STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000421-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA ALLAN VITEK,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in St. Croix County Circuit Court,
Judge Eric J. Lundell, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did police have reasonable suspicion to stop the car Joshua Vitek was driving based on information that the operating privileges of one of the multiple owners of the car were suspended?

The circuit court answered "Yes." (32:3-4; App. 125-26).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented can be fully presented in briefing, so Joshua Vitek does not request oral argument. Publication is not appropriate because this is a one-judge appeal. Wis. Stat. § 752.31(2)(d) and (3) and § (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE AND FACTS

Around 1:30 a.m. on August 26, 2013, Officer Hilary Lundberg of the Hudson Police Department was parked on Hanley Road in Hudson and was "running radar" on passing traffic. (9:6-7; App. 107-08). She decided to conduct a "warrant check" on the license plate of a white car driving by, though the car was not violating any traffic laws. (9:7, 12; App. 108, 113). The purpose of a warrant check is to see who the car belongs to, whether it has been reported stolen, and whether anyone "related" to the vehicle has any outstanding warrants. (9:12-13; App. 113-14).

The warrant check in this case showed the car was not stolen and found no warrants associated with the car. (9:13; App. 114). However, it revealed that one of the registered

owners of the car had suspended operating privileges. (9:7, 13; App. 108, 114). The owner with the suspended privileges was a male, but it was too dark for Officer Lundberg to see who was driving the car, so she could not determine whether the driver was male or female. (9:7, 13; App. 108, 114). She then "initiated a traffic stop to determine who was driving at that point." (9:7 App. 108). In particular, she "stopped [the car] to see if one of the registered owners -- or one of the registered owners who's suspended was driving…." (9:13; App. 114).

The driver was Joshua Vitek. (9:7-8; App. 108-09). Officer Lundberg noticed an odor of alcohol while speaking with Vitek and based on further investigation she ultimately arrested him for operating while intoxicated. (9:8-13; App. 109-13). Vitek was charged with operating while intoxicated, second offense, and misdemeanor bail jumping. (1:1-2). An amended complaint added a charge of operating with a prohibited alcohol content. (5:2).

Vitek moved to suppress the evidence collected as a result of the stop, arguing that Lundberg did not have reasonable suspicion to justify the stop because she did not know that the driver was the owner with suspended driving privileges. (4:5; 9:4, 15-16; 24:4-5; App. 102-04, 105, 116-17).

After a hearing on the motion (9; App. 105-19) the state filed a brief arguing the stop was lawful under ***State v. Newer***, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923. (7; App. 120-21). ***Newer*** held that an officer's knowledge that a vehicle owner's license is revoked will support reasonable suspicion for a traffic stop, so long as the officer is unaware of any facts that would suggest that the owner is *not* driving. ***Id.***, ¶2. In response Vitek argued ***Newer***

did not apply here because there is more than one owner of the car and the officer could only have a "hunch" that the suspended owner was the person behind the wheel. (10; App. 122-24).

The circuit court denied the motion. The court found that "[o]ne of the registered owners was in suspended status" and "[f]or that reason only, that reason alone, if I recall, the defendant was stopped." (32:3; App. 125). Without detailing its reasons, the circuit court concluded that "the Courts will eventually find that that is a sufficient reason for a stop." (32:3; App. 125).

Vitek thereafter reached a plea agreement that disposed of the charges in this case and two other operating while intoxicated cases, one of which occurred before the incident in this case, the other of which happened after the incident in this case. (11). In this case he pleaded guilty to an amended charge of operating while intoxicated, third offense; the bail jumping and prohibited alcohol charges were dismissed. (12; 13:1; 27:10-12). He was sentenced to serve time in the county jail and to pay a fine and fees, and the circuit court stayed the jail sentence pending appeal. (15; 17; 26:9-12, 27-28, 30-32).

Vitek appeals the denial of his motion to suppress under Wis. Stat. § 971.31(10).

ARGUMENT

Police Did Not Have Reasonable Suspicion to Stop the Car Joshua Vitek was Driving Based on Information that the Operating Privileges of One of the Multiple Owners of the Car Were Suspended.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution both guarantee freedom from unreasonable searches and seizures. A temporary detention 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, section 11. ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996).

An automobile stop must be reasonable under all the circumstances. ***Gaulrapp***, 207 Wis. 2d at 605; ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. A traffic stop is generally reasonable if police have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed. ***Gaulrapp***, 207 Wis. 2d at 605.

Whether a temporary detention complies with the Fourth Amendment and article I, section 11 is a question of constitutional fact. ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. An appellate court upholds the circuit court's findings of fact unless they are clearly erroneous, but applies the constitutional standards to those facts without deference. ***Id.***

As noted above, to justify the stop of the car Vitek was driving the state relied on ***State v. Newer***, 2007 WI App 236,

306 Wis. 2d 193, 742 N.W.2d 923. In ***Newer*** this court held that a police officer can make a common sense assumption that the registered owner of a vehicle is likely to also be its driver; thus, if the owner's license is suspended or revoked, the officer has reasonable suspicion for a traffic stop. ***Id.,*** ¶¶2, 7, 9. As the court noted, "it is not, of course, an infallibly true assumption [that the owner will be driving], but that is not what is required for reasonable suspicion." ***Id.***, ¶7. Reasonable suspicion does not require absolute certainty; "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment ...." ***Hill v. California***, 401 U.S. 797, 804 (1971).

In reaching its holding ***Newer*** relied on cases from other jurisdictions that have come to the same conclusion. ***Newer***, 306 Wis. 2d 193, ¶¶2, 5 (citing ***State v. Pike***, 551 N.W.2d 919 (Minn. 1996), and ***Village of Lake in the Hills v. Lloyd***, 591 N.E.2d 524 (Ill. Ct. App. 1992), as representative cases). As one recent decision formulates the rule adopted by the majority of courts, an officer has reasonable suspicion to initiate a stop when: (1) the officer knows that the registered owner of a vehicle has a suspended license; and (2) the officer is unaware of any evidence or circumstances which indicate that the owner is not the driver of the vehicle. ***Armfield v. State***, 918 N.E.2d 316, 321 (Ind. 2009) (collecting cases). *See also* ***State v. Vance***, 790 N.W.2d 775, 781-83 (Iowa 2010) (recognizing majority rule and collecting cases); ***State v. Hess***, 648 S.E.2d 913, 916 (N.C. Ct. App. 2007) ("our research reveals that when an officer knows that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, the majority of jurisdictions have held that an officer has reasonable suspicion to make an investigatory stop, absent evidence that the driver is not the owner").

Consistent with this rule, and with the requirement that the reasonable suspicion inquiry consider the totality of the circumstances, ***Newer*** noted that additional information might invalidate the common sense assumption that the driver is the owner:

> 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., ¶8 (emphasis added). *See also* ***id.***, ¶5 (quoting ***Pike***, 551 N.W.2d at 922 (inference that owner is driving "applies only while the officer remains unaware of any facts which would render unreasonable the assumption that the owner is driving the vehicle").

What sort of evidence or circumstances will make it unreasonable for police to assume the owner is driving the car? The above quotation from ***Newer*** notes some obvious examples—for instance, when the officer has information that the vehicle's driver appears to be much older or much younger or is a different gender than the vehicle's registered owner. Because Officer Lundberg could not see the driver of the white car, these observations did not make it unreasonable for her assume an owner was driving.

But the officer's observations about the person who is actually driving the vehicle are not the only kind of information that can make it unreasonable to assume the owner is the driver, for this case shows another kind: Information that there is more than one registered owner.

While it is reasonable to assume that a vehicle owned by one person is likely being driven by that one person, when there is *more* than one registered owner of a vehicle there is no *a priori* basis for concluding the one *particular* owner is probably driving. Instead, all known information about the owners being equal, it is equally probable that any one of the owners might be driving. That means an inference that a particular owner is driving is nothing more than a guess. The fact there are multiple owners dissolves the nexus between owner and driver that supports the ordinarily reasonable assumption that *the* owner is *the* driver.

Furthermore, as one court has rightly concluded, the fact that one of the owners has revoked or suspended operating privileges makes it *less* probable that that owner will be driving. ***State v. Galvez***, 930 N.E.2d 473 (Ill. Ct. App. 2010). While some vehicle owners will drive as much after a suspension or revocation as they did before, many if not most will either stop driving or, at least, decrease their driving. As the court explained:

> If one of two co-owners of a vehicle reduces his or her driving, the relative likelihood that he or she is the driver—at any particular moment when the vehicle is in operation—also decreases. In addition, if the co-owner whose license has been suspended or revoked drives less, the other co-owner may have the use of the vehicle more often. In that case, the odds will be even longer against finding the owner whose license has been suspended or revoked behind the wheel.

Id. at 475.

The reasoning of ***Galvez*** is particularly persuasive and applicable to this case, for two reasons. First, the facts are very similar. Galvez was pulled over after an officer ran a registration check, learned the vehicle had two co-owners—

one male, one female—and determined the male was suspended. The officer stopped the car without first determining whether the driver was male or female. ***Id.*** at 474. Second, the state argued the stop was valid based on ***Lloyd***, 591 N.E.2d 524—a decision relied on in ***Newer***, 306 Wis. 2d 193, ¶¶5-6—and ***Galvez*** rejected the claim that ***Lloyd*** justified the stop. ***Galvez***, 930 N.E.2d at 475.

In particular, the state argued that because *dicta* in ***Lloyd*** said it was "equally reasonable" that one co-owner or another may be driving, it is reasonable for police to stop a car when one of the owners has a suspended license and the officer is unable to *exclude* the validly licensed owner as a possible driver. But as the ***Galvez*** court explained, by contending it is equally probable the suspended or revoked owner is driving,

> …the State's argument essentially turns the "reasonable suspicion" standard on its head by starting with the assumption that defendant is likely to have committed a criminal act and working backward from that assumption to glean suspicion from otherwise innocuous circumstances. Perhaps the starting assumption would be permissible if there were empirical evidence to support it—evidence that, on the whole, drivers with revoked or suspended licenses routinely ignore the restrictions on their driving privileges. Here, however, the officer did not claim that he acted on the basis of such evidence or that he was familiar with defendant's individual driving habits. Simply put, the stop was based on nothing more than a guess that defendant was a scofflaw and that there was a good chance that he was behind the wheel.

Id. at 475-76.

In this case, then, the fact that the white car had more than one registered owner means there is no automatic nexus

between the one owner of the vehicle who had a suspended license and the driver of the car at the time it was stopped. Thus, it was not reasonable to infer that it was probably the suspended owner who was driving rather than an owner who was not suspended.

For a decision to stop a car with multiple owners to be based on a reasonable inference rather than just a guess, the officer must have some additional information to support the inference that one owner is more (or less) likely to be driving on a particular occasion. For instance, if the officer knows a vehicle has two owners, one male and one female, and that the male owner is suspended, seeing a male driving the car would support the stop because, based on the rule adopted in ***Newer***, the officer could reasonably infer that the suspended male owner was driving. *Cf.* ***Galvez***, 930 N.E.2d at 474, 476. Or perhaps the officer has experience with or knowledge of the driving habits of the owners. For example, it was reasonable for an officer to conclude that a woman who co-owned a vehicle with her estranged husband was the primary driver of the vehicle, and thus was driving the vehicle on a particular occasion, because the officer had stopped the vehicle twice in the previous two months and both times the woman was either driving the vehicle or was an occupant. *See* ***State v. Hamic***, 129 P.3d 114, 119-20 (Kan. Ct. App. 2006).

In this case Officer Lundberg did not point to any other information that provided an articulable suspicion that at the time of the stop the white care was being driven by the one owner who had a suspended license. At most she knew the owner with the suspended privileges was male, but that did not matter here because she could not see if a male was driving; indeed, she stopped the car solely to see if the driver was the suspended owner. (9:7, 13; App. 108, 114).

Because the rule adopted in ***Newer*** does not apply when a car has multiple owners (unless, of course, *all* of the registered owners have suspended or revoked driving privileges), and because Officer Lundberg had no factual basis on which to infer that the driver of the white car was the suspended owner rather than an owner who was not suspended, the officer could not reasonably conclude the driver of the white car was likely the one owner whose license was suspended. Her decision to stop the car was not founded on a reasonable inference from an articulable fact. It was, instead, a guess.* A good guess, as it happened, but still a guess. Officer Lundberg had a fifty percent chance of being right and a fifty percent chance of being wrong, assuming there were two registered owners, and her chance of being right was less than fifty percent if there were more than two owners (she did not recall how many registered owners there were, but knew only one of them had suspended operating privileges. (9:7; App. 108)). That is not a "sufficient probability" to establish reasonable suspicion. ***Hill***, 401 U.S. at 804. Therefore, the stop of Vitek was unlawful and the evidence obtained as a result must be suppressed.

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*_Cf._ ***State v. Leveck***, 962 N.E.2d 316 (Ohio Ct. App. 2011), where police knew that Burns, who owned a car and had valid driving privileges, sometimes lent his vehicle to Pitsick, whose license was suspended. An officer saw the car being driven by someone who matched the description of *both* men and stopped the car to see which one was driving. ***Id.*** at 318, 320-21. The officer's observations meant it was essentially a guess as to whether the car was being driven unlawfully by Pitsick or lawfully by Burns, and given of the common-sense inference that the owner is the driver, the more reasonable conclusion was that Burns was driving. Since there was no reason to suspect Burns of unlawful activity, the stop was invalid. ***Id.*** at 321.

CONCLUSION

For the reasons given above, the circuit court's order denying Joshua Vitek's motion to suppress should be reversed and the case should be remanded for further proceedings.

Dated this 12th day of June, 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 2,806 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 12th day of June, 2015.

Signed:

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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.

Dated this 12th day of June, 2015.

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