

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

RECEIVED

06-15-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CASE NO. 2016AP000108 CR

STATE OF WISCONSIN,

Plaintiff- Appellant

v.

JOSHUA D. WINBERG,

Defendant- Respondent.

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

REPLY BRIEF OF DEFENDANT-RESPONDENT

Michael R. Cohen
Attorney for Defendant-Respondent
State Bar No. 1000739
17 South Barstow Street
Eau Claire, WI 54701

715-514-5051

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ISSUES PRESENTED FOR REVIEW.....	1
I. DID THE OFFICER HAVE REASONABLE SUSPICION FOR THE TRAFFIC STOP OF THE VEHICLE DRIVEN BY JOSHUA WINBERG?.....	1
II. DID THE OFFICER HAVE REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP AFTER MAKING CONTACT WITH JOSHUA WINBERG?.....	1
STATEMENT OF ORAL ARGUMENT AND PUBLICATION.....	2
STATEMENT OF FACTS.....	2
ARGUMENT.....	2
I. THE COURT’S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS.....	2
II. THE COURT PROPERLY GRANTED WINBERG’S MOTION TO SUPPRESS WHEN IT DETERMINED THE OFFICER LACKED CREDIBILITY.....	4
III. THE COURT PROPERLY GRANTED WINBERG’S MOTION TO SUPPRESS EVIDENCE WHEN IT RULED THAT THE OFFICER DID NOT HAVE REASONABLE SUSPICION FOR THE TRAFFIC STOP OF THE VEHICLE DRIVEN BY JOSHUA WINBERG.....	6
IV. THE COURT PROPERLY GRANTED WINBERG’S MOTION TO SUPPRESS EVIDENCE WHEN IT RULED THAT THE OFFICER DID NOT HAVE REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP OF THE VEHICLE DRIVEN BY JOSHUA WINBERG.....	10
CONCLUSION.....	12
CERTIFICATION.....	14

TABLE OF AUTHORITIES

<i>Estate of Dejmal</i> , 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980).....	5
<i>Posnanski v. City of West Allis</i> , 61 Wis. 2d 461, 465, 213 N.W.2d 51 (1973).....	5
<i>State v. Betow</i> , 226 Wis. 2d 90, 593 N.W.2d 499, (Ct. App. 1999).....	9, 12
<i>State v. Fields</i> , 239 Wis. 2d 38, 619 N.W.2d 279 (Ct. App. 2000).....	2
<i>State v. Hughes</i> , 233 Wis.2d 280, 607 N.W.2d 621(2000).....	5
<i>State v. Newer</i> , 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923.....	6, 7, 9
<i>State v. Phillips</i> , 218 Wis. 2d 180, 186-87 n.4, 577 N.W.2d 794 (1998).....	5
<i>State v. Williams</i> ,” 2002 WI App 306, 158 Wis. 2d 395, 655 N.W.2d 462.....	10, 11
<i>State v. Young</i> , 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997).....	8, 9
<i>United States v. Buenaventura-Ariza</i> , 615 F.2d 29, 36 (2nd Cir. 1980).....	9

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

CASE NO. 2016AP000108 CR

STATE OF WISCONSIN,

Plaintiff- Appellant

v.

JOSHUA D. WINBERG,

Defendant- Respondent.

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

REPLY BRIEF OF DEFENDANT-RESPONDENT

ISSUES PRESENTED FOR REVIEW

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

The Trial Court answered: No.

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

The Trial Court answered: No.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

The Respondent agrees with the Appellant's Statement of Oral Argument as set forth in its brief.

STATEMENT OF FACTS

The Trial Court's factual findings are thoroughly and accurately presented in the Decision signed on January 7, 2016. The Respondent defers to the Trial Court's statement of facts.

ARGUMENT

I. THE COURT'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS.

The Trial Court's factual findings are affirmed unless clearly erroneous. *State v. Fields*, 239 Wis. 2d 38, 619 N.W.2d 279 (Ct. App. 2000). The Trial Court accurately and thoroughly details the facts of this case in its decision signed on January 7, 2016 (33). Mr. Winberg testified that he made visual contact with the officer; although the officer does not recall this (33). The video of the stop shows that the officer was stopped immediately behind the suspect car at a red light, in a well-lit area, for several seconds, and that the driver appears to be male; however, the officer testified that he never looked into the compartment (33). The video shows that the driver pulled

into a well-lit, four lane road (33). The officer made direct contact, and had a brief conversation with the occupants in the vehicle—but before conducting any field sobriety tests—the officer returned to his squad (33).

The officer testified that he did make visual contact with the driver before making direct contact. The officer testified that he subjectively realized the driver was not the registered owner before making direct contact (33). The officer approached the driver and told the driver that he pulled the car over because the registered owner was revoked (33). The officer then asked the driver, “Is that you?” (33). The officer already knew that the driver whom he had engaged was not the registered female owner (33). The false question led to a conversation—albeit brief, and largely involving the passenger who was the registered owner of the vehicle (33). The officer’s false question resulted in an extension of the stop; and exceeded the allowable contact (33).

The video timer on the recording indicates that the conversation with the driver and passenger lasted about a minute (33). During the conversation, the officer does not appear to shine a light or look carefully into the driver’s eyes; yet later testified that the driver’s eyes were bloodshot (33). During the conversation, both the driver and passenger indicate that they have imbibed alcohol (33). The officer testified that the driver smelled of alcohol and that the officer could tell that the smell was from the driver alone, and

not the passenger (33). However, the officer did not remove the driver from the car so as to separate the driver's breath/odor from the passenger's breath/odor (33). The officer also testified that the driver slurred his speech (33). The transcript produced of the stop indicates that the driver gave mostly one word answers; and the audio gives no indication of slurred speech (33). The majority of speaking was from the passenger/registered owner (33). In court the officer later changed his testimony to say the driver's slurred speech occurred after he had begun field sobriety tests (33).

The Trial Court found no bad driving, no slurred speech, a lack of credible evidence of bloodshot eyes, a lack of credible evidence of distinction between smell of intoxicants emanating from the driver or from the passenger, and conclusory/biased statements from the officer before any field tests had been conducted (33). These findings are not clearly erroneous as they are supported by facts in the record (36,37). The Trial Court watched the video of the stop, reviewed the transcript of the stop, and heard the witness testimony first hand. The State may disagree with the Trial Court's findings of fact, however, that does not equate to clearly erroneous.

II. THE COURT PROPERLY GRANTED WINBERG'S MOTION TO SUPPRESS WHEN IT DETERMINED THE OFFICER LACKED CREDIBILITY.

In reaching its decision, the Trial Court made the determination that the officer was not a credible witness (33). “The officer’s testimony lacks credibility” (33). “It is the function of the trier of fact, and not [the reviewing court], to resolve questions as to the weight of testimony and the credibility of witnesses.” *Estate of Dejmal*, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980). “This principle recognizes the Trial Court's ability to assess each witness's demeanor and the overall persuasiveness of his or her testimony in a way that an appellate court, relying solely on a written transcript, cannot.” *State v. Hughes*, 233 Wis.2d 280, 607 N.W.2d 621(2000). The trial judge is the “ultimate arbiter of the credibility of a witness,” *Posnanski v. City of West Allis*, 61 Wis. 2d 461, 465, 213 N.W.2d 51 (1973). The reviewing court will uphold a trial court's determination of credibility unless that determination goes against the great weight and clear preponderance of the evidence. *State v. Phillips*, 218 Wis. 2d 180, 186-87 n.4, 577 N.W.2d 794 (1998).

The Trial Court, upon weighing the evidence, having witnessed the officer testify in court and questioning him from the bench (37 or 36??), “conclude[ed] that the officer failed to presume innocence, and rather concluded guilt. With such demeanor, the officer reveals his bias as an investigator” (33). “The Court is not persuaded by the officer's testimony.” (33). The Trial Court disagreed with the officer’s failure to identify the driver as male (33). In court the officer changed his testimony that the driver had

slurred speech. The officer changed his testimony when the video was played in court and there was no evidence of the driver's slurred speech. In the hearing the officer changed his testimony to say Mr. Winberg's slurred speech was during field sobriety testing. The Trial Court also disagreed with the officer's testimony that he was able to see determine without further investigation that the driver had bloodshot eyes, as well as know that the smell of intoxicants was only coming from the driver (33). As the arbiter of the evidence, the Trial Court in finding the officer lacked credibility did not go against the great weight and clear preponderance of the evidence.

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

"Under the totality of circumstances, the [Trial Court did] not find a preponderance of evidence to indicate that the officer, in light of training and experience, was reasonable in suspecting that a crime had been committed" (33). In *State v. Newer*, 2007 WI App 236, ¶7, 306 Wis. 2d 193, 742 N.W.2d 923, the Court found that it was reasonable for an officer to assume the person driving a particular vehicle was the vehicle's owner. **"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” *State v. Winberg*, Appeal No. 2013AP2661-CR, citing *State v. Newer*, ¶¶5,7. The Trial Court received testimony from Mr. Winberg, the driver, that the officer made eye contact with him at the Kwik Trip parking lot prior to the traffic stop. The Trial Court also received testimony from the officer that he did not recall seeing Winberg in the parking lot. In weighing the evidence before the court, the Trial Court found the officer’s testimony lacked credibility.

Due to the determination that the officer was not credible, it is a reasonable conclusion that the Trial Court accepted Mr. Winberg’s assertion that the officer had made eye contact with him prior to the stop (33). “Thus, for example, if the officer knows that the owner of the vehicle has a revoked license and further, that the owner is a 22-year-old male, and the officer observes that the person driving the vehicle is a 50- or 60-year-old woman, any reasonable suspicion of criminal activity evaporates” *Newer*, ¶5. The fact that the officer may have seen that the driver of the vehicle was a male driver and not the female registered owner, makes the traffic stop unreasonable due to the invalid assumption of a woman driver.

The Trial Court evaluated the possibility that Officer Bjorkman did not see who was operating the vehicle. The Trial Court also addressed this analysis utilizing *Newer*. However, the Trial Court found that the stop was

unreasonable under this analysis as well. The officer followed the vehicle in a well-lit, four lane road prior to the traffic stop. “A revoked owner without any bad driving gives no ‘emergency circumstances’ to make the stop” (33). “The officer need exhaust reasonable, simple and safe follow-up investigation before exclusively relying on *Newer*” (33).

The State asserts that officers are trained in law and this is an “added condition that is not spelled out in the law” (Appellant, p10). The State’s argument is not logical. The law does not permit a law enforcement officer to bury his head in the sand and not do reasonable, minimal investigation prior to taking action that infringes on a person’s liberty interests protected under the Constitution. Conducting reasonable investigation is the minimum standard and expectation for law enforcement. In *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997), the Court found that, while the officer's training and experience is "one factor in the totality of the circumstances that courts take into account in deciding whether there is reasonable suspicion to make the stop," that fact "does not require a court to accept all of [the officer's] suspicions as reasonable, nor does mere experience mean that an [officer's] perceptions are justified by the objective facts." *Id.* at 429, 569 N.W.2d at 90. And in all cases, "[t]he basis of the police action must be such that it can be reviewed judicially by an objective

standard." *Id.*, citing *United States v. Buenaventura-Ariza*, 615 F.2d 29, 36 (2nd Cir. 1980). See *State v. Betow*, 593 NW 2d 499, footnote 5.

Finally, the Trial Court distinguished the facts of *Newer* from the facts of this case and found no reasonable suspicion for the traffic stop. In *Newer*, the officer was traveling in the opposite direction of the suspect vehicle. The officer also noted that the suspect vehicle was speeding, and the male vehicle owner, *Newer*, had a revoked license. *State v. Newer*, 2007 WI App 236, ¶3, 306 Wis. 2d 193, 742 N.W.2d 923. The officer in *Newer* testified that he did not stop the vehicle for speeding, but that the speed violation “would give [him] the pretextual stop” ¶4. Unlike this case, the Officer in *Newer* could not have pulled along-side the suspected vehicle to investigate whether or not the operator was indeed male as the vehicle registration indicated. The Officer in *Newer* had documented evidence of bad driving—speeding—to support the stop had the driver been female, or had the driver not been the registered owner. This is not present in this case as the officer observed no evidence of poor driving to justify a traffic stop. In *Newer*, “the officer did not observe the driver of the vehicle and had no reason to think it was anyone other than the registered owner at any time during the stop” at ¶9. In this case there is evidence that the officer did observe the driver of the vehicle and, therefore, had reason to believe it was someone other than the female

registered owner (33). Thus factually *Newer* and this case are distinct. The factual findings in this case evidence an unreasonable traffic stop.

IV. THE COURT PROPERLY GRANTED WINBERG'S MOTION TO SUPPRESS EVIDENCE WHEN IT RULED THAT THE OFFICER DID NOT HAVE REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP OF THE VEHICLE DRIVEN BY JOSHUA WINBERG.

“The [Trial Court found] that the officer questioned the driver beyond the scope allowed by *State v. Williams*,” 2002 WI App 306, 158 Wis. 2d 395, 655 N.W.2d 462. (33). “No extension is reasonable because any extension caused by a false question causes pre-textual detention” (33). “*Williams* is, in and of itself, an extension beyond reasonable doubt. As such it must be treated with due care. A mistaken question, leading to an extension of the stop, further leading to finding new reasonable suspicion cannot be accepted” (33). In *Williams*, an officer stopped William's vehicle on the suspicion that Williams was a suspect in a domestic abuse case. As soon as the officer looked at the driver, he saw that Williams was not the domestic abuse suspect. The Appellate Court in *Williams* found that, because the officer had lawfully stopped the vehicle, he was able to ask for the driver's name and identification despite knowing that the driver was not the suspect. ¶¶18,21-22.

In this case, the officer testified that he suspected the driver had a revoked license, but once he made contact with Mr. Winberg saw that it was not the vehicle's registered owner operating the vehicle. Instead of asking for the Driver's name and identification, the officer told the driver that he stopped him because the registered owner was revoked, and asked "Is that you?" The officer knew that the male driver is not the female registered owner. As the officer knew the answer, this is a false question. The passenger indicates to the officer that she is the vehicle's registered owner. However, the officer continued to question the vehicle's occupants: "Where are you guys coming from?" "Anything to drink tonight?" "You have ID on you ma'am (directed at passenger)?" "Where were you having beers at?" and "Headed home right now, or?" The officer extended the stop beyond the exception detailed in *Williams*. "*Williams* is, in and of itself, an extension beyond reasonable suspicion. As such it must be treated with due care" (33). The officer's actions are not permissible within the narrow exception created in *Williams*.

Following testimony by the officer and review of the audio, video and transcription of the traffic stop, the Trial Court disagreed with the officer's assertions that based on his training and experience, he identified additional information that made him suspicious of the commission of a crime other than operating a motor vehicle with a revoked license (33). Under *State v.*

Betow, 226 Wis. 2d 90, the officer would be able to broaden the scope of his investigation beyond the purpose for the traffic stop," if additional suspicious factors come to the officer's attention." Specifically, the officer alleged that the driver was slurring his speech, smelled of alcohol and appeared to have bloodshot eyes.

The Trial Court found these allegations of additional suspicious factors unsubstantiated (33). The officer's testimony of slurred speech was not to be corroborated by the audio, video or transcript of the traffic stop (33). The officer recanted his testimony that the slurred speech had occurred while the driver was first contacted in the vehicle (33). The officer later admitted that the slurred speech had occurred during field sobriety testing (33). The officer did not look into the driver's eyes (33). After being informed that both persons in the vehicle had consumed alcohol, officer did not smell the driver independently of the intoxicated passenger (33). The officer did not ask the driver to step out of the vehicle to speak with him. The Trial Court's findings that the allegations of additional substantial factors were not credible make *State v. Betow*, 226 Wis. 2d 90, inapplicable to this case.

CONCLUSION

The Trial Court properly granted the Motion to Suppress Evidence after determining the officer's testimony lacked credibility. Due to the not

credible testimony provided by the officer, the Trial Court found that the traffic stop lacked reasonable suspicion and the officer lacked reasonable suspicion to extend the traffic stop for further investigation. For the reasons stated therein, the Decision of the Trial Court should be confirmed.

Dated this 10th day of June, 2016.

Respectfully submitted,

Michael R. Cohen
Attorney for Defendant-Respondent
State Bar No. 1000739
17 South Barstow Street
Eau Claire, WI 54701

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 13 pages and 2,752 words.

Dated this 10th day of June, 2016.

Michael R. Cohen
Attorney for Defendant-Respondent
State Bar No. 1000739
17 South Barstow Street
Eau Claire, WI 54701

**CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(F), WIS. STATS.**

I hereby certify that I have submitted an electronic copy of the brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12)(f), Wis. Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 10th day of June, 2016.

Michael R. Cohen
State Bar No. 1000739
17 South Barstow Street
Eau Claire, WI 54701