STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2016 AP 467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRITTANIE JO PALAIA,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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

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CASES CITED

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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.

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

The State acknowledges *Newer*[1] is distinguishable with its one owner. (State's Brief, p. 10). The State also distinguishes *Vitek*[2] because it had an unknown number of owners. (State's Brief, p. 8). With two owners, *Heinrich*[3] is the most analogous case, according to the State, and therefore governs the outcome of this appeal. (State's Brief, p. 10). The State's reasoning fails. All of these cases are distinguishable because of a critical undisputed fact common to each of them: at least one of the registered owners could not legally drive. The only question being decided was whether a police officer could reasonably infer the registered owner with suspended or restricted driving privileges was the driver.

In this case, there was no evidence either registered owner had restricted driving privileges. Knepfel did not have reasonable suspicion to stop Palaia's vehicle because, even if he could reasonably infer Anthony Palaia was the driver, he had no reason to believe Anthony Palaia was violating the law.

The State tries to address this problem by proposing a new and unprecedented inference, namely, that the mere absence of a Wisconsin issued driver's license reasonably permits a police officer to infer a person is driving illegally. The State supports this premise by speculating how unusual it would be for the owner of a Wisconsin registered vehicle to not have a Wisconsin issued license. Presumably, this would allow a police officer to assume the driver did not have valid driving privileges. (State's Brief, pp. 6-7). The State's argument fails for at least three alternative reasons: First, the State concedes there are multiple scenarios under which a person without a Wisconsin issued license can

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1 *State v. Newer*, 2007 WI App 236, 306 Wis.2d 193, 742 N.W.2d 923

2 *State v. Vitek*, 2015 WI App 90, 365 Wis. 2d 608, 871 N.W.2d 867 (unpublished) (Appellant's Brief, Appendix pp. 9-14)

3 *State v. Heinrich*, 2016 WI App 26, 367 Wis.2d 750, 877 N.W.2d 651 (unpublished) (Respondent's Brief Appendix pp. 1-3)

legally drive in Wisconsin. (See State's brief, pp. 3-6). Therefore, the mere absence of a Wisconsin issued license does not give rise to an inference of illegality; Second, the State's argument is purely speculative and based on factual allegations outside the record made before the circuit court; Third, the State's argument fails the test of logic. However unusual it may be for a Wisconsin registered owner to legally drive without a Wisconsin issued license, it would be far more unusual to find a 30-something-year-old driver who never had a Wisconsin issued driver's license; *had no Wisconsin driving record*; ***and*** no out-of-state license. Each will be addressed in turn.

The State concedes there are multiple ways a person can legally drive in Wisconsin without a Wisconsin issued license. (State's Brief, pp. 3-6). This concession ends the debate. Unusual or not, Knepfel had no reason to believe Anthony Palaia was other than one of these drivers. Knepfel neither claimed any reason nor does there exist any reason to believe Anthony Palaia would have been driving illegally. An officer cannot speculate based on an absence of information but must have some articulable reason to believe a crime is being committed. As the Court noted in *Vitek*, driving on a roadway without committing any traffic violation "*is* per se innocent behavior." *Vitek*, at ¶15, n. 6. (A:13). In short, Palaia is not arguing the officer must rule out innocent explanations before acting on reasonable suspicion but rather, that no inculpatory inference existed in the first place.

Alternatively, the State's logic fails as well. The State suggests it would be unusual for Anthony Palaia to be driving a Wisconsin registered car with an out-of-state driver's license, but fails to consider how much more unusual it would be for him not to be. The State completely ignores the fact that Knepfel's record check revealed no Wisconsin driving record at all.[4] (30:25). The

4 Palaia assumes a Wisconsin DOT driver's license check would disclose whether the person had a Wisconsin driving record.

chances that a male in his 30's[5] with no Wisconsin issued license and no Wisconsin traffic record was driving a late model vehicle *without* an out-of-state license is next to zero or at best for the state, completely unknown. The bottom line is that Knepfel had no affirmative reason to suspect Anthony Palaia was driving illegally.

Alternatively, the state speculates that Officer Knepfel would have dismissed various scenarios as improbable and therefore reasonably concluded Anthony Palaia was driving illegally. (State's Brief, pp. 3-6). In fact, the State did not argue or present any evidence in support of such a theory to the circuit court, and still does not show *any* correlation between a Wisconsin registered vehicle, the lack of a Wisconsin issued license, and driving illegally.

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

The inference in *Newer* is based on the assumption that the registered owner will do the vast amount of driving.[6] Palaia argued that *Newer*'s inference falls apart when there is more than one driver because two drivers can't each do the vast amount of driving. The State does not address Palaia's argument and therefore concedes it.

Rather, the State relies on *Heinrich* for the proposition that two registered owners create a 50-50 probability one of them is driving and a 50-50 probability is sufficient to support reasonable suspicion. (State's Brief, p. 8-9). In *Heinrich*, there were two

5 Palaia assumes the officer would have known Anthony's age based on the vehicle's registration and the fact that a birth date was required to run the driver's license check. (30:25).

6 *Newer* cites *State v. Pike*, 551 N.W.2d 919 (Minn. 1996) and *Village of Lake in the Hills v. Lloyd*, 591 N.E.2d 524 (Ill. App. Ct. 1992) in support of its owner/driver inference. *Newer*, at ¶¶2, 5-6. *Lake in the Hills* explains this inference is based on the assumption "that the owner will do the vast amount of driving." *Id*., at 353.

registered owners, one of whom had a restricted license and could not be driving at the time of the stop. *Heinrich*, at ¶2. The officer stopped the vehicle in order to determine whether the owner with the restricted license was driving. *Heinrich*, at ¶3. Heinrich argued that reasonable suspicion required a greater than 50-50 chance the driver of the vehicle was violating the law. Because there were two registered owners, "there could not have been a greater than 50 percent chance that the owner with the invalid license was operating the vehicle,…." *Heinrich*, ¶10. The court rejected this argument because "it is based on a faulty premise: that reasonable suspicion requires evidence suggesting a greater than 50 percent chance of a law violation." *Id*.

The problem with relying on *Heinrich* is that it merely addresses the argument Heinrich made, which is indeed based on a faulty premise. The faulty premise is that two owners will each drive half the time. This assumption has no empirical basis whatsoever. The state did not make this argument to the circuit court nor did it provide any statistics, law enforcement experience, or anecdotal evidence that would support it. If one is going to presume anything, the logical assumption is that the owner without the revoked license is the one driving. *State v. Galvez*, 930 N.W.2d 473, 475 (Ill. Ct. App 2010). *Heinrich* applies *Newer* to a multi-driver circumstance without considering whether the rationale underlying *Newer* actually supports such a result. Likewise, *Heinrich* does not address any of the issues raised in *Vitek*, or the arguments Palaia makes here.

Heinrich does not comport with the Fourth Amendment requirement that reasonable suspicion be individualized. See *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis.2d 296, 625 N.W.2d 623. The presence of a vehicle on a roadway "is not suspicious merely because one of two co-owners is prohibited from driving;…." *Galvez*, at 475.

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 27th day of June, 2016.

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Dated this 27th day of June, 2016.

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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 June 27, 2016. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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