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COURT OF APPEALS  
STATE OF WISCONSIN  
DISTRICT III

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

CASE NO. 2016AP000108 CR

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STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JOSHUA D. WINBERG,

Defendant-Respondent.

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APPEAL FROM AN ORDER GRANTING SUPPRESSION OF  
EVIDENCE IN EAU CLAIRE COUNTY CIRCUIT COURT  
THE HONORABLE JON M. THEISEN, PRESIDING

---

BRIEF OF PLAINTIFF-APPELLANT

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Meri C. Larson  
Assistant District Attorney  
State Bar No. 1006680  
Eau Claire County Courthouse  
721 Oxford Avenue  
Eau Claire, WI 54703

(715) 839-4828

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COURT OF APPEALS  
STATE OF WISCONSIN  
DISTRICT III

CASE NO. 2016AP000108 CR

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STATE OF WISCONSIN,

Plaintiff- Appellant

v.

JOSHUA D. WINBERG,

Defendant- Respondent.

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APPEAL FROM JUDGMENT OF CONVICTION IN  
EAU CLAIRE COUNTY CIRCUIT COURT  
THE HONORABLE JON M. THEISEN, PRESIDING

---

BRIEF OF PLAINTIFF-APPELLANT

---

ISSUES PRESENTED FOR REVIEW

- I. DID OFFICER BJORKMAN HAVE REASONABLE SUSPICION FOR THE TRAFFIC STOP OF THE VEHICLE DRIVEN BY JOSHUA WINBERG?

The court answered: No.

- II. DID OFFICER BJORKMAN HAVE REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP AFTER MAKING CONTACT WITH JOSHUA WINBERG?

The court answered: No.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Oral argument should not be necessary for the prosecution of this appeal. It is expected that the parties' legal briefs will fully present and address the issues

presented for appeal. Additionally, the court's decision need not be published since it is anticipated that it will be controlled by existing case law.

### STATEMENT OF THE CASE AND FACTS

The State of Wisconsin appeals the trial court's second decision suppressing evidence in this case (33). The trial court's first decision suppressing evidence (14) was appealed by the State in Appeal No. 2013AP2661-CR. The appellate court reversed the trial court's decision to suppress evidence by concluding that Officer Bjorkman lawfully stopped the vehicle driven by Winberg, and lawfully made contact with Winberg and remanded for further proceedings consistent with its decision.

After the case was remanded to the trial court for further proceedings, Winberg's attorney asked the court to entertain an alternate theory for suppression of evidence. In a letter dated July 21, 2014, Winberg's attorney said the "issues for the Court's consideration, in light of the Court of Appeals decision in this matter based upon the Court's previous ruling, will be for the Court to determine whether or not there was a constitutional violation of Mr. Winberg's rights to be free of any intrusion of his liberties by law enforcement as a result of an illegal and prolonged detention in this particular case under the facts of this matter" (20). Evidence regarding that issue was not presented at the original hearing held September 5, 2013, in reliance on the attorney's statement that the only issue for

consideration by the court was whether there was appropriate justification for the stop of the vehicle (11:2).

The court heard additional testimony on September 15, 2014 (36), and received a partial transcript of the squad video as evidence (22). The court said it would rule on the motion at a later date. In a letter dated September 30, 2014, the court requested that the police report of Officer Bjorkman and the squad video be provided (25). The court requested another evidentiary hearing be held on April 22, 2015 for testimony of Officer Bjorkman along with presentation of the squad video during his testimony (37). During that testimony, the court acknowledged that Officer Bjorkman was likely looking at his computer during the turn onto Hastings Way, and not looking at the vehicle driven by Winberg or its occupants, otherwise he would have noticed that Winberg made an illegal turn, which would have provided an alternate basis justifying the traffic stop of the vehicle (37:15-16). A review of the squad video (26) shows that at 50:14, Officer Bjorkman activates his emergency lights to initiate the traffic stop. From 49:45 up until 50:37, nothing on the squad video shows that the driver is or might be a male (26). At 50:37, after the traffic stop has been initiated, Officer Bjorkman activates his spotlight which illuminates the interior of the vehicle, which is the first time the video clearly shows that the driver might be a male (26).

When Officer Bjorkman makes contact with the driver at 51:04, the first statement he makes, after greeting the driver "How ya doing?", is his explanation

for stopping the vehicle. “I’m Officer Bjorkman, Eau Claire Police Department. The reason I stopped you, is the registered owner of the vehicle comes back revoked. Is that you?” The female passenger answers first, “That’s me, I’m sorry”. When viewing the video, one can reasonably assume that Officer Bjorkman directed the question at the female passenger, and that it wasn’t a “false question” as the court asserts. Officer Bjorkman then promptly at 51:19, asks for identification of the driver and the passenger. When viewing the video, one can see the wind blowing in the direction of Officer Bjorkman’s face upon first contact at 51:04. Officer Bjorkman can be seen looking in the direction of the driver’s face as the driver turned to speak to Officer Bjorkman at 51:04 to 51:14, at 51:31 and 51:47. (Officer Bjorkman also testified extensively about his observations during the contact with Winberg at the hearing held April 22, 2015 (37:19-30)). One can see on the video that Officer Bjorkman has a flashlight in his left hand, that the intersection is well-lit (See at 50:27), and that the interior of the car is illuminated by the spotlight from the squad car. Officer Bjorkman testified that immediately upon contact, he could smell the odor of intoxicants coming from the driver (36:3, 12). Officer Bjorkman asked the driver where they were coming from. The driver responded “Kwik Trip”. He then asked the driver if he’d had anything to drink tonight, to which the driver responded that he’d had a couple of beers. Officer Bjorkman then explained that he “smelled a little bit of alcohol coming from the car.” He then asked where they had been before the Kwik Trip –



where they had the beers. The driver answered “Whiskey Dick’s”. Officer Bjorkman then asked whether they were headed home and then asked for insurance information on the vehicle (26). The court incorrectly states that the majority of the speaking was from the passenger (33:3).

On the video, one can see that Officer Bjorkman returns to his squad car, runs a check on the information, and backs up his squad car in order to provide room for field sobriety tests (26). He waits for the backup officers to arrive – Officer Dohms and Officer Leque – whom he tells “I just backed up to make some room to do tests. He’s, he’s gassed, he smells, smells just like a brewery coming out of the car. ... No, they were leaving Kwik Trip. I ran a plate, came back revoked. ... She’s the one that’s revoked. He’s – he’s got a valid dl. I couldn’t see who was driving it, so I stopped it”. Officer Dohms comes into view of the squad camera at 55:21 and Officer Leque comes into view of the squad camera at 56:16. After the backup officers arrive, Officer Bjorkman asks Winberg to exit the vehicle to perform standard field sobriety tests (26) at 55:33. Winberg’s performance on those tests corroborates the observations Officer Bjorkman made before he asked Winberg to perform them (26).

## ARGUMENT

- I. THE COURT ERRONEOUSLY GRANTED WINBERG'S MOTION TO SUPPRESS WHEN IT RULED THAT OFFICER BJORKMAN DID NOT HAVE REASONABLE SUSPICION FOR THE TRAFFIC STOP OF THE VEHICLE DRIVEN BY JOSHUA WINBERG.

### Standard of Review

When reviewing a motion to suppress, the appellate court will uphold the trial court's findings of fact unless they are clearly erroneous. State v. Fields, 239 Wis. 2d 38, 619 N.W.2d 279 (Ct. App. 2000). The application of constitutional standards to the facts is a question of law which is decided without deference to the trial court. State v. Rutzinski, 241 Wis. 2d 729, 623 N.W. 2d 516 (2001). The court reviews de novo whether the facts lead to reasonable suspicion. State v. Young, 2006 WI 98, ¶ 17, 294 Wis. 2d 1, 717 N.W.2d 729.

#### **A. The appellate court already decided that Officer Bjorkman's conduct was in conformance with *Newer*.**

In a written decision filed May 28, 2014, the appellate court reversed the trial court's decision to suppress evidence by concluding that Officer Bjorkman lawfully stopped the vehicle driven by Winberg, lawfully made contact with Winberg, and remanded for further proceedings consistent with its decision. Under the law of the case doctrine, "a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." State v. Stuart, 2003 WI 73,

¶23, 262 Wis. 2d 620, 664 N.W. 2d 82 (quoting Univest Corp. v. General Split Corp., 148 Wis. 2d 29, 38, 435 N.W. 2d 234 (1989)). This rule, however, is not absolute. Id., ¶24. An appellate court may disregard the doctrine in the interest of justice or in certain circumstances when “cogent, substantial, and proper reasons exist.” Id. (quoting Univest, 148 Wis. 2d at 39). No such reasons exist here. The trial court cannot disregard existing law (*Newer*), and the appellate court’s reversal of the trial court’s decision to suppress evidence, by now imposing its own requirement that Officer Bjorkman investigate further the identity of the driver before initiating the traffic stop.

**B. The trial court’s conclusion is clearly erroneous when it finds that the squad video shows that when Officer Bjorkman was stopped behind the suspect vehicle at the red light, the driver appears to be a male.**

The gender of the driver cannot be identified at the time that Officer Bjorkman is behind the vehicle at the red light at 49:45 to 49:52 from viewing the squad video (26). The trial court at the hearing itself, and while viewing the squad video, agreed that when Officer Bjorkman was behind the vehicle at the red light, even if he had been looking into the vehicle, he could not have determined whether the driver was a male or female (37:10).

MS. LARSON: Right. Right. At this point it is 50 and 45 on the current time under the media time indicator. What you were able to observe before that was that at 50 and 14 is when the emergency lights came on and that’s when the traffic stop began. You can also see that the spotlight on the – on the squad car goes on

at 50 and 37. And that is really the first point that you can look inside the vehicle and suspect that the driver may be a male.

THE COURT: Well, that's -- that's argument. That's not --

MS. LARSON: What?

THE COURT: What you just said was argument.

MS. LARSON: Well --

THE COURT: To say that that's the first time you can look inside on the video, I mean.

MS. LARSON: Well, you can see shadows before that time, but you can't see the head as you clearly see at the point that the spotlight goes on.

THE COURT: I think -- I think it would be -- it wouldn't be contested that you can see better once the spotlight comes on. But if you want to recue that to the beginning of the video. At this juncture, which is the beginning of the video, you can see two subjects in the car ahead of the squad car, one car length or whatever, one hood and a few feet I guess ahead. The individual on the left seems taller and the individual on the right passenger seems smaller.

If you'll go forward just a few frames.

(Videotape.)

THE COURT: The individual on the right took her hair, which was down her back, and flipped it, so the individual on the right appears to be female.

MS. LARSON: But --

THE COURT: Now, we've already addressed this testimony, because Officer Bjorkman -- We clarified that this is a video. These aren't his eyes, so.

MS. LARSON: Right. And he testified I believe that at the point that he would have been turning the corner he would have been inputting the information about the plate.

THE COURT: Sure.

MS. LARSON: And he – he also testified that he doesn't even know at what point he started concentrating on the plate itself, because he said that the video itself goes back 30 seconds from when his initial observations start. So at the point where he's at the stoplight with this vehicle, he may not be looking inside the – the vehicle.

THE COURT: Right.

MS. LARSON: So even at the point where he's at the stoplight, you can't tell that the driver is a male or female.

**THE COURT: Oh, I agree.**  
(37:8-10)

Even if Officer Bjorkman had been looking into the vehicle (which is contrary to his testimony (37:15)) and watched the occupants, at most he might have seen a moment when the passenger appeared to flip a ponytail at 49:52 (26). A reasonable conclusion could be reached that the person flipping the ponytail was a female, but no conclusion could be drawn that this passenger was an adult as opposed to a child. And even if Officer Bjorkman made that observation of the passenger, no reasonable conclusion could be reached that the driver must be a male.

**C. The trial court in its second decision suppressing evidence imposes an affirmative obligation on Officer Bjorkman to further investigate the identity of the driver before conducting the traffic stop, even though this is not what *Newer* requires.**

As the appellate court noted at footnote 3 of its decision in *State v. Winberg*, Appeal No. 2013AP2661-CR, “In *State v. Newer*, 2007 WI App 236, ¶7, 306 Wis. 2d 193, 742 N.W. 2d 923, we determined it was reasonable for an officer

to assume the person driving a particular vehicle was the vehicle's owner. We concluded that, as long as the officer remains unaware of any facts which would render that assumption unreasonable, knowledge that the owner of a vehicle has a revoked license is enough to form "reasonable suspicion of criminal activity" when an officer observes the vehicle being driven. *Id.*, ¶¶5,7." The appellate court concluded that Officer Bjorkman's conduct was in accordance with the law. It is unreasonable for the trial court to require an investigating officer, who has been trained in the law (37:30-32) to have to anticipate that the trial court will impose an added condition that is not spelled out in the law in order to support reasonable suspicion for a traffic stop.

II. OFFICER BJORKMAN HAD REASONABLE SUSPICION JUSTIFYING EXTENSION OF THE TRAFFIC STOP AFTER HE MADE CONTACT WITH WINBERG.

A. The appellate court in its decision at footnote 5 provided direction to the trial court on remand that "to the extent Winberg concedes that when Bjorkman made contact with him to ask for his identification, Bjorkman observed the odor of intoxicants, his bloodshot eyes, and his slurred speech, these indicia of impairment, combined with the fact that the traffic stop occurred at 12:50 a.m., would give rise to a reasonable articulable suspicion that Winberg was operating while impaired and would allow Bjorkman to extend the traffic stop to investigate his suspicion."

Officer Bjorkman testified that he smelled the odor of intoxicants coming from Winberg when he was speaking to him, and that Winberg's speech was slurred and Winberg's eyes appeared to be bloodshot and glazed over (36:3,

37:19-30). Officer Bjorkman told the backup officers upon their arrival that Winberg appeared “gassed”, meaning intoxicated, but Officer Bjorkman told Winberg that he smelled a little bit of alcohol coming from the car because he didn’t want the occupants of the vehicle to know he suspected any criminal activity until his backup officers arrived (36:4-6).

The trial court erroneously concluded there was no credible evidence to suggest that the stop could have gone from a *Newer* stop to a *Williams* question to a new investigation within approximately 10 seconds, because Officer Bjorkman did not separate the driver from the passenger within that 10 seconds (33:6). First, it should be noted that Officer Bjorkman’s contact with Winberg goes from 51:04 to 51:19 when the ID is requested, then to 51:31 when the ID is handed to Officer Bjorkman (26). Next, one can clearly see on the video that Winberg turns his head to face Officer Bjorkman multiple times between 51:04 and 51:31, and for a duration of several seconds between 51:04 and 51:14 and Winberg speaks in the direction of Officer Bjorkman’s face. You can see the air/wind on the video blowing in the direction of Officer Bjorkman’s face throughout the contact (26). Based on what is visible on the video, it is unreasonable to assume Officer Bjorkman would not have smelled Winberg’s breath, as Winberg not only spoke with his face in the direction of Officer Bjorkman’s face, but also in close proximity (26).

The court concludes that Officer Bjorkman's delay in separating the driver from the passenger in order to confirm that the odor of intoxicants was coming only from Winberg, rather than from the passenger or from both of them, invalidates the investigation (33:7). The court erroneously states that the passenger admitted drinking [alcohol] (33:7). The squad video contains no admission from the passenger that she had consumed alcohol (26). The court suggests that Officer Bjorkman needed to smell the driver independently during the first ten seconds in order to permit an extension of the contact (33:6). That conclusion is unreasonable as Officer Bjorkman can establish reasonable suspicion that the driver may be intoxicated without eliminating the possibility that the passenger may be intoxicated too.

The court also concluded erroneously that the video did not show Officer Bjorkman looking into Winberg's eyes, that slurred speech could not be heard on the video and that the driver had not exhibited any bad driving (33:6). On the contrary, the video shows Officer Bjorkman looking into Winberg's eyes multiple times (26). Winberg's speech sounds mildly slurred when he spoke of having come from Kwik Trip, when he answered that he'd had a couple of beers to drink, and when he said he drank the beers at Whiskey Dick's (26). As for bad driving, even the court acknowledged an illegal turn was made by Winberg before the traffic stop was initiated (37:15-16). Upon closer review of the video, in addition to the illegal turn, one can see that the vehicle was being driven on or over the



white lane division line at 50:08 to 50:15 (26). Even so, it is not necessary for Officer Bjorkman to have observed bad driving in order to support a finding of reasonable suspicion that Winberg was impaired by alcohol and reasonable suspicion to justify extension of the contact.

The court erroneously concluded that Officer Bjorkman had an obligation during his investigation to presume Winberg innocent of the conduct he was investigating, and by failing to presume Winberg's innocence, Officer Bjorkman was a biased investigator (33:7). The court's assessment of Officer Bjorkman's credibility appears to stem from the court's application of an incorrect legal standard. The legal standard is reasonable suspicion, which in this case began with the immediate odor of intoxicants coming from the defendant upon contact. Reasonable suspicion depends on whether an officer's suspicion is grounded in "specific, articulable facts and reasonable inferences from those facts" indicating the individual committed or is committing an offense. *State v. Waldner*, 206 Wis.2d 51,56, 556 N.W. 2d 681 (1996). When determining whether reasonable suspicion exists, an officer need not rule out the possibility of innocent behavior. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W. 2d 763 (1990). If during a traffic stop the officer gains additional information creating a reasonable suspicion the driver is impaired, the officer may administer field sobriety tests. *See State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394.

In Winberg's case, Officer Bjorkman made lawful contact with Winberg, immediately smelled the odor of intoxicants, saw bloodshot eyes and heard Winberg's speech was slurred (36:8, 37:18). As these observations were made, Officer Bjorkman continued to ask questions which led to an admission by the driver that he had been to a bar (Whiskey Dick's) and "had a couple of beers", the phrase Winberg used when Officer Bjorkman believes he first noticed his slurred speech (37:18). Officer Bjorkman waited for backup officers to arrive before asking Winberg to exit the vehicle to perform standard field sobriety tests. All of this was done in a reasonable progression based on Officer Bjorkman's observations at the beginning of his contact with Winberg and is corroborated by statements Officer Bjorkman made during the continued contact (smell a little bit of alcohol coming from the car; he's gassed, he smells, smells just like a brewery coming out of the car; we're gonna do some tests here I – smell a lot of alcohol coming off ya, okay?) (26).

The court contends that the Officer Bjorkman's question "is that you?" following his explanation for the reason for the traffic stop invalidates the entire contact (33:5-6). This was a natural extension of his explanation of the reason for the stop, and was logically directed at the female passenger. The court's conclusion that those three words amounted to an illegal seizure of the driver is not a reasonable conclusion under the circumstances. If the female passenger

were not the registered owner, was Officer Bjorkman foreclosed from asking what these individuals were doing with a car that wasn't registered to either of them? The three words were reasonable under the circumstances.

**B. It would have been unreasonable and irresponsible for Officer Bjorkman to have not investigated whether Winberg was safe to drive after he smelled alcohol coming from him.**

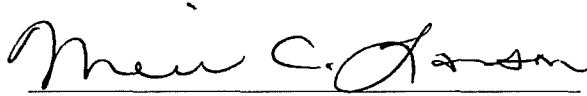
Once Officer Bjorkman had reasonable suspicion to believe Winberg was impaired, the next reasonable step in the investigation was to ask Winberg to perform standard field sobriety tests. If Officer Bjorkman's suspicions were confirmed by the results of the standard field sobriety tests, then the next reasonable step was to request a blood sample for chemical testing to confirm (or dispel) those suspicions. That's what Officer Bjorkman did here.

The court concludes that all of the questions Officer Bjorkman asked after he requested identification from Winberg and his passenger were not allowed based on State v. Williams, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W. 2d 462 (33:6-7). The court fails to consider that Officer Bjorkman has already moved on from the *Williams* questions into the broader line of questioning permitted under State v. Betow, 226 Wis. 2d 90, 94-95, 593 N.W. 2d 499 (Ct. App. 1999). The court's analysis would call for Officer Bjorkman to ignore the observations he made upon contacting Winberg and have Winberg drive away without further investigation, even though he had reason to believe Winberg was driving while impaired. That result would be both unreasonable and irresponsible.

CONCLUSION

The trial court erroneously granted the Motion to Suppress Evidence after ruling that Officer Bjorkman lacked reasonable suspicion for the traffic stop of the vehicle driven by Joshua Winberg and that Officer Bjorkman lacked reasonable suspicion to extend the traffic stop to investigate his suspicion that Winberg was operating a motor vehicle while impaired by alcohol. For the reasons cited, the Decision of the trial court resulting in suppression of evidence should be reversed.

Dated this 13th day of May, 2016.



Meri C. Larson  
Assistant District Attorney  
State Bar. No. 1006680

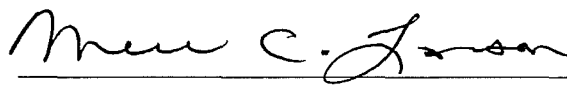
Eau Claire County Courthouse  
721 Oxford Avenue  
Eau Claire, WI 54703

Attorney for Plaintiff-Appellant

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 16 pages and 3,795 words.

Dated this 13th day of May, 2016.



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Meri C. Larson  
Assistant District Attorney  
State Bar. No. 1006680

Eau Claire County Courthouse  
721 Oxford Avenue  
Eau Claire, WI 54703

Attorney for Plaintiff-Appellant

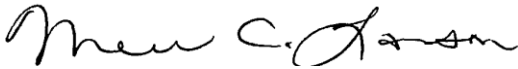
**CERTIFICATION OF ELECTRONIC FILING**

I HEREBY CERTIFY THAT I have submitted, on May 13, 2016, an electronic copy of this brief, excluding the appendix, 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 as of May 13, 2016.

A copy of this certificate has been served with the court and served on all opposing parties.

Dated this 13th day of May, 2016.



Meri C. Larson  
Assistant District Attorney

MCL #1006680/jan

cc: Attorney Michael Cohen