

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 27, 2009**

David R. Schanker  
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. 2008AP2891-CR**

**Cir. Ct. No. 2008CT481**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**CHRISTOPHER S. BILKE,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Walworth County:  
MICHAEL S. GIBBS, Judge. *Affirmed and cause remanded.*

¶1 BROWN, C.J.<sup>1</sup> This appeal by the State involves an application of the facts of this case to the law announced in *State v. Newer*, 2007 WI App 236,

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

306 Wis. 2d 193, 742 N.W. 2d 923. There, we held that a police officer can make a common sense assumption that the registered owner of a vehicle is likely to also be its driver and, if the owner's license is revoked, the officer has reasonable suspicion for a traffic stop so long as there are no facts which would call into question the nexus between the owner of the vehicle and the driver. *Id.*, ¶2. Here, there were *two* registered owners of the vehicle, an older man and a younger man—the younger man's license was revoked. We agree with the circuit court that this fact ruined the nexus which usually supports a reasonable suspicion that the driver is the owner. We affirm.

¶2 The facts are very simple to relate. At about 2:00 a.m. on June 4, 2008, an officer observed a vehicle travelling on a street, checked the vehicle's license plate on the mobile data computer, and learned that the vehicle was registered to two individuals, one sixty-four years old and the other twenty-five years old. The younger of the two was identified as Christopher S. Bilke and his driving privileges were revoked. Acting on his belief that it would be more likely for a twenty-five year old man to be driving at two in the morning than a sixty-four year old man, the officer stopped the vehicle. Before stopping Bilke, the officer observed the vehicle at a local McDonald's and simply pulled over down the road and waited for the vehicle to be on the move again. After several minutes, the officer decided to drive back towards McDonald's and, in doing so, saw the vehicle on the road. A stop resulted in an arrest. In their briefs the parties allege that Bilke was arrested for operating a motor vehicle while intoxicated,

second offense and the corollary charge of operating with a prohibited alcohol concentration, second offense.<sup>2</sup>

¶3 Bilke moved to suppress the evidence on grounds that there was no reasonable suspicion to stop him. As we interpret it, he argued that because there were two registered drivers of the car rather than one, this fact destroyed the common sense assumption a reasonable police officer may make that the driver of the vehicle was also its registered owner. As such, Bilke argued that the officer was obliged to obtain more information before making the stop. The State responded that it is enough that the officer suspected Bilke to be the driver rather than the older man, presumably because of the early morning hours.

¶4 The trial court agreed with Bilke. The trial court called the officer's assumption that Bilke was the driver due to the time in the morning a "guess" or a "hunch" rather than a reasonable inference based on articulable facts. The trial court mused that the officer could easily have discerned if it was a younger man driving or an older man driving simply by going into the McDonald's lot and eyeballing the driver before making the stop. That would have provided the missing link that the officer needed. The trial court granted the motion to suppress and the State appeals.

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<sup>2</sup> We searched the record for any reference to the charges of operating a motor vehicle while intoxicated, second offense, and operating with a prohibited alcohol concentration, second offense, but found none. The only charge in the record is for operating while revoked. However, a search on the Wisconsin Circuit Court Access website turned up another circuit court case in which the State charged Bilke with these two offenses on the same day as the operating while revoked offense. There is no appeal relating to that case. The appellant (in this case, the State) has the responsibility of providing a complete record. See *State v. Provo*, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272. We admonish the State for not spending more time ensuring that the record was complete. Inattention to detail makes the record needlessly ambiguous and our work more difficult.

¶5 The State takes issue with the trial court’s conclusion that the officer’s stop was based on a hunch. The State claims instead that the stop was based on specific, articulable facts and reasonable inferences drawn from those facts. The State points to the *fact* that the vehicle was being driven at 2:00 a.m. in the morning and then submits that the officer made a *reasonable inference* from this fact—a twenty-five year old is more likely to be driving at that time in the morning than a sixty-four year old. The State then reasons that because the officer arrived at a reasonable inference based on this articulable fact, the officer did not have to seek further information before making the stop. The State dismisses the possibility of the driver being the sixty-four year old man rather than Bilke as simply “an innocent explanation” that officers are not required to rule out before making the stop.

¶6 The State is just plain wrong. We look at the actions of a police officer based on the common sense notion of what a reasonable police officer would reasonably be able to infer from the situation given his or her training and experience. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Common sense dictates that sixty-four year old people are no more unlikely to be out on the road at two in the morning than fifty year old people, forty year old people, thirty year old people or twenty-five year old people. People of all ages work second and third shifts (this *was* a Wednesday, not a weekend), have to go to the grocery or drug stores at that time of the night and, yes, get cravings for something to eat and go to a fast-food place like a McDonald’s or a George Webb’s. The officer’s hunch that the driver had to be the younger of the two registered owners because of the time of the night was not a reasonable inference from an articulable fact. It was, as the trial court observed, a guess. A good guess, as the trial court also observed, but just a guess. The officer had a fifty percent

chance of being right and a fifty percent chance of being wrong, based on the facts of this case. That is not enough to make a stop. We agree with the trial court that the officer could easily have gleaned the necessary information to make the stop by simply driving into McDonald's and having a "look-see" for himself. He did not. We affirm.

*By the Court.*—Order affirmed and cause remanded.

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

