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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

APPEAL NO. 2015AP001524 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DREW A. HEINRICH,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE DECISION OF THE
HONORABLE JOHN V. FINN, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR PORTAGE COUNTY, BRANCH II

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TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES 1

STATEMENT ON ORAL ARGUMENT AND
PUBLICATION 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

STANDARD OF REVIEW 3

ARGUMENT 4

CONCLUSION 8

CONSTITUTIONS

United States Constitution, Fourth Amendment 5

CASES CITED

State v. Williams,
241 Wis.2d 631
623 N.W.2d 106 (2001) 3

State v. Young,
2006 WI 98
717 N.W.2d 729 (2006) 4

State v. Dubose,
2005 WI 126 (2005) 4

State v. Newer,
2007 WI App 923
742 Wis. 2d 526 (Ct. App. 2007) 5

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 5

Hill v. California, 401 U.S. 797 (1971).....	5
State v. Waldner, 206 Wis. 2d 51, 556 N.W.2d 681 (1996).....	7
State v. Guzy, 139 Wis. 2d 663, 407 N.W.2d 548, (1987).....	8
Terry V. Ohio, 392 U.S. 1 (1968).....	8

STATUTES CITED

Wis. Stat. § 809.23(1)(b)3	1
Wis. Stat. § 346.63(1)(a)	1

STATEMENT OF THE ISSUES

DID OFFICER STARKE HAVE REASONABLE SUSPICION TO JUSTIFY CONDUCTING A TRAFFIC STOP ON A VEHICLE CO-OWNED BY TWO PERSONS, ONE VALIDLY LICENSED AND ONE NOT, WHEN THE OFFICER CANNOT TELL WHICH CO-OWNER IS DRIVING?

- The circuit court answered “Yes.”
- This court should answer “No.”

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication of this court’s opinion nor oral argument is necessary in this case. The parties’ briefs will adequately address the issues in this case and, therefore, oral argument will not assist the court. The court will likely decide the case based on controlling precedent, and the court will not have any reason to question, qualify, or distinguish that precedent. See § 809.23(1)(b)3.

STATEMENT OF THE CASE

On March 20, 2015, Portage County District Attorney filed a criminal complaint charging Drew Heinrich with one count of violating Wis. Stat. § 346.63(1)(a) by Operating a Motor Vehicle While Intoxicated, Second Offense (R1).

On March 23, 2015, Heinrich made his initial appearance in Portage County Circuit Court.

On June 8, 2015, Heinrich filed a motion to suppress evidence from an illegal traffic stop and detention (R10).

On June 17, 2015, Judge John Finn presided over a hearing on Heinrich's motion and heard evidence along with argument from Heinrich. (R23). The State offered no argument (R23:18).

On June 17, 2015, Judge John Finn denied Heinrich's motion. (R23:20).

On July 22, 2015, Heinrich entered a plea of no contest to the sole count in the criminal complaint. Also, the State and Heinrich entered into a stipulation to stay imposition of the sentence to allow Heinrich to pursue postconviction relief. (R18). Judge Richard Wright, who was acting as a reserve judge for the recently retired Judge Finn, approved the stipulation and signed the order to stay sentence pending appeal (R18).

On July 22, 2015, Heinrich filed his notice of appeal from Judge Finn's denial of his motion (R19).

STATEMENT OF FACTS

On February 12, 2015 at approximately 11:01 p.m., Officer Starke of the Stevens Point Police Department was on regular patrol in a marked squad car traveling south on church Street at Clark Street in the City of Stevens Point, Portage County, Wisconsin, when he observed a silver vehicle bearing Wisconsin license plate 808-ULN in front of him and conducted a routine vehicle registration check and driver's license information check on the two listed registered owners, Drew Heinrich and Howard Heinrich (R1:1). The vehicle registration and driver's license

status for Howard Heinrich showed as valid (R1:2). The driver's license status for Drew Heinrich showed a revoked driver's license with a valid occupational driver's license (R1:2). Drew Heinrich was born on February 23, 1993 and Howard Heinrich was born on February 15, 1989 (R23:12). Based on the permitted hours of operation on the occupational license, the observed vehicle was being operated outside of those hours (R1:2). Officer Starke activated the squad's emergency lights and conducted a traffic stop of the vehicle (R1:2). Officer Starke made contact with the driver and informed him the reason for the traffic stop was due to his suspicion that the registered owner, Drew Heinrich, was operating a motor vehicle outside of his permitted occupational driver's license hours (R1:2). Officer Starke testified at the hearing on the motion to suppress evidence that the reason for the traffic stop was to determine who was driving the car (R23:7). Officer Starke further testified that he could not see inside the car prior to the traffic stop and that there was no other reason for the traffic stop (R23:14-15).

STANDARD OF REVIEW

Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact, to which a two-part standard of review applies. *State v. Williams*, 2001 WI 21, 241 Wis.2d 631, 623 N.W.2d 106 (2001). In reviewing

a motion to suppress, the appeal court will uphold the circuit court's findings of fact unless clearly erroneous. Whether those facts constitute reasonable suspicion is a question of law independently decided by the appeal court. *State v. Young*, 2006 WI 98, 717 N.W.2d 729 (2006) and *State v. Dubose*, 2005 WI 126 (2005).

ARGUMENT

If a car has two owners, and we are allowed to assume that one of the two owners is driving the car whenever the car is being driven, then there is a fifty percent chance that one of the two drivers is driving the car at any given moment of time that the car is being driven. If one of these two owners is legally allowed to drive the car, and the other driver is not legally allowed to drive the car, then there is likewise a fifty percent chance of the car being driven legally at any given moment of time that the car is being driven. Put another way, the odds of a police officer being able to legally perform an investigative stop on the above described car, without assuming any other facts, are even. There is a fifty percent chance that an officer will catch the illegally driving owner any time that he pulls that car over.

When he chose to make the investigative traffic stop that is the subject of this case, Officer Starke had exactly a fifty percent chance of catching one of the co-owners of this vehicle driving outside of their occupational

license hours. It is precisely because the probability of stopping the unlicensed driver was not greater than fifty percent that this traffic stop was not supported by reasonable suspicion. “. . .sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . .” *State v. Newer*, 2007 WI App 236, ¶ 7, 742 N.W.2d 923, 925 (Ct. App. 2007), citing *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985), citing *Hill v. California*, 401 U.S. 797, 804 (1971).

At the motion to suppress held in this matter, defense counsel pointed out to Judge Finn that the holding in *Newer* was: “. . . that an officer's 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.” (R23:16) citing *State v. Newer*, 2007 WI App 236, ¶ 2, 742 N.W.2d 923, 924 (Ct. App. 2007). Counsel continued on to point out that the fact that Officer Starke became aware of that suggested that the unlicensed driver was not driving the car was that there was another registered owner with a valid driver's license (R23: 17-18). Because of the existence of the above described fact, Officer Starke is, according to *Newer*, no longer allowed to assume that the owner was driving the car he decided to stop. If this assumption is removed, the remaining reasons that Officer Starke had for this traffic stop can best be

summarized by a quote from Officer Starke that he made during his testimony at the suppression hearing: “Other than the violation of the occupational hours, there was no other reason, correct” (R23:15).

The mistake that Judge Finn made in his reasoning was in assuming that any level of probability above a probability of zero percent would be a sufficient probability to allow for a finding of reasonable suspicion as demonstrated by his following statement: “And the fact that one of those two would have been operating outside the hours permitted by the occupational license raises the level of suspicion (R23: 20). If both registered owners of this car had been listed as having a valid driver’s license, the probability that Officer Starke would be writing a citation for unlicensed driving would have been zero. Officer Starke would therefore correspondingly not have reasonable suspicion for the traffic stop. The fact that one of the registered owners showed an occupational driver’s license and the timing of the observation of driving happened to be outside of the listed hours for that occupational driver’s license does raise the probability above zero. While Officer Starke’s may have raised his probability of writing a citation for unlicensed driving above a zero percent probability by observing the fact that one of the registered owners had an occupational driver’s license, that probability was not raised above fifty percent due to the fact that there existed another fully licensed registered owner of the car. Furthermore, Officer Starke’s observation of the fact that there existed as an additional registered owner another person who

was also a validly licensed driver was the fact that destroyed the assumption he otherwise could have made that the registered owner who possessed the occupational driver's license was the driver of the car he was observing. The removal of this assumption does not change the fact that Officer Starke still had a fifty percent probability of being able to write a citation for unlicensed driving, but the removal of the assumption does destroy the reasonable suspicion he otherwise would have possessed for this traffic stop but for the fact of his observation of another registered owner with a valid driver's license. If the "sufficient probability" required for reasonable suspicion is to have any meaning whatsoever, it must mean a level of probability above a fifty percent chance because lowering it to that level or below that level would allow the State to employ the argument that in any traffic stop an officer will either have the ability to write a citation or not. Allowing the State to advance that argument would be a complete misinterpretation of what reasonable suspicion requires. As the Court pointed out in *Waldner*, "Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An inchoate and unparticularized suspicion or "hunch" ... will not suffice." *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996), quoting

State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548, (1987), quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

CONCLUSION

For the reasons set forth above, Defendant-Appellant requests that this court to reverse the circuit court's denial of the suppression motion and to remand the case to the circuit court with directions to grant the suppression motion, along with any other instructions and/or remedies this court deems appropriate.

Dated this _____ day of _____, 20__.

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 1726 words.

Dated this _____ day of _____, 20__.

Signed:

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**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 _____ day of _____, 20__.

Signed:

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