Appeal No. 2006AP2388-CR **Cir. Ct. No. 2005CF681**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

FRANK C. NEWER,

DEFENDANT-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

Pursuant to WIS. STAT. RULE 809.61 (2005-06)[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Does a police officer, knowing that a vehicle's owner's driving privileges are revoked, have sufficient grounds to stop the vehicle where the

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

officer has no information (other than the registered ownership) about who is driving the vehicle?

2. If the answer to the first question is "no," may a police officer constitutionally detain a motorist where the officer has observed a very minor speed violation, using that violation as a pretext to investigate other matters for which the officer lacks reasonable suspicion?

This is the State's appeal of an order suppressing evidence obtained as a result of a traffic stop. The issue is whether the officer's observations can support reasonable suspicion justifying the stop. The State asserts two separate grounds for the stop: that the officer knew that the owner of the observed vehicle had a revoked license, though the officer did not know the identity of the person driving the vehicle; and that the officer had observed the vehicle moving at three miles per hour over the speed limit, which fact the officer described as a "pretext" for the stop. We find no published cases in this state squarely deciding whether either of these grounds will support a traffic stop.

The undisputed facts come from the officer's suppression hearing testimony. On December 20, 2005, in the early morning, the officer was driving his squad car when he encountered a vehicle traveling in the opposite direction. The officer activated his radar and found that the oncoming vehicle was traveling at twenty-eight miles per hour, while the posted speed limit was twenty-five. The officer continued past the vehicle, but ran the license plate and found that the vehicle was registered to Frank Newer. He then contacted the sheriff's department and learned that Newer's license was revoked. The officer turned his squad

around, caught up with the vehicle and activated his lights; the vehicle then pulled into the parking lot of a motel that the officer knew to be Newer's address.[2] The officer contacted the driver, Newer, and eventually arrested him for operating while intoxicated.

At the time the officer stopped the vehicle, he did not know whether Newer was driving the car; he also did not know the gender of the driver. He testified that he did not stop the vehicle for the three-mile-per-hour speeding violation, but that the speed violation "would give me the pretextual stop."

The State contends that the officer had reasonable suspicion to stop Newer's vehicle because he knew that, if Newer were driving, he would be in violation of WIS. STAT. § 343.44(1)(b) and (2). The State argues that it is a common-sense assumption that the owner of a vehicle is also the driver, and thus the officer was reasonable in believing that Newer was driving his vehicle illegally. The State relies on eleven foreign cases for its argument. ***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), are representative. In ***Pike***, the Minnesota court, facing a stop much like this one,[3] held that

[2] The parties dispute whether this fact could contribute to reasonable suspicion for the stop. Under ***State v. Kelsey C.R.***, 2001 WI 54, ¶33, 243 Wis. 2d 422, 626 N.W.2d 777, a person is not "seized" until the person "actually yield[s]" to a police show of authority. Whether the vehicle's turn into the parking lot occurred before the seizure and could therefore contribute to reasonable suspicion may thus depend on whether the act of turning into the lot constituted the vehicle's "yielding" to the command communicated by the squad car's illuminated lights.

[3] The officer in ***Pike*** also testified that he observed suspicious driving and had also noted the age and gender of the driver, which matched that of the owner. ***State v. Pike***, 551 N.W.2d 919, 922 (Minn. 1996). The court of appeals held that the district court had discounted this testimony, and the supreme court did not address these additional grounds because it held that the stop was justified based solely on the officer's knowledge that the owner of the vehicle in question had a revoked license. ***Id.***

> [w]hen an officer observes a vehicle being driven, it is rational for him or her to infer that the owner of the vehicle is the current operator.… Thus, we hold that the knowledge that the owner of a vehicle has a revoked license is enough to form the basis of a "reasonable suspicion of criminal activity" when an officer observes the vehicle being driven.

Pike, 551 N.W.2d at 922. However, the court went on to limit its holding, stating that it

> applies only while the officer remains unaware of any facts which would render unreasonable the assumption that the owner is driving the vehicle. Thus, for example, if the officer knows that the owner of a vehicle has a revoked license and further, that the owner is a 22-year-old male, and the officer observes that the person driving the vehicle is a 50- or 60-year-old woman, any reasonable suspicion of criminal activity evaporates.

Id.

In ***Lake in the Hills***, the Illinois court confronted the same question and held that based on "common sense," "an officer may reasonably presume that the owner of a vehicle is also the driver." ***Lake in the Hills***, 591 N.E.2d at 526. The Illinois court did not limit its holding as the Minnesota court did.

The State also points out that several Wisconsin statutes presume that the owner of a vehicle is also its driver when the vehicle is involved in certain traffic offenses. *See, e.g.*, WIS. STAT. § 346.175(1)(a) (fleeing from a traffic officer); WIS. STAT. § 346.195(1) (failing to yield to an emergency vehicle). Thus the State argues that, based on the same "common sense" that the Illinois court relied on, Wisconsin courts should reach the same conclusion.

Newer analogizes this case to the recent supreme court case ***State v. Lord***, 2006 WI 122, ¶7, 297 Wis. 2d 592, 723 N.W.2d 425, in which the court held

that a police officer cannot infer wrongful conduct based solely on the display of temporary tags. He charges that in the State's view, a police officer can pull over a motorist "in total ignorance" of any information about the driver and without having witnessed any suspicious conduct.

This issue is one of federal and state constitutional law. We have been unable to discover any published Wisconsin cases addressing the question presented, though there is at least one unpublished case that does so. *See* ***State v. Johnson***, No. 1998AP3044CR, unpublished slip op. (Wis. Ct. App. March 18, 1999). Though we do not know for certain, common sense suggests that the practice of stopping a vehicle because its owner may not legally drive may be a widespread one. Thus, this case presents a novel issue, the resolution of which is likely to have statewide impact. Whether the court adopts a limited holding like that of the Minnesota court in ***Pike***, a broad one like that of the Illinois court in ***Lake in the Hills***, or holds that the knowledge held by the officer here will not support a seizure, the decision would provide useful guidance for police officers and drivers alike.

The State asserts as a second grounds for the stop of Newer that the officer had observed him going twenty-eight miles per hour in a twenty-five mile per hour zone, in violation of WIS. STAT. § 346.57(5). The State argues that this created reasonable suspicion for the officer to stop Newer.

Without question, an officer's direct observation of lawbreaking is sufficient to create reasonable suspicion (as well as probable cause). Nevertheless, Newer argues that his speeding violation does not justify the stop here. First, he

argues that the State did not rely on the speeding violation at the suppression hearing; we take this to be a claim of waiver.[4] He also argues that, even if the officer has knowledge of a violation of the law, whether the officer may lawfully stop a motorist must still be subject to a "reasonableness" test. He points out that the officer admitted that he had seldom, if ever, pulled anyone over for driving three miles per hour over the limit, that the officer did not intend to stop the vehicle when he had only witnessed the speeding violation, and that the officer stated that the speeding violation gave him a "pretextual" reason for making the stop. Newer argues that it defies common sense to allow the stop on these grounds because, in his words, "just about every car on the Beltline during a normal day would be subject to being stopped."

The State responds that, under Wisconsin and United States Supreme Court case law, an officer's subjective motivation is irrelevant to the question of whether a stop is justified. ***State v. Baudhuin***, 141 Wis. 2d 642, 650-51, 416 N.W.2d 60 (1987); ***Whren v. U.S.***, 517 U.S. 806, 813 (1996). Rather, it is the facts available to the officer and the inferences that can be drawn from those facts that govern. If an officer has knowledge of a violation the officer may detain the violator, even if the officer would not ordinarily do so and is using the violation as a "pretext" to obtain other information or take other action.

We acknowledge that in ***Whren***, the U.S. Supreme Court appears to have closed off all consideration of "pretext" in Fourth Amendment analysis. However, we find the implications of the ***Whren*** rule in this case troubling. While

[4] The State argues that the circuit court erred by discounting the speeding violation because the officer testified that he did not rely on it. The State does not address Newer's claim that the State failed to rely on the speeding violation in its argument at the suppression hearing.

there is no evidence on this point in the record, our experience tells us that traveling at a few miles per hour over the speed limit is not only common behavior, but the default driving style of the majority of Wisconsin residents. If our experience on Interstate 94 is any guide, the driver observing the speed limit exactly is in a distinct minority. If police officers may always use a three-mile-per-hour violation as a "pretext" for stopping motorists, then a police officer's discretion as to whom to stop may be, practically speaking, nearly unlimited. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3, at 358-60, § 1.4(e), at 132-33 (4th ed. 2004). While this result was explicitly countenanced by the Supreme Court in ***Whren***, the high courts of at least two states have rejected pretextual stops under the search and seizure provisions of their state constitutions. *See* ***State v. Sullivan***, 74 S.W.3d 215 (Ark. 2002); ***State v. Ladson***, 979 P.2d 833 (Wash. 1999). *See also* 1 LAFAVE § 1.4(e) and (f), 125-55 (discussing pretext issues generally).

The courts of this state have cited ***Whren*** with approval in a number of cases. *See, e.g.*, ***State v. Sykes***, 2005 WI 48, ¶¶29-33, 279 Wis. 2d 742, 695 N.W.2d 277. However, in our research we have not discovered a case addressing the intersection of the ***Whren*** rule and minor speeding violations, where, as we have said, the rule would seem to subject the majority of motorists to seizure (even including full custodial arrest, ***Atwater v. City of Lago Vista***, 532 U.S. 318 (2001)). As a novel constitutional question of potentially statewide impact, we believe that the propriety of a stop in such a situation is best resolved by the supreme court. As such, we respectfully ask the supreme court to assume jurisdiction over this appeal.