

RECEIVED

04-07-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**STATE OF WISCONSIN
COURT OF APPEALS**

DISTRICT III

Case No. 2016 AP 467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRITTANIE JO PALAIA,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

MILLER APPELLATE PRACTICE, LLC

Attorneys for the Defendant-Appellant

By Steven L. Miller #1005582

P.O. Box 655

River Falls, WI 54022

(715) 425-9780

On appeal from the Circuit Court
of Brown County, Hon. Donald R. Zuidmulder,
Circuit Judge, presiding.

TABLE OF CONTENTS

	Page
ISSUE FOR REVIEW	5
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	6
STATEMENT OF THE CASE	6
ARGUMENT	7-14
I. THE POLICE OFFICER DID NOT HAVE REASONABLE SUSPICION TO STOP THE VEHICLE BASED SOLELY ON THE FACT THAT ONE OF TWO REGISTERED OWNERS HAD NOT BEEN ISSUED A DRIVER'S LICENSE BY THE STATE OF WISCONSIN.	7-9
1. The absence of a Wisconsin issued driver's license does not support an inference the operator is driving illegally.	9-10
2. Alternatively, a police officer cannot reasonably infer the registered owner is also the driver when there is more than one registered owner.	10-13
3. Alternatively, the probability that both inferences are true is so low it fails to establish reasonable suspicion.	13-14
CONCLUSION	14
CERTIFICATIONS	15-17
APPENDIX	18

CASES CITED

<i>Berkemer v. McCarty</i> , 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)	7
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325, 346 (1985)	8
<i>State v. Galvez</i> , 930 N.W.2d 473, 475 (Ill. Ct. App. 2010)	11
<i>State v. Gammons</i> , 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623	7
<i>State v. Gaulrapp</i> , 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996)	7
<i>State v. Lord</i> , 2006 WI 122, 297 Wis. 2d 592, 723 N.W.2d 425	9
<i>State v. Newer</i> , 2007 WI App 236, 306 Wis.2d 193, 742 N.W.2d 923	8
<i>State v. Popke</i> , 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569	7
<i>State v. Post</i> , 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634	7
<i>State v. Vitek</i> , 2015 WI App 90 (2015AP421-CR, October 27, 2015, unpublished)	11

WISCONSIN STATUTES CITED

Wis. Stat. §343.05(4)(b)1&2	9
Wis. Stat. § 346.63(1)(a)	7
Wis. Stat. § 752.31(2)	11
Wis. Stat. § 809.23(3)(b)	11
Wis. Stat. § 971.31(1)	7

OTHER AUTHORITY

Wis. Admin. Code §Trans. 102.14(4)(b)	9
2016 “Motorist’s Handbook”, page 2, published by the Wisconsin Department of Transportation at: http://wisconsindot.gov/Documents/dmv/shared/bds126-motorists-handbook.pdf	9

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2016 AP 467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRITTANIE JO PALAIA,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

ISSUE FOR REVIEW

1. Does a police officer have reasonable suspicion to stop a vehicle based solely on the fact that one of two registered owners does not have a Wisconsin issued license?

The Trial Court Answered: "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE¹

On May 23rd, 2015, at approximately 10:50 p.m., Officer David Knepfel of the Brown County Sheriff's Department was following a north-bound car on South Webster Avenue, in the City of Allouez, with a valid Wisconsin plate. (30:6, 7). He did not observe any erratic driving or traffic violations. (30:9, 17). Knepfel ran the plate. The result showed two registered owners, one of whom was Anthony Palaia. (30:7, 17). Knepfel then ran Anthony Palaia's name through the Wisconsin DOT driver's license database and the result was "no license issued." (30:8). He did not run the second owner's name. (30:24-25). Knepfel had no information that either owner's driving privileges were suspended or revoked. (30:26-27).

Knepfel stopped the car. (30:8). He conceded the stop was based solely on the fact that no Wisconsin driver's license had been issued to one of the two registered owners. (30:19, 24, 25). Knepfel did not know how many people were in the car or whether the driver was male or female until he approached the vehicle. (30:8, 9, 28). The driver identified herself as Brittanie Palaia and presented a Minnesota driver's license. (30:9-10). At that point, Knepfel observed "glassy eyes" and could "smell the odor of intoxicants." (30:10). He asked her to do a number and alphabet test, and was satisfied that she may be legally impaired. (30:15). As there was an "OWI task force" on duty that night, he called them and when they arrived, he left. (30:15).

¹ The Statement of the Case and the Statement of Facts are combined.

Palaia challenged the stop. (9). An evidentiary hearing was held on November 24, 2015. (30). The circuit court denied the motion in an oral decision. (30:37-39; Appendix, (“A:”), pp. 4-6). On November 30, 2015, Palaia entered a no contest plea to first offense OWI with a passenger less than 16 years old, contrary to Wis. Stat. § 346.63(1)(a). She received a fine and was ordered to serve five days in jail. The circuit court stayed the jail sentence pending appeal. (20). Palaia now appeals pursuant to Wis. Stat. § 971.31(1).

ARGUMENT

I. THE POLICE OFFICER DID NOT HAVE REASONABLE SUSPICION TO STOP THE VEHICLE BASED SOLELY ON THE FACT THAT ONE OF TWO REGISTERED OWNERS HAD NOT BEEN ISSUED A DRIVER’S LICENSE BY THE STATE OF WISCONSIN.

A traffic stop constitutes a seizure within the meaning of the Fourth Amendment. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996); *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. Before conducting an investigatory stop a police officer must have a reasonable suspicion, grounded in specific articulable facts, that an individual is violating the law. *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623; *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. The analysis is focused on whether a particular person has violated the law. *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

The State has the burden of establishing that an investigative stop of a particular individual was reasonable. *Post*, 2007 WI at ¶12. On appeal, the issue of whether an officer had reasonable suspicion to stop a vehicle is a question of constitutional fact with a two-step standard of review. *Post*, ¶10. The circuit court’s findings of fact will be upheld unless they are clearly erroneous, but the application of those facts to constitutional principles is

reviewed de novo. *Id.* In this case, the facts are not disputed. Whether Officer Knepfel had reasonable suspicion is therefore a question of law reviewed de novo.

Officer Knepfel stopped Palaia's vehicle based solely on the fact that one of two registered owners had not been issued a Wisconsin Driver's license. (30:19, 24, 25). This requires two presumptions. First, that a driver without a Wisconsin issued driver's license is driving illegally; and, second, of the two owners, the owner without a Wisconsin issued driver's license is the person driving the car.

The State relies on *State v. Newer*, 2007 WI App 236, 306 Wis.2d 193, 742 N.W.2d 923. In *Newer*, the officer ran the vehicle's plate and found there was a single registered owner. A record check revealed his driver's license was revoked. *Id.*, at ¶1. The officer did not know who was actually driving the vehicle or the driver's gender. *Id.* The circuit court suppressed the evidence, holding that the officer lacked grounds to reasonably suspect illegal activity because he did not know who in fact was driving the vehicle. *Id.*, at ¶4. The Court of Appeals reversed. An officer could reasonably infer the owner of the vehicle was the operator. While not "infallible", this assumption provides a "sufficient probability" to meet Fourth Amendment standards. *Newer*, at ¶7 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985)). This inference is also subject, however, to "information suggesting that the assumption is not valid in a particular case,...." *Newer*, at ¶8. In *Newer*, the officer "*had no reason to think* that it was anyone other than the vehicle's owner at any time during the stop." (Emphasis added). *Id.*, at ¶9.

Newer is distinguishable on two grounds. First, the absence of a Wisconsin issued driver's license does not support a reasonable inference the operator is driving illegally. Second, the assumption underlying the inference in *Newer* does not apply when there are multiple owners. Third, the probability that the one of two owners without the Wisconsin issued license is both driving

the car and doing so illegally is either impossible to know or so low that no suspicion of illegal conduct is reasonably possible.

1. The absence of a Wisconsin issued driver's license does not support an inference the operator is driving illegally.

Knepfel did not have any information that either of the two registered owners' driving privileges were restricted in any way. (30:25-27). Furthermore, Knepfel did not claim any correlation between the lack of a Wisconsin issued driver's license and illegal driving.² Therefore, the only reasonable assumption under these circumstances is that the owner without a Wisconsin issued license had a valid license from another jurisdiction.

Wisconsin grants driving privileges to all out-of-state and foreign non-resident drivers with valid home licenses, as long as their driving privileges in Wisconsin have not been affirmatively revoked. Wis. Stat. §343.05(4)(b)1&2. The main exception to this is "new" Wisconsin residents. They are required to apply for a Wisconsin license within 60 days of becoming a state resident. Wis. Admin. Code §Trans. 102.14(4)(b). There are, however, numerous exceptions to the "new resident" requirement. Persons *who reside* in Wisconsin are not required to obtain a Wisconsin issued license if they are: 1) active duty military (including spouses and children); 2) students for up to one year; 3) employees of out-of-state companies in Wisconsin for instruction or a business purpose; or 4) "foreign" tourists for up to one year.³ In any event, Knepfel did not claim any reason to believe that either owner may have violated the 60-day new resident

2 Assuming such a correlation would matter. See e.g. *State v. Lord*, 2006 WI 122, ¶¶7 & 10, 297 Wis. 2d 592, 723 N.W.2d 425 (police cannot stop vehicle to see if properly displayed temporary tags are valid even when such tags are frequently invalid).

3 See the 2016 "Motorist's Handbook", page 2, published by the Wisconsin Department of Transportation at: <http://wisconsin.gov/Documents/dmv/shared/bds126-motorists-handbook.pdf> (A:15).

requirement. While the record does not contain any statistics, one would have to assume that large numbers of out-of-state and foreign drivers are commonly found on Wisconsin roadways.

Newer is entirely distinguishable because it was undisputed the registered owner's driving privileges were revoked. *Newer*, at ¶1. The lack of a Wisconsin issued license, on the other hand, only means the driver likely had a license issued by another state or country. The probability of a finding driver with no Wisconsin issued license, no Wisconsin driving record, *and* no valid out-of-state or foreign license is either minuscule or, at best, unknown. In either case, it does not give rise to a reasonable suspicion. There was "no reasonable assumption of lawbreaking...drawn from the circumstances." *Newer*, ¶9, n. 4. In other words, Knepfel lacked an objective basis upon which to infer illegal conduct. The evidence obtained from the stop should have been suppressed.

2. Alternatively, a police officer cannot reasonably infer the registered owner is also the driver when there is more than one registered owner.

Newer's owner-is-the-driver inference falls apart when there is more than one registered owner.

Newer's holding is based on the assumption that "the owner will do the vast amount of driving." See e.g. *State v. Galvez*, 930 N.W.2d 473, 474 (Ill. Ct. App. 2010). This is what allows an officer to reasonably suspect that when a particular car is being operated, a single owner with a revoked license is likely to be driving the car illegally. This assumption falls apart when there are two owners because the underlying basis supporting the assumption becomes self-contradictory. An officer can no longer assume a particular person is driving the car based on who, presumably, does the "vast amount" of driving, as two owners cannot *each* do the "vast amount" of driving. There is no logical basis upon which to assume one particular registered owner is the likely driver. Reasonable suspicion must be individualized. See

Berkemer, 468 U.S. 420 at 439 (reasonable suspicion analysis is focused on whether a particular person has violated the law). Without individualized suspicion, no reasonable suspicion is possible.

Neither does reasonable suspicion arise based on the assumption there is a 50 percent chance the targeted owner is driving. Apart from the fact that such a proposition goes well beyond the holding in *Newer*, the assumption that two owners are equally likely to be driving the same vehicle at any given time has no empirical basis. Neither the state nor Knepfel made this argument nor did they provide any statistics, law enforcement experience, or anecdotal evidence supporting it. If one were to assume anything, it would be that the owner without a revoked license is the driver:

While some vehicle owners may drive as much after a suspension or revocation as they did before, many if not most will refrain altogether from driving or at least decrease the time spent behind the wheel. If one of two co-owners of a vehicle reduces his or her driving, the relative likelihood that he or she is the driver—at any particular moment when the vehicle is in operation—also decreases. In addition, . . . the co-owner may have the use of the vehicle more often. In that case, the odds are even longer against finding the owner whose license has been suspended or revoked behind the wheel.

State v. Galvez, 930 N.W.2d at 475. Consequently, “[t]he presence of a vehicle on the road is not suspicious merely because one of two co-owners is prohibited from driving; . . .” *Id.*, at 475.

Alternatively, even if there *were* some basis for such a probability assessment, reasonable suspicion requires more. A traffic stop must be justified by specific, articulable facts, and “not . . . the absence of certain facts.” *State v. Vitek*, 2015 WI App 90, at ¶14 (unpublished)⁴ (A:9-14). The general rule that law

4 *State v. Vitek*, 2015 WI App 90 (2015AP421-CR, October 27, 2015, unpublished) is a

enforcement officers are not required to rule out all innocent explanations does not apply because there are no grounds for suspicion in the first place. Driving on a roadway without committing any traffic violation “*is per se innocent behavior.*” *Vitek*, at ¶15, n. 6. (A:13); See also *Galvez*, 930 N.W.2d at 475. As Knepfel had no objective basis upon which he could reasonably infer *Anthony Palaia* was the driver, he lacked reasonable suspicion. *State v. Gammons*, 2001 WI App 36, at ¶6.

This Court has already refused to apply *Newer* when there were multiple registered owners. In *Vitek*, a patrol officer ran a “warrant check” on a license plate and learned that the operating privilege of “one of the registered owners,” a male, was suspended. *Id.*, at ¶3 (A:11). The officer could not see whether the driver was a male, so she stopped the vehicle to determine who was driving. *Id.* The State relied on *Newer* for the proposition that police may stop a vehicle when a registered owner has a revoked license. *Id.*, at ¶9 (A:12). This Court disagreed, pointing out the obvious fact that in *Newer*, “the defendant with the revoked license was the *only* registered owner...” (emphasis original). *Newer*, at ¶9 (A:12). As the record did not reveal how many owners there were, the court could not even begin to evaluate how reasonable the inference was that the suspended owner was the person driving. *Id.*, at ¶11 (A:12-13). The Court did not rule out the use of *Newer* entirely, but nonetheless *rejected* the proposition that: “regardless of the number of a vehicle’s registered owners (unless, of course, that number is one and *Newer* controls), a traffic stop is justified only by the fact that one of the owners has an invalid license.” *Id.*, at ¶12 (A:13). The Court noted the holding in *Galvez*, but as the State had already failed to meet its burden, it left open for another day whether the holding in *Galvez* should also be the law of Wisconsin. *Vitek*, at ¶12.

one-judge authored opinion decided pursuant to Wis. Stats. § 752.31(2) and therefore may be cited as persuasive authority pursuant to Wis. Stat. § 809.23(3)(b).

The presumption adopted by *Newer* fails the test of logic when there is more than one registered owner. Two owners can't each be driving the "vast majority" of the time. The statistical probability that one owner is driving rather than the other is reduced to guess-work, and therefore lacks the particularized suspicion necessary to meet Fourth Amendment standards. In short, even if the lack of a Wisconsin issued license provided reason to suspect illegal driving, the officer had no objective basis to believe this particular owner was driving the car.

3. Alternatively, the probability that both inferences are true is so low it fails to establish reasonable suspicion.

Unlike *Newer* and the cases it relies on, this case requires *two* inferences to support the stop: 1) a driver without a Wisconsin issued license is operating illegally; and, 2) of the two registered owners, the driver is the one without a Wisconsin issued driver's license. As Palaia previously argued, neither of these inferences standing alone is sufficient to meet Fourth Amendment standards. When they are combined, the probability drops even further. By way of illustration, if one assumes there is an 80 percent probability⁵ that a single registered owner is the driver of a car at any given time, then, at best,⁶ the probability would be 40 percent if there are two owners. Further, if one makes the concededly arbitrary assumption⁷ that one in five drivers without a Wisconsin issued license is driving illegally, the probability is only 8 percent a particular car is being driven illegally. An 8 percent probability based solely on unsupported assumptions fails to provide an inference that a crime is being committed, especially when the

5 *Newer* acknowledges the owner-driver inference is not "infallibly true" and therefore something less than 100%. *Newer*, at ¶7.

6 As argued earlier, this assumption has no empirical basis and fails to meet Fourth amendment standards. The assumption is made for the purpose of illustration only.

7 The percentage is arbitrary because there is no empirical or other basis upon which to make any assumption.

officer is observing what is otherwise perfectly innocent behavior.

In reality, the probability is far less than 8 percent. Again, Knepfel did not testify as to any law enforcement experience, training, or actual knowledge that would support any correlation between the lack of a Wisconsin issued license and illegal driving. As the *Galvez* court points out, moreover, the most logical assumption between two owners is that the one *with* valid driving privileges is the one most likely driving the car. *Id.*, at 475.

The inference Knepfel had to make in this case goes well beyond *Newer*. There are two owners rather than one, and neither owner has demonstrably compromised driving privileges. Knepfel relied, at best, on two weak inferences which, taken together, are much weaker still. So weak, in fact, that they are far short of a “a reasonable suspicion, grounded in specific articulable facts, that an individual is violating the law.” *Gammons*, 2001 WI App 36, at ¶6.

CONCLUSION

This Court should reverse the conviction and remand to the circuit court with directions to suppress all evidence obtained after the stop.

Respectfully submitted this 7th day of April, 2016.

MILLER APPELLATE PRACTICE, LLC

By _____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(8)(b)&(c)**

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief contains 3903 words.

**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 s. 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 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.

**CERTIFICATE OF COMPLIANCE WITH RULE
809.19(2)(b)**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

**CERTIFICATE OF COMPLIANCE WITH RULE
809.19(13)**

I hereby certify that: I have submitted an electronic copy of this appendix, excluding the brief, which complies with the requirements of s. 809.19(13). I further certify that: This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 7th day of April, 2016.

MILLER APPELLATE PRACTICE, LLC

By _____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on April 7th, 2016. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 7th day of April, 2016.

MILLER APPELLATE PRACTICE, LLC

By _____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

APPENDIX OF DEFENDANT-APPELLANT

INDEX TO APPENDIX

	Page
Judgement of Conviction December 2, 2015 (Record Item 18)	1
Circuit Court's oral decision November 24, 2015 (Record Item 30:35-41)	2-8
<i>State v. Vitek</i> , 2015 WI App 90 (2015AP421-CR) October 27, 2015, unpublished)	9-14
2016 “Motorist’s Handbook”, page 2, published by the Wisconsin Department of Transportation at: http://wisconsin.gov/Documents/dmv/shared/bds126-motorists-handbook.pdf (30:27; Exhibit 2) ⁸	15

⁸ The 2014 version was admitted into evidence. There is no substantive difference between the 2014 and 2016 versions.