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COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2015AP001524-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

-vs-

DREW A. HEINRICH,

Defendant-Appellant.

APPEAL FROM THE DECISION OF THE CIRCUIT COURT
FOR PORTAGE COUNTY

The Honorable John V. Finn, Presiding

Trial Court Case No. 15 CT 87

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

Respectfully submitted,

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CERTIFICATION

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 monospaced font. The length of this Brief is 6 pages.

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief and conforms to the rules contained in s. 809.19(12)(f).

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APPENDIX CERTIFICATION

I hereby certify that this appendix conforms to the rules contained in s. 809.19(2)(a) for an appendix produced with a monospaced font.

DAVID R. KNAAPEN
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STATEMENT OF THE ISSUE

DID OFFICER STARKE HAVE SUFFICIENT ARTICULABLE FACTS FOR MAKING A TRAFFIC STOP OF THE DEFENDANT-APPELLANT?

The Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT

The Plaintiff-Respondent does not believe oral argument is necessary in this case. The briefs will fully develop the issues and the law.

STATEMENT ON PUBLICATION

The Plaintiff-Respondent does not believe publication of this case is necessary as the case involves the application of well-settled rules of law to a common fact situation.

STATEMENT OF FACTS AND CASE

The Plaintiff-Respondent agrees this appeal centers around an incident that occurred on February 12, 2015 at approximately 11:00 p.m. as recited in Defendant-Appellant's brief. Plaintiff-Respondent also agrees that Officer Starke of the Stevens Point Police Department ran a record check on a vehicle he observed driving south on Church Street in the City of Stevens Point, Portage County, Wisconsin. Officer Starke ran a record check on the vehicle and learned there were two registered owners, whose ages were approximately four years difference. (Transcript, pg. 5, lines 9-13; pg. 12, lines 11 and 12.) Officer Starke also learned in

running that record check that one of the registered owner's did not have a valid license but did have an occupational license. However, Officer Starke noted the vehicle was being driven outside those hours. (Trans. pg. 5, lines 14-23.) Officer Starke testified that it was dark outside and he was following behind the vehicle. Due to the conditions, Officer Starke was not able to see inside the vehicle, other than to note there was only one occupant. At no time prior to the stop did Officer Starke have an opportunity to see the physical description of the person operating the vehicle. (Trans. pg. 6, lines 2-12.) Officer Starke testified that the reason for making the traffic stop was to determine who was driving the vehicle. (Trans. pg. 7, lines 7-10.) Upon making contact with the driver, the driver identified himself as the Defendant-Appellant. It was only after the Defendant-Appellant identified himself that Officer Starke informed him of the reason for the traffic stop. (Trans. pp. 7-8, lines 17-12.) Subsequently the Defendant-Appellant was arrested for operating while intoxicated and convicted. The Defendant-Appellant now challenges the trial court's ruling denying his motion to suppress based on an illegal stop. That hearing was held on June 17, 2015 before the Honorable John V. Finn, Portage County Circuit Court, Branch II.

ARGUMENT

OFFICER STARKE HAD SUFFICIENT ARTICULABLE FACTS FOR MAKING A TRAFFIC STOP OF THE DEFENDANT-APPELLANT.

The Plaintiff-Respondent agrees that the standard of review is that this Court is to uphold the findings of fact made by the trial court unless they are clearly erroneous. Whether the stop or detention meets constitutional standards, however, is a question of law that is reviewed de novo. State v. Gammons, 241 Wis.2d 296, 301, 625 N.W.2d 623 (Ct.App. 2001), quoting State v. Young, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App. 1997).

The Plaintiff-Respondent believes this case is governed by State v. Newer, 306 Wis.2d 193, 742 N.W.2d 923 (Ct.App. 2007). In Newer, the officer ran a record check on the license plate of a vehicle he encountered and learned that the registered owner was revoked. The officer testified that at the time of the stop he did not know whether Mr. Newer was the driver and he did not know the gender of the person driving the vehicle. *Id.*, pp. 195-6. The Court of Appeals, in finding the officer's stop was valid, held,

It is indeed a reasonable assumption that the person driving a particular vehicle is that vehicle's owner. It is not, of course, an infallibly true assumption, but that is not what is required for reasonable suspicion. "[T]he requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . .'" *New Jersey v. T.L.O.*, 469 U.S. 325, 346, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). *Ibid.*, pg. 198.

The Court of Appeals recognized that the reasonableness of that suspicion is based on the totality of the circumstances. Further, if an officer becomes aware of information suggesting that the assumption is not valid, the reasonable suspicion could dissipate. *Id.* The Court of Appeals identified some factors that could cause that assumption to dissipate: "the vehicle's driver appears to be much older, much younger, or of a different gender than the vehicle's registered owner". *Id.*

When the facts of this case are reviewed by that standard, it is clear that Officer Starke's stop of the Defendant-Appellant's vehicle was reasonable and valid. Officer Starke ran a record check on the vehicle he observed and found it had two registered owners; both males and only four years difference in age. Officer Starke could not see into the vehicle and had no idea of the gender or age of the person driving. As the Wisconsin Supreme Court said,

When weighed against the public interest in safe roads, we are satisfied that the "temporary and brief" detention of a traffic stop is an "appropriate manner" in which a police officer may "approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." State v. Houghton, 364 Wis.2d 234, 251, 868 N.W.2d 143, 151 (2015). Citations omitted.

Defendant-Appellant argues that the fact there was a fifty percent chance the driver was the "other" registered owner meant Officer Starke no longer had the reasonable

assumption to make the traffic stop to determine which of the registered owners was driving. However, as the Wisconsin Appellate Courts and the United States Supreme Court have repeatedly held, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. See, State v. Walli, 334 Wis.2d 402, 799 N.W.2d 898 (Ct.App. 2011); State v. Washington, 284 Wis.2d 456, 700 N.W.2d 305 (Ct.App. 2005); State v. Waldner, 206 Wis.2d 51, 556 N.W.2d 681 (1996); United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581 (1989).

In addition, the Wisconsin Supreme Court has recognized that the law in this area must be "sufficiently flexible to allow law enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect." State v. Guzy, 139 Wis.2d 663, 676, 407 N.W.2d 548, 554(1987). It is clear from the transcript of the motion hearing that that is exactly what Officer Starke was doing in this situation. He had specific articulable facts (a vehicle being driven on a road, a record check of that vehicle showed that one of the registered owners had an occupational license, the operation of the vehicle was outside the hours of that occupational permit, he was unable to see inside of the vehicle to know who was driving) and based on those facts, had a reasonable

suspicion that a crime was being committed. It would have been poor police work indeed for Officer Starke not to have made a temporary stop to determine who was driving and whether or not it was the registered owner who was operating outside the hours of his occupational permit.

CONCLUSION

For the reasons set forth above, the Plaintiff-Respondent asks the Court to affirm the Trial Court's ruling that Officer Starke's stop was reasonable and supported by sufficiently articulable facts.

Dated: _____

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