

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 3

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2015AP000421-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA ALLEN VITEK,

Defendant-Appellant.

ON APPEAL OF A DENIAL OF MOTION TO
SUPPRESS ENTERED IN THE CIRCUIT COURT
FOR ST. CROIX COUNTY, HON. JUDGE ERIC J.
LUNDELL, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT,

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ISSUE PRESENTED

1. Does an officer have reasonable suspicion to conduct a traffic stop when they are aware that one of the vehicle's registered owners has a suspended driver's license?

The circuit court answered "Yes." (32:3-4).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the court in deciding this appeal.

Publication is not warranted as the issues raised on appeal are controlled by existing precedent.

STATEMENT OF THE CASE AND FACTS

On August 26, 2013, Officer Hilary Lundberg was on patrol in the City of Hudson, St. Croix County, Wisconsin. (9:6-7). At around 1:24 a.m. Officer Lundberg was running radar on passing traffic from a stationary position on Hanley Road. (9:6-7). From her position Officer Lundberg observed a white car passing by, and ran a "warrant check" on the license plate of the vehicle. (9:7).

The warrant check revealed that there was more than one registered owner, and that one of the owners was a male whose driver's license was suspended. (9:7). It was early in the morning and dark, so Officer Lundberg was unable to see if the driver was male or female. (9:7). Given the information that was available to her at the time, Officer Lundberg conducted a traffic stop to investigate whether the person driving the vehicle had a valid driver's license. (9:7).

The driver of the vehicle was, in fact, a male who was identified as Joshua Vitek (Hereafter "the Defendant"). (9:7-8). While speaking with him, Officer Lundberg noticed a strong odor of intoxicants. (9:8). Officer Lundberg asked the Defendant about the odor, and he stated that he drank a twelve pack of Redd's Apple Cider earlier that evening. (9:8). After further investigation through Standardized Field

Sobriety Testing and a Preliminary Breath Test, the Defendant was placed under arrest for Operating While Intoxicated. (9:11).

Following his arrest, the Defendant was charged with Operating While Intoxicated, second offense, and Misdemeanor Bail Jumping. (1:1-2). An amended complaint added the charge of operating with a prohibited alcohol concentration. (5:2).

The Defendant then moved to suppress all evidence that was collected as a result of the stop based upon a lack of reasonable suspicion to stop the defendant's vehicle. (24:4). The basis being, that since there was more than one registered owner of the vehicle, Officer Lundberg could not have known that the driver of the vehicle had a suspended operating privilege. (24:4).

After an evidentiary motion hearing and written briefings from both the Defendant and the State, the circuit court denied the motion. (32:3). After which, the Defendant pleaded guilty to an amended charge of Operating While Intoxicated, third offense. (12)

ARGUMENT

Officer Lundberg Had Reasonable Suspicion to Stop the Defendant's Vehicle Because One of the Registered Owners Had Suspended Operating Privileges, and She Had No Information Excluding Either Owner as the Current Driver.

The Defendant argues in his brief in chief that Officer Lundberg did not have reasonable suspicion to stop his vehicle because there was more than one registered owner of the vehicle, only one of whom had a suspended driver's license. Def.'s Br. 8-9. Therefore, the defendant claims, the

stop could not have been based on anything more than a guess. Def.'s Br. 10. "A good guess, as it happened, but still a guess." Def.'s Brief: 10.

A. Standard of Review

The question of whether a traffic stop is reasonable is a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899. A question of constitutional fact is a mixed question of law and fact to which this Court must apply a two-step standard of review. *State v. Martwick*, 2000 WI 5, ¶ 16, 231 Wis. 2d 801, 604 N.W.2d 552. This Court should review the circuit court's findings of historical fact under the clearly erroneous standard, and review independently the application of those facts to Constitutional principles. *Id.*; *State v. Payano-Roman*, 2006 WI 47, ¶ 16, 290 Wis. 2d 380, 714 N.W.2d 548.

B. There Was Reasonable Suspicion To Stop the Defendant's Vehicle.

Officer Lundberg's stop was based upon more than a guess, and she did, in fact, have reasonable suspicion to stop the Defendant's vehicle because "knowledge that a vehicle's owner's license is revoked will support reasonable suspicion for a traffic stop so long as the officer remains unaware of any facts that would suggest that the owner is not driving." *State v. Newer*, 2007 WI App 236, ¶ 2, 306 Wis. 2d 193, 742 N.W.2d 923. The *Newer* court also noted that it is reasonable to assume that the person driving a vehicle is that vehicle's owner. *Newer*, 306 Wis. 2d at ¶ 7. It is not an infallibly true assumption, but that is not required for reasonable suspicion. *Id.* On the contrary, "the suspicion necessary to justify an investigatory stop is considerably less than proof of wrongdoing by a preponderance of the evidence" *State v. Young*, 2006 WI 98, ¶ 59, 294 Wis. 2d 1, 717 N.W.2d 729.

While *Newer* involved a defendant whose driver's license was revoked, its reasoning should still apply here, where the Defendant's driver's license was suspended. In Wisconsin, the only differences between a license being revoked and a license being suspended are the penalties and the requirements to reinstate driving privileges. Both revocation and suspension of one's driving privilege make it illegal to operate a motor vehicle on public roadways. Consequently, there is no reason to distinguish between them for purposes of a *Newer* analysis of the stop's reasonableness, and the Defendant does not assert otherwise. Def. Br. 5.

In this case, Officer Lundberg testified that she was running radar and observed the defendant's vehicle at around 1:24 a.m. (9:6). "The hour of the day may... be relevant in that the individual's activities may or may not be consistent with the typical behavior of law-abiding citizens at that time." *State v. Kyles*, 2004 WI 15, ¶ 58, 269 Wis. 2d 1, 675 N.W.2d 449. In this case, the hour of the day is relevant to the totality of the circumstances due to the prevalence of drunk driving cases that occur in the early morning and Officer Lundberg's inability to identify the sex of the driver prior to the stop due to the darkness. Based upon those factors Officer Lundberg had reasonable suspicion for the limited intrusion of a traffic stop to investigate further.

As noted above, it has been well established in Wisconsin that if police become aware that the registered owner of a vehicle has a revoked license they are justified in conducting an investigatory traffic stop based upon that alone. *Newer*, 306 Wis. 2d. at ¶ 2. The Defendant now asserts with no precedential authority that if there is more than one registered owner, that justification is in some way diminished. Def.'s Br. 6.

As support for his contention, the Defendant relies almost exclusively on *State v. Galvez*, 930 N.E.2d 473 (Ill. Ct. App.). Def.'s Br. 7-9. This case is from the Illinois Court of Appeals, a foreign jurisdiction, and serves as nothing more than persuasive authority. Additionally, it is the only case in the country that, the State's research has revealed, creates any distinction between stopping a car with a single registered owner and one with multiple registered owners when a registered owner has suspended operating privileges.

The *Galvez* court argued that when a vehicle has more than one registered owner, one of whom has suspended operating privileges, it is more likely that the owner with the active license is driving. *Id.* at 475. However, it was unable to cite any authority for its conclusion. Instead it simply stated that the conclusion of an earlier court that it is equally likely that either registered owner could be operating "is one that common sense suggests is most likely incorrect." *Id.* This conclusion is based upon that court's belief that the assumption *should be* that people generally follow the law. However, it does not consider the fact that people who generally follow the law do not generally have suspended operating privileges. Thus, the *Galvez* court's assertion is flawed because it is made in a vacuum where no other circumstances are considered even though the reasonable suspicion standard considers the totality of the circumstances. *Kyles*, 269 Wis. 2d at ¶ 49. Based upon this fundamental flaw, this Court should decline to adopt the *Galvez* approach to determinations of reasonable suspicion.

Under the totality of the circumstances, Officer Lundberg had reasonable suspicion to conduct a traffic stop given: (1) the late hour, (2) Her knowledge that a registered owner had a suspended driver's license, and (3) her lack of information indicating which owner was driving. Based upon the totality of those circumstances Officer Lundberg had

reasonable suspicion to conduct a traffic stop because it was just as likely that the registered owner whose license was suspended was driving as the other registered owner.

Reasonable suspicion is a lower standard than proof by a preponderance of the evidence. *Young*, 294 Wis. 2d at ¶ 59. Proof by a preponderance of the evidence requires only that it be more likely than not that the fact is true. Therefore, a showing that there is at least a fifty percent chance that the driver of the vehicle had a suspended driver's license is more than enough to find reasonable suspicion for an investigatory traffic stop. Thus, the circuit court's decision to deny the Defendant's motion was in accordance with Constitutional principles, and this Court should affirm its decision.

CONCLUSION

For the reasons stated, the State respectfully requests that the this Court affirm the circuit court's ruling.

Respectfully submitted this ____ day of _____, 2015.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1595 words.

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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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 so reproduced to preserve confidentiality and with appropriate references to the record.

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ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

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