

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP467-CR

Cir. Ct. No. 2015CT1238

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRITTANIE JO PALAIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Reversed and cause remanded for further proceedings.*

¶1 STARK, P.J.¹ Brittanie Palaia appeals a judgment of conviction for operating a motor vehicle while intoxicated as a first offense with a passenger

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.

under the age of sixteen. She argues the circuit court erred by failing to suppress evidence gathered during a traffic stop because the officer lacked reasonable suspicion to believe Palaia was committing a traffic offense. We agree. Accordingly, we reverse the judgment and remand for the circuit court to grant Palaia's suppression motion and for further proceedings.

BACKGROUND

¶2 Palaia filed a motion to suppress all evidence resulting from the traffic stop, arguing deputy David Knepfel of the Brown County Sheriff's Department did not possess the reasonable suspicion necessary to initiate the stop. At the suppression hearing, Knepfel testified that at about 10:51 p.m., he ran a vehicle registration check through Department of Transportation (DOT) records for a Ford sport utility vehicle with a Wisconsin license plate that he was following. The check revealed the vehicle was registered to two individuals, Anthony Palaia and Brittanie Palaia.² Knepfel only noted that the record check showed Anthony had not been issued a license by the State of Wisconsin. Knepfel did not run a registration check on Brittanie or could not otherwise remember doing so, and he did not determine whether either registered owner possessed any other valid license.

¶3 Knepfel testified he stopped the Palaia vehicle because his record check showed no license had been issued to one of the vehicle owners. He had not observed any unusual driving behavior before making the stop, and he could not observe who was operating the vehicle or how many occupants it contained. After

² Hereafter, we refer to both Brittanie Palaia and Anthony Palaia by their first names.

the vehicle was stopped, and as Knepfel approached it, he realized the driver was female. The driver identified herself as Brittanie Palaia and provided Knepfel with a Minnesota driver's license. At that point Knepfel smelled the odor of intoxicants, observed Brittanie had glassy eyes and slurred speech, and saw there were two minor children in the vehicle with her.

¶4 Brittanie offered proof at the hearing that Anthony was her husband, that he was an active duty United States Marine serving as a recruiter in Green Bay, and that they currently lived in Wisconsin. Brittanie claimed they both were excepted from possessing a Wisconsin driver's license, and she offered the Wisconsin Motorists' Handbook as proof to that effect.³

¶5 The circuit court denied Brittanie's suppression motion. She pled no contest to the operating while intoxicated charge, and an operating with a prohibited alcohol concentration charge was dismissed. Brittanie now appeals. *See* WIS. STAT. § 971.31(10).

DISCUSSION

¶6 Review of a motion to suppress evidence presents a question of constitutional fact, consisting of a two-step standard of review. *State v.*

³ The current version of the Department of Transportation Motorists' Handbook may be found at <http://wisconsindot.gov/Documents/dmv/shared/bds126-motorists-handbook.pdf>. The 2014 Handbook offered by Brittanie excepts non-residents of Wisconsin who live in this state from the requirement to obtain a Wisconsin license if they are: (1) "[m]embers of the Armed Forces on active duty... as well as their spouse and children[;]" (2) "[s]tudents who are here up to one year to further their education[;]" (3) "[e]mployees of out-of-state companies who are here temporarily to receive or give job instruction[;]" and (4) "[f]oreign tourists who are here for up to one year." While we note these "exceptions" are substantially different from the current 2016 DOT Handbook exemptions and are otherwise unconfirmed by then-existing statute or administrative code, we accept as valid the relevant segments of the 2014 DOT Handbook entered into the record, and the State does not argue to the contrary.

Houghton, 2015 WI 79, ¶18, 364 Wis. 2d 234, 868 N.W.2d 143. The circuit court’s findings of historical fact shall be upheld unless clearly erroneous, while any constitutional question is reviewed de novo. *Id.*

¶7 Traffic stops are seizures within the meaning of the Fourth Amendment. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). Such a seizure may be justified when a law enforcement officer possesses reasonable suspicion that a traffic offense is being committed. *Houghton*, 364 Wis. 2d 234, ¶30. Reasonable suspicion requires law enforcement “to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” a short detention. *Id.*, ¶21 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). Reasonable suspicion is a common sense, non-technical standard, greater than a mere hunch but less demanding than probable cause, that depends upon the facts and circumstances of each case. See *State v. Eason*, 2001 WI 98, ¶19, 245 Wis. 2d 206, 629 N.W.2d 625. The State bears the burden of establishing the reasonableness of the stop. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634.

¶8 WISCONSIN STAT. § 343.05(3)(a) prohibits a person from operating a motor vehicle in Wisconsin “unless that person possesses a valid operator’s license issued to the person” by the DOT and that license has not been “revoked, suspended, cancelled or expired.” Persons who are not residents⁴ are exempted from this requirement under § 343.05(4)(b)1. if they possess “a valid operator’s license issued to the person in the person’s home jurisdiction.” New residents of

⁴ A “resident” is defined by WIS. STAT. § 343.01(2)(g) as “an adult whose one home and customary and principle residence, to which the person has the intention of returning whenever he or she is absent, is in this state.”

this state, however, are required to apply for a Wisconsin operator's license within sixty days of "establishing Wisconsin residency." WIS. ADMIN. CODE § TRANS 102.14(4)(b) (May 2015).

¶9 The sole issue on appeal is whether Knepfel reasonably suspected that a traffic violation occurred or was ongoing. *See State v. Newer*, 2007 WI App 236, 306 Wis.2d 193, 742 N.W.2d 923. Prior to stopping the vehicle, it is undisputed Knepfel observed only two things when he ran the record check: there were two registered owners, and one of those owners, Anthony, had not been issued a Wisconsin driver's license. Knepfel had no knowledge of whether either owner was a Wisconsin resident and, if so, when they established that residency, or were otherwise excepted from the Wisconsin license requirement. The circuit court concluded that Knepfel had reasonable suspicion to stop the Palaia vehicle because Knepfel believed the vehicle was being driven by a person without a valid Wisconsin license. However, under the statutory scheme above, driving a Wisconsin registered vehicle without a Wisconsin-issued driver's license is not a criminal or traffic offense. Therefore, we agree with Brittanie that based upon the limited facts known to the officer at the time, there was no reasonable basis for an officer to suspect the person operating the Palaia vehicle was doing so illegally.

¶10 The cases cited by the State in support of the officer's reasonable suspicion are distinguishable. In *Newer*, we concluded the officer reasonably inferred a vehicle's owner was its operator. *Id.*, ¶7. It was undisputed the registered owner's driver's license had been revoked and that he could not lawfully operate a vehicle pursuant to WIS. STAT. § 343.44(1)(b). *Newer*, 306 Wis. 2d 193, ¶¶3, 5. In *State v. Heinrich*, No. 2015AP1524-CR, unpublished slip

op. (WI App Feb. 25, 2016),⁵ the officer knew one of the two owners of a vehicle possessed an occupational license and was prohibited from driving at the time the vehicle was observed on the road. *Id.*, ¶2. In both cases the officer knew the operation of the vehicle by one of the vehicle owners was illegal. Here, however, the fact that one of the vehicle's two owners lacks a Wisconsin license, without more information, does not mean an owner is driving illegally.

¶11 The State argues that a violation of WIS. ADMIN. CODE § TRANS 102.14(4)(b) could reasonably have been inferred in this case. It claims an officer could reasonably believe the Palaias were more likely than not residing in Wisconsin because their vehicle was registered in Wisconsin, possessed Wisconsin-issued license plates, and was observed driving in Allouez, far from a Wisconsin border. Under these facts, the State claims Knepfel could dismiss the possibility that a driver would register a vehicle in Wisconsin without living in this state and properly assume Anthony had failed to apply for a Wisconsin license.

¶12 This assumption is tenuous. The fact that Knepfel observed a Wisconsin license plate may give rise to an inference the *vehicle* is or was from Wisconsin at some point. *Cf. Houghton*, 364 Wis. 2d 234, ¶77 (violation of WIS. STAT. § 341.15, requiring license plates on the front and back of a Wisconsin vehicle, may be inferred if vehicle possesses single Wisconsin plate on the vehicle's rear end). But given the mobility of modern society, the jurisdiction of a vehicle's registry or where that vehicle is observed on the road does not necessarily provide information as to where a vehicle's *owner* resides, let alone

⁵ Unpublished opinions authored by a single judge and issued on or after July 1, 2009, may be cited for persuasive value. WIS. STAT. RULE 809.23(3)(b).

that the vehicle's owner has resided in this state for over sixty days or that the owner did not meet other licensing exceptions. Knepfel's limited check of the vehicle and the resulting readout on Anthony provided no specific facts that would permit Knepfel to conclude that Anthony was a Wisconsin resident.⁶ See *Post*, 301 Wis. 2d 1, ¶12. And, as the State concedes by way of the Motorists' Handbook, certain categories of residents and non-residents do not need to apply for a Wisconsin driver's license. See *supra* ¶4 n.3. On these facts, at the time of the stop, Knepfel had nothing more than an "inchoate and unparticularized suspicion, or 'hunch'" that the vehicle operator was committing a traffic violation. See *Terry*, 392 U.S. at 27.

¶13 The State correctly asserts an officer does not need to rule out innocent explanations as to why conduct might be lawful before conducting a traffic stop. See *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). However, its argument fails here because an officer in the first place must be able to objectively discern wrongful conduct based upon specific, articulable facts. See *id.* The State is tasked with showing any specific, articulable facts permitting reasonable suspicion that a traffic offense is being committed and failed to do so here. See *Post*, 301 Wis. 2d 1, ¶12; see also *Terry*, 392 U.S. at 22.

⁶ We recognize that "resident" is a technical legal definition and that reasonable suspicion is a non-technical common sense standard. Nevertheless, certain information provided by a vehicle record check may lend itself to an inference that the owner of the vehicle lives in Wisconsin, has done so for some time, and was required to have a Wisconsin driver's license, providing reasonable suspicion of a traffic offense. See *State v. Klausen*, No. 2009AP2268, unpublished slip op. ¶¶8-9 (WI App Aug. 12, 2010) (stop for sixty-day requirement violation was reasonable when registration check showed Wisconsin address and driving history including past accident).

¶14 Because we conclude Knepfel did not possess the reasonable suspicion required to conduct a traffic stop, we do not need to reach the second issue argued by Brittanie—whether it was reasonable for Knepfel to assume that a particular owner of a vehicle is driving unlawfully when there are two registered owners of that vehicle.

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

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

