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

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

As in the circuit court, the state defends the stop in this case by relying on ***State v. Newer***, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923. It acknowledges that, under ***Newer***, knowledge that a vehicle owner's license is suspended or revoked will support reasonable suspicion to stop the vehicle "so long as the officer remains unaware of any facts that would suggest that the owner is not driving." ***Id.***, ¶2. (State's brief at 4).* The state asserts the ***Newer*** rule applies even when an officer knows a vehicle has multiple owners but only one of the owners has suspended or revoked operating privileges. According to the state, a fifty percent chance that the driver is the suspended or revoked owner is good enough because reasonable suspicion is a lower standard than preponderance of the evidence. (State's brief at 6-7).

The state cites no authority for the proposition that "[p]roof by preponderance of the evidence requires only that it be more likely than not that the fact is true." (State's brief at 7). The claim is wrong if it is based on the standard civil burden of proof, as that standard contains both a quantum of evidence element and degree of certainty element, the latter expressed in terms of "reasonable certainty," not some sort of percentage of probability. *See* ***Wis. J.I.-Civil*** 200 (2004).

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* Vitek agrees that ***Newer***'s holding applies whether the owner's operating privileges are revoked or suspended. (State's brief at 5).

Moreover, reasonable suspicion is not expressed in terms of a bright-line percentage. As the Supreme Court has said regarding probable cause, "[t]he probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances"; instead, "[p]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." ***Maryland v. Pringle***, 540 U.S. 366, 370-71 (2003) (quotation marks and quoted sources omitted). Like probable cause, reasonable suspicion is also a "commensense, nontechnical conception[ ] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," and therefore is also "not readily, or even usefully, reduced to a neat set of legal rules." ***Ornelas v. United States***, 517 U.S. 690, 696 (1996) (quoted sources omitted). Because reasonable suspicion, like probable cause, deals with probabilities and depends on the totality of the circumstances, it, too, is incapable of precise definition or quantification into percentages. *Cf.* ***State v. Young***, 2006 WI 98, ¶22, 294 Wis. 2d 1, 717 N.W.2d 729 (citing ***Ornelas*** and noting "the lines between hunch, reasonable suspicion, and probable cause are fuzzy, with each case requiring an examination of the facts").

Even if reasonable suspicion were a fifty-percent-chance bright-line rule rather than fact-dependent standard, that bright-line rule is not met here. There is not "at least" a fifty percent chance the suspended or revoked owner was driving (state's brief at 7) because, as ***Newer*** recognized, it is not "infallibly true"—*i.e.*, there is not a one hundred percent chance—an owner is driving. 306 Wis. 2d 193, ¶7. If there is less than a one hundred percent probability the owner is driving, there is less than a fifty percent probability one of

two owners is driving. And in any event, we do not know how many owners there were in this case because Officer Lundberg could not recall the number. (9:7; A-Ap. 108). More owners reduce the percentage even more, but how much more is impossible to say. So even if the issue in this case were subject to determination by the percentage chance the suspended owner was driving, we do not know that percentage.

As Vitek argued in his brief-in-chief (at 7), while it is reasonable to assume a vehicle owned by one person is likely being driven by that 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. The fact there are multiple owners dissolves the nexus between owner and driver that supports ***Newer***'s ordinarily reasonable assumption that *the* owner is *the* driver. Thus, when there are multiple owners but only one owner is suspended or revoked, the officer must have information that one owner or another is more likely to be driving—*e.g.*, observations of the driver that show a match with the description of the suspended or revoked owner, or recent stops of the vehicle being driven by that owner.

The state does not respond directly to the logic of this argument. It does, however, respond to Vitek's reliance on ***State v. Galvez***, 930 N.E.2d 473 (Ill. Ct. App. 2010), for the related claim that a suspended or revoked owner is actually *less* likely to be driving than on owner whose operating privileges are valid. (Brief-in-chief at 7-8). The state discounts ***Galvez*** for two reasons, but neither reason is sound.

First, the state says, ***Galvez*** is only one case from a foreign jurisdiction, and is of persuasive value only. (State's brief at 6). True, it is the only decision directly dealing with

the question raised here, but the state cites *no* cases holding that police may stop a car whenever any one of multiple owners is suspended or revoked. And though ***Galvez*** is not mandatory authority, it is worth following because, as Vitek noted in his brief-in-chief (at 7-8), it is factually indistinguishable from this case and it is elaborating on ***Village of Lake in the Hills v. Lloyd***, 591 NE.2d 524 (Ill. Ct. App. 1992), one of the cases ***Newer*** relied on. ***Galvez***, 930 N.E.2d at 475; ***Newer***, 306 Wis. 2d 192, ¶¶2, 5.

Second, the state criticizes ***Galvez***'s reasoning that most owners with suspended or revoked privileges will refrain from driving completely or at least decrease their driving, making it *less* likely they will be the driver and more likely a co-owner would be the driver. 930 N.E.2d at 475. According to the state, ***Galvez*** wrongly assumes suspended or revoked drivers will follow the law because "people who generally follow the law do not generally have suspended or revoked privileges." (State's brief at 6). Implicit in this argument is that police and the courts should infer that every person with a suspended or revoked license is an incorrigible scofflaw who will always defy the suspension or revocation order. For the following reasons, this inference is not a reasonable one.

Driving a motor vehicle is an intensively regulated activity. Operating privileges may be suspended or revoked for a wide variety of reasons, from violation of a serious criminal statute, *e.g.*, Wis. Stat. § 343.31(1), to chalking up demerit points for such things as exceeding the speed limit by less than 10 miles an hour, failing to signal, or having an obstructed view out the windshield, *e.g.*, Wis. Stat. § 343.32(2); Wis. Admin. Code § Trans 101.02(3)(d) and (n) and (4)(b). The numerous and varied bases for suspension and revocation mean we can not say all suspended and revoked

drivers have the same level of disregard for the law and therefore will all likely drive despite the suspension or revocation.

Furthermore, tarring every suspended or revoked driver with the same brush risks subjecting a substantial number of innocent co-owner drivers and their passengers to traffic stops. Indeed, the state's claim that persons with suspended or revoked privileges continue to drive in complete defiance of a suspension or revocation order effectively permits the officer to *assume* exactly what the cases say the facts must *show*: Specific, articulable facts, and reasonable inferences from those facts, providing a particularized and objective basis for suspecting the person of criminal activity. *See* ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). As ***Galvez*** put it, the state's approach "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." 930 N.E.2d at 475. The state is advancing in this case the same assumption urged by the prosecution in ***Galvez***: "that vehicle owners whose licenses have been suspended or revoked will not merely flout the law on occasion but will ignore the suspension or revocation entirely." ***Id.*** at 475. ***Galvez*** was right to reject this claim. This court should reject it, too.

The state also suggests that ***Galvez***'s reasoning is conducted in "a vacuum where no other circumstances are considered even though the reasonable suspicion standard considers the totality of the circumstances." (State's brief at 6). This misapprehends what ***Galvez*** is saying. ***Galvez*** does *not* disregard the totality of the circumstances, and in fact notes that familiarity with a person's individual driving habits

or attempts to observe and identify the driver would be relevant considerations. ***Id.*** at 474, 476. Rather, the point of ***Galvez*** is that when *all* the officer knows is that *one* of the multiple owners of a car is suspended or revoked, the inference adopted by ***Newer*** is no longer enough by itself to justify the stop. Instead, the officer needs additional information to support the suspicion that the driver to be stopped is the owner with the suspended or revoked privileges. Again, that information could range from the officer's observations of the driver to specific knowledge of the suspended owner's driving or living habits. The problem in this case is that Officer Lundberg stopped the white car based on nothing beyond the fact that one owner was suspended. (32:3; A-Ap. 125).

Which brings us to our final point. In arguing that the totality of the circumstances supports the stop, the state relies on two other circumstances: The time of the stop (1:24 a.m.); and the fact Lundberg could not see who was driving. (State's brief at 5, 6). While these two facts are part of the totality of the circumstances, they do not save the stop in this case.

First, the state provides no reason for believing it is more likely a suspended or revoked owner rather than an owner with valid privileges will be driving at 1:24 a.m., nor is there any apparent reason to believe that is the case. Further, Officer Lundberg had no information about the use of this specific car by the various owners that would support the inference that one owner rather than another was driving. *Cf.* ***State v. Hamic***, 129 P.3d 114, 119-20 (Kan. Ct. App. 2006) (it was reasonable to conclude that a woman who co-owned a vehicle with her estranged husband was primary driver of the vehicle—and thus was driving the vehicle on a particular occasion—because police had stopped the vehicle twice in the previous two months and both times the woman was

either driving the vehicle or was an occupant). And, while there are more drunk drivers out at 1:24 a.m. (State's brief at 5), that does not add anything in this case. Officer Lundberg was not acting on the belief the driver was intoxicated; she was acting because one of the car's multiple owners had suspended or revoked driving privileges. The higher prevalence of drunk drivers at 1:24 a.m. tells us nothing about whether there's also a higher prevalence of suspended or revoked drivers.

The time of the stop does explain why it was too dark for Officer Lundberg to see the gender of the driver. But the officer's inability to see whether the driver was male only means her *observations* did not give her "information suggesting that the assumption [the owner is driving] is not valid…." ***Newer***, 306 Wis. 2d 193, ¶8. As Vitek argued in his brief-in-chief (at 6-7), the officer's own observations are not the only possible source for "information suggesting that the assumption [the owner is driving] is not valid." In this case the warrant check revealed there was more than one registered owner, and that constitutes "information suggesting that the assumption [the owner is driving] is not valid." Moreover, the officer's inability to see the driver does not *add* anything in support of the conclusion that the driver was the revoked owner. Instead, in the face of the information that there's more than one owner and thus more than one likely driver, Officer Lundberg's inability to see the driver simply emphasizes how little she knew and that her decision to stop was ultimately based on a hunch.

Thus, while the time of the stop and Lundberg's inability to see the driver are specific articulable facts that are part of the totality of the circumstances, they are not facts that support reasonable suspicion that the driver was the owner with the suspended operating privileges.

CONCLUSION

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

Dated this 29th day of July, 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 2,187 words.

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I hereby certify that:

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Dated this 29th day of July, 2015.

Signed:

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