

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II**

**RECEIVED**

**03-14-2017**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

---

**Appeal No. 2016AP002383  
Waukesha County Circuit Court Case Nos. 2016CV000121**

---

**CITY OF PEWAUKEE,**

Plaintiff-Respondent,

v.

**JOHN JAY KENNEDY,**

Defendant-Appellant.

---

**AN APPEAL FROM THE JUDGEMENT OF  
CONVICTION AND OF THE TRIAL COURT'S RULING  
DENYING THE DEFENDANTS MOTION FOR  
SUPPRESSION OF EVIDENCE IN THE CIRCUIT  
COURT FOR WAUKESHA COUNTY, THE  
HONORABLE MICHAEL P. MAXWELL, PRESIDING**

---

**THE BRIEF AND APPENDIX OF THE DEFENDANT-  
APPELLANT JOHN JAY KENNEDY**

---

**By: Walter A. Piel, Jr.  
Attorney for the Defendant-Appellant  
State Bar No. 01023997**

**Piel Law Office  
500 W. Silver Spring Drive  
Suite K-200  
Milwaukee, WI 53217  
(414) 617-0088  
(920) 390-2088 (FAX)**

## TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE ISSUES.....	iii
STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION.....	iii
STATEMENT OF THE CASE/FACTS.....	1
STANDARD OF REVIEW.....	4
ARGUMENT .....	5
<b>A. OFFICER BECKER DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO STOP MR. KENNEDY’S VEHICLE WHERE HE OBSERVED NO TRAFFIC LAW VIOLATIONS JUSTIFYING THE STOP, AND STOPPED MR. KENNEDY’S VEHICLE SOLELY BECAUSE A DOT CHECK REVEALED THE OWNER HAD AN OUTSTANDING WARRANT, BUT WHERE OFFICER BECKER FAILED TO CONFIRM THE VALIDITY OF THE WARRANT UNTIL AFTER THE STOP...</b>	5
CONCLUSION .....	9
FORM AND LENGTH CERTIFICATION .....	10
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	11
APPENDIX CERTIFICATION .....	12
APPENDIX.....	14
Order.....	A.App. 1
Excerpts from Motion Hearing- 03/11/2016 ..	A.App. 2

## TABLE OF AUTHORITIES

### Page No.

### CASES

#### Wisconsin Supreme Court

<i>State v. Anderson</i> , 155 Wis. 2d 77, 454 N.W.2d 763 (1990). . . . .	8
<i>State v. Popke</i> , 2009 WI 37, 317 Wis.2d 118, 765 N.W.2d 569. . . . .	5,6
<i>State v. Post</i> , 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634 . . . . .	6,
<i>State v. Waldner</i> , 206 Wis.2d 51, 556 N.W.2d 681 (1996). . . . .	8,9

#### Wisconsin Court of Appeals

<i>State v. Gaulrap</i> , 207 Wis.2d 600, 558 N.W.2d 696 (Ct. App. 1996) . . . . .	5,6
<i>State v. Newer</i> , 2007 WI App 236, 306 Wis.2d 193, 742 N.W.2d 923. . . . .	7,8
<i>State v. Powers</i> , 2004 WI App 143, 275 Wis.2d 456, 685 N.W.2d 869. . . . .	4
<i>State v. Walli</i> , 2011 WI App 86, 334 Wis.2d 402, 799 N.W.2d 898. . . . .	4

#### United States Supreme Court

<i>Terry v. Ohio</i> , 392 U.S. 1 (1968). . . . .	6
---	---

#### United States Constitution

Fourth Amendment. . . . .	5
---------------------------	---

#### Wisconsin Constitution

Article I, Section 11. . . . .	5
--------------------------------	---

## **STATEMENT OF THE ISSUES**

Did City of Pewaukee Officer, William Becker, have the requisite level of suspicion to stop Mr. Kennedy's vehicle, where he testified that a DOT/CIB computer check revealed the vehicle owner had an outstanding warrant, but where the officer failed to confirm the validity of the warrant until after stopping Mr. Kennedy's vehicle?

The trial court answered: Yes.

## **STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION**

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

## **STATEMENT OF THE CASE/FACTS**

The defendant-appellant, John J. Kennedy, (Mr. Kennedy) was charged in the City of Pewaukee Municipal Court, Waukesha County with having operated a motor vehicle while under the influence of an intoxicant and operated a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) on June 21, 2015. On July 10, 2015, in writing, Mr. Kennedy entered a not guilty plea to both charges in Municipal Court. On the same date, Mr. Kennedy, by counsel, filed a motion for suppression of evidence challenging the stop of his vehicle. On December 16, 2015, a hearing on the defendant's motion and a trial to the court was held in the City of Pewaukee Municipal Court. The Court orally denied the defendant's motion and found Mr. Kennedy guilty of both charges.

On December 17, 2015, Mr. Kennedy, by counsel, timely filed a written Notice of Appeal of the municipal court judgment. The matter was transferred to the Waukesha County Circuit Court. The defendant refiled the motion for suppression of evidence on January 26, 2016. (R2:1-2).

A hearing on said motion was held on March 11, 2016. The court denied said motion, and a written Order denying the

motion was filed on November 21, 2016. (R. 18:1/ A.App. 1). A jury trial was held on October 11, 2016. The jury found Mr. Kennedy not guilty of operating a motor vehicle while under the influence of an intoxicant, but found him guilty of operating a motor vehicle with a prohibited alcohol concentration. The verdict of guilty was entered on October 11, 2016. Mr. Kennedy timely filed a Notice of Appeal on November 30, 2016. The appeal stems from the judgment of conviction, and the court order denying Mr. Kennedy's motion for suppression of evidence.

The pertinent facts to this appeal were adduced at the motion hearing held on March 11, 2016 through the testimony of City of Pewaukee Officer William Becker. Officer Becker testified that he was a six year veteran of the Waukesha County Sheriff Department working a City of Pewaukee contract on June 21, 2015. (R.16:3/ A.App. 2). On that date he was in a gas station parking lot at the intersection of Prospect Avenue and Meadowbrook Road in the City of Pewaukee. (R.16:4/ A.App. 3)

While positioned at that location, he observed a white SUV pass his location. Nothing drew the officer's attention to the vehicle, but the officer conducted a "random" check on the

registration of the vehicle. *Id.* The check revealed that the registered owner had one outstanding warrant. Officer Becker could not observe the physical characteristics of the driver, but the registered owner was Mr. Kennedy. (R.16:5/ A.App. 4). The officer eventually stopped the vehicle.

On cross-examination, Officer Becker conceded that he observed no other traffic violations. (R.16:6/ A.App. 5) Becker agreed that the only reason that he stopped the vehicle was due to the information received through CIB check. *Id.* More importantly, Officer Becker conceded that only after the stop and contact with the vehicle did he confirm that the warrant was valid and active. (R.16:6-7/ A.App. 5-6).

The City compared this case to *State v. Newer*, 2007 WI App 236, 306 Wis.2d 193, 742 N.W.2d 9, and argued that the stop was supported by a reasonable suspicion inasmuch as the Officer had information that the driver had an outstanding warrant (similar to the officer in *Newer* who knew that the vehicle owner's driver's license was revoked). Defense counsel argued among other things that the warrant was not confirmed until after the contact, and because there were no other violations, the evidence was insufficient to justify the stop. (R.16:9/ A.App. 8). The Court denied the motion, finding that

once the officer checked the registration, found there was only one owner, the officer was justified in stopping the vehicle. (R.16:10/ A.App. 9). A written order denying the motion was entered on November 21, 2016.

Mr. Kennedy timely appealed after the jury found him guilty of operating a motor vehicle with a prohibited alcohol concentration in violation of Wis. Stat. §346.63(1)(b). The appeal herein stems from the court Order denying Mr. Kennedy's motion for suppression of evidence. Mr. Kennedy timely filed a Notice of Appeal on November 30, 2016.

### **STANDARD OF REVIEW**

Whether reasonable suspicion exists is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis.2d 456, 685 N.W.2d 869. The court applies a two-step standard of review when reviewing questions of constitutional fact. A trial court's finding of historical fact will be upheld unless they are clearly erroneous. However, determining whether a reasonable suspicion justified the stop is reviewed de novo. *Id*



## ARGUMENT

**A. OFFICER BECKER DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO STOP MR. KENNEDY'S VEHICLE WHERE HE OBSERVED NO TRAFFIC LAW VIOLATIONS JUSTIFYING THE STOP, AND STOPPED MR. KENNEDY'S VEHICLE SOLELY BECAUSE A DOT CHECK REVEALED THE OWNER HAD AN OUTSTANDING WARRANT, BUT WHERE OFFICER BECKER FAILED TO CONFIRM THE VALIDITY OF THE WARRANT UNTIL AFTER THE STOP**

It is well settled that the “temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of the Fourth Amendment.” *State v. Gaulrapp*, 207 Wis.2d 600, 605, 558 N.W.2d 696 (Ct.App. 1996). To satisfy the constitutional standard of the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, an investigative traffic stop must be supported by either “probable cause to believe that a traffic violation has occurred, or an officer must have grounds to reasonably suspect that a violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶12, 317 Wis.2d 118, 765 N.W.2d 569.

“Probable cause refers to the ‘quantum of evidence which would lead a reasonable police officer to believe’ that a violation

has occurred.” *Popke* at ¶14 citing to *Johnson v. State*, 75 Wis.2d 344, 348, 249 N.W.2d 593(1977). The evidence must be sufficient to “lead a reasonable officer to believe that guilt is more than a possibility.” *Id.*

However, even if probable cause does not exist, an officer can conduct a traffic stop where “under the totality of the circumstances, he has grounds to reasonably suspect that a crime or traffic violation has been or will be committed.” *State v. Gaulrapp*, 207 Wis.2d 600, at 605, 558 N.W.2d 696. In this situation, an officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W. 634. “The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing or is about to commit a crime.” *Id.* at ¶13. This standard requires that the stop be based on something more than an “inchoate and unparticularized suspicion or ‘hunch.’” *Terry v. Ohio*, 392 U.S. 1, 27 (1968). “The determination of reasonableness is a common sense test.” *State v. Post*, 2007 WI

60, ¶ 301 Wis.2d 1, 733 N.W.2d 634 *citing State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

Reasonable suspicion to stop a vehicle exists where an officer possesses knowledge that the vehicle owner's driver's license is revoked and the officer is unaware of any facts that would suggest that someone else is driving. *State v. Newer*, 2007 WI App 236, ¶2, 306 Wis.2d 193, 742 N.W.2d 923. At the motion hearing in Mr. Kennedy's case, the City comparing *Newer*, argued that reasonable suspicion also existed where an officer has knowledge that a vehicle owner has an outstanding warrant, and where there is only one owner listed for the vehicle. (R.16:8/ A.App. 7). The reasoning in *Newer* is equally applicable in a situation where an officer has knowledge that the owner of a vehicle has an outstanding warrant.

However, in either situation, the officer must have the requisite knowledge (ie. that the owner's license is revoked or that the owner has an outstanding valid warrant.). In *Newer*, the police officer ran the registration plate of Mr. Newer, and "subsequently contacted the sheriff's department and learned that Newer's license was revoked." *Id.* at ¶3. After learning that the license was revoked, the officer proceeded to conduct a

traffic stop. *Id.* In *Newer*, knowledge that the owner had a revoked license was obtained prior to the traffic stop. *Id.*

Conversely, in Mr. Kennedy's case, Officer Becker confirmed the validity of the warrant only after the stop had been effectuated and after making contact with the vehicle. (9). While on patrol in the City of Pewaukee, Becker randomly ran Mr. Kennedy's registration through his squad computer system. It showed that Mr. Kennedy had an outstanding warrant. From Officer Becker's testimony it was gleaned that there is a procedure the officer can follow to determine the validity of the warrant. Apparently, Becker followed that procedure here, but did so only after the traffic stop had been effectuated. Becker, who observed Mr. Kennedy commit no traffic law violations, and without confirming the validity of the warrant, proceeded to stop Mr. Kennedy's vehicle. Subsequent to stopping and contacting Mr. Kennedy, Officer Becker confirmed the validity of the warrant. (R.16:6/ A.App. 5). Unlike *Newer*, where the officer took steps to determine that the owner was revoked prior to the stop (he contacted the sheriff department and determined that the owner's license was revoked), here, knowledge that the warrant was valid came only after the traffic stop was effectuated. At a very minimum, reasonable suspicion requires

specific and articulable facts that a vehicle owner is subject to seizure. Because Officer Becker did not have knowledge as to the validity of the warrant prior to the stop, the stop is not justified on reasonable suspicion grounds.

### **CONCLUSION**

Because of the above, Officer Becker did not possess the requisite level of suspicion to stop Mr. Kennedy's vehicle. Thus, the trial court erred in denying Mr. Kennedy's suppression motion. The Court should vacate the judgment of conviction and reverse the trial court's order.

Dated this 14<sup>th</sup> day of March, 2017.

Respectfully Submitted

Piel Law Office

---

Walter A Piel, Jr.  
Attorney for the Defendant-Appellant  
State Bar No. 01023997

**Mailing Address:**

500 W. Silver Spring Drive  
Suite K200  
Milwaukee, WI 53217  
(414) 617-0088  
(920) 390-2088 (FAX)

## **FORM AND LENGTH CERTIFICATION**

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 18 pages. The word count is 3287.

Dated this 14<sup>th</sup> day of March, 2017.

Respectfully Submitted

Piel Law Office

---

Walter A Piel, Jr.  
Attorney for the Defendant-Appellant  
State Bar No. 01023997

**Mailing Address:**

500 W. Silver Spring Drive  
Suite K200  
Milwaukee, WI 53217  
(414) 617-0088  
(920) 390-2088 (FAX)

**CERTIFICATION 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.

Dated this 14<sup>th</sup> day of March, 2017.

Respectfully submitted,

Piel Law Office

---

Walter A. Piel, Jr.  
Attorney for the Defendant-Appellant  
State Bar No. 01023997

## **APPENDIX CERTIFICATION**

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) 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 a 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.



Dated this 14<sup>th</sup> day of November, 2017.

Respectfully submitted,

---

Walter A. Piel, Jr.  
Attorney for the Defendant-Appellant  
State Bar No. 01023997

## **APPENDIX**