COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP421-CR **Cir. Ct. No. 2013CT251**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA ALLAN VITEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded for further proceedings with directions.*

¶1 HRUZ, J.[1] Joshua Vitek appeals a judgment convicting him of operating a motor vehicle while intoxicated (OWI), third offense, based on the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

circuit court's denial of his motion to suppress. Vitek argues the circuit court erroneously concluded a police officer had reasonable suspicion to stop the vehicle he was driving based solely on information that the operating privileges of one of the vehicle's registered owners was suspended. We conclude the State failed to meet its burden of proving the stop was supported by reasonable suspicion, and we therefore reverse and remand with directions that the circuit court grant Vitek's suppression motion and hold such further proceedings as are necessary to resolve the case.

BACKGROUND

¶2 Vitek was charged in a criminal complaint with second-offense OWI and bail jumping. The complaint later was amended to add a charge of second-offense operating with a prohibited alcohol concentration (PAC). Vitek filed a motion to suppress the evidence obtained as a result of the traffic stop, arguing officer Hilary Lundberg did not have reasonable suspicion to justify the stop.

¶3 During the motion hearing, Lundberg testified that on the night in question, at approximately 1:24 a.m., she ran a "warrant check" on a license plate for a vehicle passing by her.[2] Upon checking the plate, she learned that the operating privileges of "one of the registered owners" was suspended and that the owner with the suspended operating privileges was a male. Lundberg could not recall how many owners were registered to the vehicle. Lundberg could not see whether the driver of the vehicle was male, so she "initiated a traffic stop to determine who was driving." She subsequently identified Vitek as the driver.

[2] Lundberg testified the purpose of a warrant check is to determine to whom the vehicle belongs, whether it has been reported stolen, and whether anyone "related" to the vehicle has any outstanding warrants.

While speaking with Vitek, Lundberg detected a strong odor of intoxicants. After further investigation, Lundberg arrested Vitek for OWI.

¶4 After the motion hearing, the State submitted a brief in response to Vitek's motion to suppress, arguing that under ***State v. Newer***, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923, police generally are justified in conducting an investigatory traffic stop based solely upon their awareness that a registered owner of a vehicle has a revoked license. After Vitek submitted a reply to the State's brief, the parties reconvened for the circuit court's oral ruling on the motion. The court found that through her license plate check of Vitek's vehicle, Lundberg learned that "[o]ne of the registered owners was in suspended status," and "[f]or that reason only, that reason alone, ... [Vitek] was stopped." The circuit court concluded, without further analysis, that "there certainly could be an appellate issue" but "believe[d] that the [c]ourts will eventually find that that is a sufficient reason for a stop."

¶5 Vitek reached a global plea agreement on this and two other pending cases, and pled guilty to an amended charge of third-offense OWI.[3] The PAC and bail jumping charges were dismissed. The circuit court stayed Vitek's sentence pending this appeal. Pursuant to WIS. STAT. § 971.31(10), Vitek now challenges the circuit court's denial of his motion to suppress.

[3] As part of the plea agreement, Vitek pled guilty to second-offense OWI in an earlier charged case, which converted this case to a third-offense OWI.

DISCUSSION

¶6 "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). Thus, an investigative traffic stop is subject to the constitutional requirement of reasonableness. ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. Before conducting an investigatory stop, officers must have "a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those 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. Importantly, the analysis is focused on whether the circumstances evince that "a particular person" has violated the law. ***Berkemer v. McCarty***, 468 U.S. 420, 439 (1984) ("Under the Fourth Amendment, we have held, a [police officer] who lacks probable cause but whose 'observations lead [that officer] reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly ....") (quoting ***United States v. Brignoni–Ponce***, 422 U.S. 873, 881 (1975)).

¶7 "No simple, mechanical formula tells us what reasonable suspicion is, though we know it is less than probable cause and more than a naked hunch." ***United States v. McGregor***, 650 F.3d 813, 821 (1st Cir. 2011). "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment," ***Hill v. California***, 401 U.S. 797, 804 (1971), and reasonable suspicion is an objective and common sense test, ***State v. Waldner***, 206 Wis. 2d

51, 56, 556 N.W.2d 681 (1996).[4] "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." ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569 (quoting ***Post***, 301 Wis. 2d 1, ¶13).

¶8 Whether an officer had reasonable suspicion to stop a vehicle is a question of constitutional fact to which we apply a two-step standard of review. ***Id.***, ¶10. We will uphold the circuit court's findings of fact unless they are clearly erroneous, but we review the application of those facts to constitutional principles de novo. ***Id.*** Given the record on appeal, the court's findings of fact in this case are not clearly erroneous, and neither party argues to the contrary. We therefore focus our analysis on whether, in light of the court's undisputed factual findings, officer Lundberg had reasonable suspicion to stop the vehicle Vitek was driving.

¶9 The State argues the stop here was justified under ***Newer***, because "it has been well established in Wisconsin that if police become aware that the registered owner of a vehicle has a revoked license they are justified in conducting an investigatory traffic stop based upon that alone." As the State correctly explains, in ***Newer*** this court held it is reasonable for an officer to assume that the

[4] This is not to suggest there must be a "probability" of criminal activity in the "probable cause" sense. *See* ***United States v. Sokolow***, 490 U.S. 1, 7 (1989) (level of suspicion required for an investigative stop is "obviously less demanding than that for probable cause"); *see also* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996) ("The law of investigative stops allow[s] police officers to stop a person when they have less than probable cause."). Determining whether an officer had reasonable suspicion for a stop "does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers." ***United States v. Cortez***, 449 U.S. 411, 418 (1981).

person driving a particular vehicle is that vehicle's owner. ***Newer***, 306 Wis. 2d 193, ¶7. However, in ***Newer***, the defendant with the revoked license was the *only* registered owner of the subject vehicle. ***Id.***, ¶3. Thus, a more-precise articulation of ***Newer***'s holding is when a vehicle has only one owner, and that owner has a revoked or suspended license, a police officer may reasonably infer, for purposes of initiating a traffic stop, that the driver operating the vehicle is the owner with the revoked or suspended license, as opposed to, for example, a permissive user of the vehicle.

¶10 ***Newer*** does not answer the question posed in this case: Is there reasonable suspicion to initiate a traffic stop where there is more than one owner of a vehicle, but it is unclear precisely how many owners there are, and only one of the owners has a suspended license? Lundberg in this case knew precisely two facts prior to initiating the traffic stop: (1) that the vehicle was operating on the roadway; and (2) that one of an unidentified number of the vehicle's owners had a suspended license. Lundberg could not recall how many owners were identified in the "warrant check." The circuit court found, based on officer Lundberg's testimony, that "[o]ne of the registered owners" was in suspended status, thereby implicitly finding that more than one owner was registered to the vehicle. On appeal, the State concedes this general fact, stating in its brief "[t]he warrant check revealed that there was more than one registered owner, and that one of the owners was a male whose driver's license was suspended."

¶11 Under these facts, we cannot properly evaluate the reasonableness of the inference that the suspended owner was the person driving without knowing how many other owners could have been lawfully operating the vehicle. There could have been one other owner, there could have been two, there could have been four, or whatever number. The record is silent in this regard. At some point

the inference underlying ***Newer*** becomes unreasonable when there are registered owners of the same vehicle who do not have a suspended license.

¶12 We need not decide in this case where that point is. The State has the burden of establishing that an investigative stop of a particular individual was reasonable. ***Post***, 301 Wis. 2d 1, ¶12. Given the record, including its failure to establish the actual number of people who owned the vehicle Vitek was driving (and, furthermore, how many of those people had valid licenses), the State has failed to satisfy its burden in this case. We can and do reject the notion 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 those owners has an invalid license. The State has cited no authority for that broad proposition. Vitek meanwhile relies on ***People v. Galvez***, 930 N.E.2d 473 (Ill. App. Ct. 2010), in which the Appellate Court of Illinois concluded that "[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. The State argues ***Galvez*** was wrongly decided and should not be followed. However, because the State failed in this case to prove the number of the vehicle's owners, which is itself sufficient to warrant reversal, it is neither necessary nor proper for us to address whether the Illinois court's view of the law should also be the law in this state.

¶13 The State attributes some significance to Lundberg's testimony that it was dark and she could not identify the driver's gender prior to the stop. This is an apparent reference to ***Newer***, in which we stated that "an officer's knowledge that a vehicle's owner's license is revoked will support reasonable suspicion for a traffic stop *so long as the officer remains unaware of any facts that would suggest that the owner is not driving*." ***Newer***, 306 Wis. 2d 193, ¶2 (emphasis added).

The State appears to argue the stop was justified because Lundberg was unaware of any such facts, given that she could not identify the driver.

¶14 For purposes of our disposition in this case, the fact that Lundberg did not view any particular defining characteristics of the driver is irrelevant, or at least not compelling. The question is whether Lundberg possessed specific, articulable facts that justified the intrusion of the stop, not whether the stop was justified based on the absence of certain facts. Even if Lundberg did not know at the time how many owners were registered to the vehicle, the stop nonetheless may have been justified if she was able to match the driver's characteristics to a description of the suspended owner—a practice we encourage in any event, as it diminishes the probability of erroneous deprivations of individual liberty, such as the seizure of a registered owner with a valid driver's license.[5] However, Lundberg either could not or did not attempt to do so.

¶15 Finally, the State argues the time of day in which the traffic stop occurred is an additional factor that, under the totality of circumstance in this case, gave rise to reasonable suspicion. In particular, the State argues "the hour of the day is relevant to the totality of the circumstances due to the prevalence of drunk driving cases that occur in the early morning." This argument is misdirected, as Lundberg did not stop Vitek based on her suspicion that the person operating the vehicle was driving under the influence of an intoxicant.[6] Rather, the sole purpose

[5] In ***State v. Newer***, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923, we stated that reasonable suspicion to stop a one-owner vehicle dissipates "[i]f an officer comes upon information suggesting that the assumption [that the owner is driving] is not valid in a particular case, for example that the vehicle's driver appears to be much older, much younger, or of a different gender than the vehicle's registered owner." ***Id.***, ¶8.

[6] For a similar reason, given the nature of the suspected offense at issue (operating without a valid license), the State cannot rely on the general rule that law enforcement officers are (continued)

for her stop, as found by the circuit court, was to determine whether the person operating the vehicle was the registered owner in the suspended status.

¶16 For the foregoing reasons, we reverse the judgment and remand the case with directions for the circuit court to grant Vitek's suppression motion. On remand, the circuit court shall then hold such further proceedings as are necessary to resolve this case.

By the Court.—Judgment reversed and cause remanded for further proceedings with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

---

not required to rule out all innocent explanations of an observed activity in order to have reasonable suspicion justifying a brief stop. *See* ***Waldner***, 206 Wis. 2d at 59-60. Indeed, the State does not raise that principle in its arguments on appeal. The activity Lundberg observed—someone driving on a roadway apparently without committing any traffic violation—*is* per se innocent behavior. The conduct *only* becomes suspicious if there is reason to believe the driver otherwise is acting unlawfully, such as by operating the vehicle without a license, having stolen the vehicle, operating it while intoxicated, or otherwise using the vehicle in furtherance of a crime. As we have explained, the stop in this case was not justified because it is not apparent, given the state of the record, that Lundberg could objectively draw a "reasonable inference of unlawful conduct" from the facts known to her at the time of the stop. *See* ***id.*** at 60.