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COURT OF APPEALS  
STATE OF WISCONSIN  
DISTRICT III

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

CASE NO. 2016-AP-000108 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

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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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.

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

Winberg did not address the *law of the case doctrine* which provides that 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. Instead, Winberg once again tries to backpedal from the concession he made at the hearing on the motion for reconsideration that "based on the testimony

of the officer, the law says that he had the right to stop the car for the purposes of securing the identification of the driver.” *State v. Winberg*, Appeal No. 2013AP2661-CR, footnote 4, (*See* Appendix). “By ultimately conceding in the circuit court that Bjorkman’s testimony supported the stop, Winberg forfeited his right to argue on appeal that other facts show Bjorkman knew the registered owner was not driving at the time of the stop.” *Id.* at ¶14. Winberg raises this issue again on pages 2, 7 and 9 of his 2016 Respondent’s Brief and even attempts to suggest that the court made a factual finding on this matter, which the court did not (33).

**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 traffic light, the driver appears to be a male.**

Winberg maintains that the trial court accurately and thoroughly detailed the facts of this case in its Decision signed on January 7, 2016, when that conclusion is clearly and demonstrably not true. Winberg makes no attempt to support the court’s findings with the record in this case. The squad video does **not** show that while Officer Bjorkman was stopped behind the suspect vehicle at the red light, the driver appears to be a male (26). Winberg provides no response to the court’s own admission on the record which contradicts the court’s finding of fact (37:8-10). Nor does Winberg address the fact that there is no admission on the squad video by the passenger that she was consuming alcohol (26). Only after

Winberg was arrested and placed in the back of Officer Bjorkman's squad car, did the passenger admit to having been to Whiskey Dick's with Winberg (26). She mentioned that Winberg had vodka from a bottle which was located in the vehicle before going to Whiskey Dick's, but there is no mention of what, if any, alcohol she drank (26).

Winberg also relies on the court's Decision in which there is a clearly erroneous finding of fact that there was no bad driving demonstrated by Winberg. That finding contradicts the court's own observation that Winberg made an illegal turn from the stoplight (37:15-16) and (26). The video also reveals that the vehicle was being driven on or over the white lane division line for approximately seven seconds (26).

The court's findings that the driver gave mostly one word answers is not true, the majority of the speaking was with the passenger is not true, and there was no indication on the audio of Winberg's slurred speech is also not true (26). After Winberg was arrested, handcuffed, and placed in the back of Officer Bjorkman's squad car, Winberg complained of the handcuffs being uncomfortable (26). His slurred speech is readily apparent and corroborates Officer Bjorkman's testimony about the slightly slurred speech he heard when Winberg answered "Yeah, I've had a couple of beers" in response to his question "Anything to drink tonight?" (37:17-19).

The court's conclusion that Officer Bjorkman did not appear to look into the driver's eyes, so he wasn't in a position to notice bloodshot eyes, is unreasonable. The video clearly shows Officer Bjorkman looking in the direction of Winberg's face several times from a close distance (26) at 51:04 to 51:14; 51:31, 51:47. The video shows that there is sufficient lighting from combination of the streetlamps, commercial lighting, the squad lights including the spotlight and Officer Bjorkman's flashlight (26). Later in the video from 1:04:21 until 1:05:40, one can see the effects of intoxication in Winberg's eyes, even at a distance from the squad camera (26). As Officer Bjorkman noted in his testimony, "they looked similar to nearly every other intoxicated person I've dealt with while working. They were bloodshot and he appeared to be intoxicated" (37:22). It doesn't take more than a glance to observe the indicators of intoxication that Officer Bjorkman described to Officers Dohms and Leque as "gassed". Even the court distinguished between looking into a person's eyes while speaking to him versus the need to observe more closely while conducting an HGN field sobriety test (37:22).

The court's conclusion that Officer Bjorkman changed his testimony to say the driver's slurred speech occurred after he had begun field sobriety tests is also not true (37). There was no testimony by Officer Bjorkman about field sobriety testing in reliance on Winberg's statement that it would not be challenged (36:7). Officer Bjorkman testified that he noticed Winberg's slurred speech at

approximately line 19 of the transcript (22) of the video (37:17) when Winberg says “Yeah, I’ve had a couple of beers,” after he had immediately noticed the smell of alcohol coming from Winberg and after he saw that Winberg’s eyes were bloodshot when they were facing each other (37:19).

The court’s findings of fact are not supported by the record and in some respects are actually contradicted by the record. That Winberg chose to ignore the record and simply agree with the court’s findings without reference to the record is troubling.

**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.**

The trial court makes clear its dissatisfaction with the appellate court’s decision to reverse the trial court’s first Decision Suppressing Evidence and which held 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. *See* (33) and (37). In so doing, the trial court sought to distinguish the facts of the *Newer* case from the facts of Winberg’s case and overrule the Decision of the Court of Appeals, which it did by concluding a second time that the traffic stop of the vehicle driven by Winberg was made without reasonable suspicion. The *law of the case doctrine* does not permit the trial court to do that.



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 suspicion that Winberg was operating while impaired and would allow Bjorkman to extend the traffic stop to investigate his suspicion”.

The trial court originally found “no reason to question the credibility of the officer. I question the credibility, but I have no reason to find anything remiss.” (36:28). The court then went on to describe his discomfort with the facts of the case and the law he must apply (36:28-29). *See also* (37:4-6, 31-40). The court noted that “[j]ust because [Officer Bjorkman] didn’t tell the dispatch that he saw slurred – or saw bloodshot, glazed eyes, slurred, does not mean that didn’t happen. When he called dispatch, he was not testifying, he was talking about the totality of the circumstances based on his training and experience, previous stops and whatnot. So I don’t have any reason to question the credibility of that.” (36:29).

The trial court’s change in perception of Officer Bjorkman’s credibility appears to have arisen from the court’s application of an incorrect legal standard. The court found that in order for Officer Bjorkman to be credible, he needed to “presume innocence”. While the presumption of innocence is an important legal

standard, it is not the legal standard which applies to an investigating officer at a traffic stop. When one views the video of the traffic stop (26), there is nothing all that unusual about Officer Bjorkman's contact with Winberg. Nothing about his demeanor on the video suggests Officer Bjorkman is biased as an investigator or that he lacks credibility. Nothing about his testimony at the multiple hearings suggests that Officer Bjorkman did anything inconsistent with his training and experience or that he changed or "recanted" his testimony as the court asserted in its findings of fact (33).

The trial court was particularly troubled by what he called Officer Bjorkman's "false question" which he cites as the flaw in the investigation which invalidates the rest of the contact - - the three words "Is that you?" Logically, that question would have been directed at the passenger, as she was the only female in the vehicle and she's the one who answered the question first. But there is an alternative which was not considered by the court , and that is the possibility that the registration was recently transferred and the computerized record kept by the Department of Transportation had not been updated to accurately reflect the identity of the registered owner. Since that could have been possible, even if the question had been directed at the driver, it would not have been a false question. In any case, it would have been a logical question following Officer Bjorkman's explanation for why he stopped the vehicle. 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.**

Officer Bjorkman first noticed the smell of alcohol coming from the driver immediately upon making contact with him (36:3). Corroborating that testimony, the video of the traffic stop shows that the air is blowing in the direction of Officer Bjorkman's face while he is speaking with Winberg at the opened driver's window (26). Officer Bjorkman next noticed Winberg's eyes appeared bloodshot and glazed over at the point he exchanged eye contact with Winberg when asking him for his identification (26) and (36:8) and (37:19, 21-22). Following those observations, Officer Bjorkman asked Winberg where they had been coming from and "Anything to drink tonight?" (22). When Winberg answered "Yeah, I've had a couple beers", Officer Bjorkman noted Winberg's slightly slurred speech (37:17-19). This observation is further corroborated by Winberg's speech later in the video when he is in the back of Officer Bjorkman's squad car (26).

What transpired during Officer Bjorkman's contact with Winberg is consistent with the appellate court's directive in footnote 5 of its Decision in *State v. Joshua Winberg*, Appeal No. 2013AP2661-CR dated May 28, 2014 (*See Appendix*). When Officer Bjorkman observed of the odor of intoxicants, bloodshot eyes and slurred speech during his contact with Winberg, these indicia


of impairment, combined with the fact that the traffic stop occurred at 12:50 a.m., gave rise to a reasonable, articulable suspicion that Winberg was operating while impaired and would allow Officer Bjorkman to extend the traffic stop to investigate his suspicions. Officer Bjorkman was then authorized to proceed to the next step in the investigation which was to ask Winberg to perform standard field sobriety tests, which is what he did.

The trial court's analysis would call for Officer Bjorkman to ignore his observations and his duty as a law enforcement officer to protect the public and permit Winberg to drive away without further investigation. That 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.

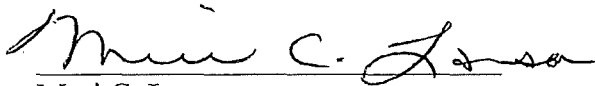
Dated this 22<sup>nd</sup> day of July, 2016.

  
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### 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 nine (9) pages and 2,080 words.

Dated this 22<sup>nd</sup> day of July, 2016.

A handwritten signature in cursive script, appearing to read "Meri C. Larson", written over a horizontal line.

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