstitutional to ask for driver's license after officer realized registration sticker legal); ***State v. Chatton***, 463 N.E.2d 1237, 1240-41 (Ohio 1984), *superseded on other grounds as stated in* ***State v. Phillips***, 799 N.E.2d 653, 657 (Ohio Ct. App. 2003) (officer stopped vehicle without plates but saw lawful temporary tag on approaching vehicle; driver could not be detained further to determine the validity of his driver's license absent some specific and articulable fact rendering detention reasonable); ***McGaughey v. State***,

37 P.3d 130, 139-141 (Okla. Crim. App. 2001) (officer exceeded authority in continuing detention once it was determined that taillights were functional; "The seizure becomes illegal at the point where its initial justification has ceased and no new justification has arisen."); ***State v. Farley***, 775 P.2d 835, 836 (Or. 1989) (unlawful to request license after seeing lawful temporary license plate; decided under statute conferring same rights as Fourth Amendment, *see* ***State v. Toevs***, 964 P.2d 1007, 1013 (Or. 1998)); ***State v. Amick***, 831 N.W.2d 59, 64 (S.D. 2013) (officer who stopped vehicle on suspicion of lack of license plate could "not ask for identification, registration, or proof of insurance" absent other reasonable suspicion after seeing valid tag); ***State v. Morris***, 259 P.3d 116, 124 (Utah 2011) (after mistaken basis for stop resolved, officer "may not ask for identification, registration, or proof of insurance" absent other reasonable suspicion). *See also* ***United States v. Jenkins***, 452 F.3d 207, 214 (2d Cir. 2006) (adopting ***McSwain*** analysis) ***State v. Nevarez***, 329 P.3d 233, 238 (Ariz. Ct. App. 2014) (same, no violation where officer observed suspicious conduct while explaining error).

As those cases recognize, the continued detention of a driver for the purpose of requesting identification and checking the driver's status is unreasonable under the Fourth Amendment where the justification for the stop has already ended. The holding sought here is narrow. When the sole justification for the stop is reasonable suspicion that the unlicensed registered owner is driving and, even before communicating with the driver, the officer knows conclusively that the driver is not the registered owner, the reasonable suspicion is gone and the officer has no authority to continue the detention in order to demand identification, take it from the driver and run the information.

The holding Mr. Calzadas seeks does not mean an officer in Deputy Klemke's position must simply turn around and drive away, leaving the driver to wonder what was going on. Indeed, Klemke testified that he could have ended the encounter by telling the driver he thought he was someone else. (24:25-26; App. 130-31). Courts have recognized that even though in such circumstances the officer cannot ask for identification, registration or proof of insurance, "it is constitutionally reasonable for the officer to approach the driver and explain his mistake." ***Morris***, 259 P.3d at 124; *see also* ***Amick***, 831 N.W.2d at 64. Instead of briefly explaining the mistake, Deputy Klemke demanded Mr. Calzadas' identification, took it from him, returned to the squad and ran the information through the computer. The continued detention was constitutionally unreasonable.

CONCLUSION

For the reasons set forth above, Mr. Calzadas respectfully requests that the court reverse the judgment of conviction and remand to the circuit court with directions that all evidence derived from the stop be suppressed.

Dated this 1st day of May, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,052 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of May, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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