

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 2010

A. John Voelker
Acting 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. 2010AP954-CR

Cir. Ct. No. 2008CT97

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH DONALD PEACOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County:
JOHN P. ANDERSON, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Joseph Peacock appeals a judgment of conviction for operating with a prohibited alcohol concentration, third offense. Peacock argues the arresting officer lacked reasonable suspicion to stop his vehicle because

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

the officer was unsure whether Peacock's license was still suspended and could not discern whether Peacock was the driver. We disagree and affirm.

BACKGROUND

¶2 At the suppression motion hearing, officer William Wellens of the Red Cliff Police Department testified regarding the events of November 28, 2008. Early in the evening, Wellens observed Peacock with two females, all of whom Wellens recognized, at a grocery store. Peacock's vehicle was outside. Wellens testified that later that evening he was parked about one block away when he observed Peacock's vehicle leave a casino and he recognized Peacock as the driver. On cross-examination, Wellens reiterated, "I saw who the driver was and I saw who the passengers were – both the girls were sitting on the passenger side and the male, Joe – Joseph Peacock – was sitting – was driving the vehicle." He further testified, "I could see him. Clearly. ... As he passed underneath the light ... I could see him clearly driving the vehicle."

¶3 Wellens followed Peacock's vehicle because he knew from previous contacts, the most recent only six days prior, that his driver's license was suspended. Wellens nonetheless contacted dispatch to confirm Peacock's license status. A portion of that recorded conversation was played at the hearing:

Officer Wellens: Is he valid or is he suspended?

[Dispatcher]: Well, I've got to run both of his DL numbers in order to find that out, and then – that's what I'm doing. I've got the first one back, but it really doesn't tell me anything. So, I'm going to run the second one.

Officer Wellens: I can't tell if he's driving the car either. But, oh, well, I'm going to stop him.

At a continued hearing,² the court observed:

Before I get to the heart of the issue, this officer needs to know that this Court does not look kindly upon somebody wearing a badge coming in here and having the type of testimony that we had and his certainty to it, to compare it to what was going on in the field and with this recording.

All three of us [the court, prosecutor, and defense counsel] agree they are not reconcilable. There is probably only one reasonable inference to draw from it in that the officer was being less than truthful, and that is troubling. And, what makes it so troubling is, you know, the audio tape – his, [“]Oh, well[”] comment, is a very cavalier attitude to take when you’re dealing with Constitutional rights.

....

[H]ere we have a case where the officer saw a car with multiple people in it. He testified he saw Peacock driving. I think that probably – is probably a false statement.

¶4 The court denied Peacock’s suppression motion, concluding it was reasonable to suspect Peacock was the vehicle’s driver and that his license was still suspended. Peacock subsequently entered a no contest plea, and now appeals.³

² Because the recording could not be played back with sufficient clarity at the initial motion hearing, the court granted a continuance and the court reporter prepared a transcript after slowing down the recording.

³ The State’s brief included a complete statement of facts that appears to be largely copied-and-pasted from Peacock’s brief. This is neither necessary nor helpful. *See* WIS. STAT. RULE 809.19(3)(a)2. The brief also cites facts from an affidavit that was used exclusively to refresh Wellens’ recollection, representing that Wellens testified to those facts when he in fact did not. Finally, the brief relies on Wellens’ testimony that he observed a male driving the car. That testimony, however, was inextricably connected to the testimony the circuit court dismissed as untruthful. The foregoing observations are especially troubling because a law student assisted the State on appeal.

DISCUSSION

¶5 Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact, to which a two-part standard of review applies. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. A circuit court's findings of historical facts will be upheld unless clearly erroneous, but we independently determine whether those facts constitute reasonable suspicion. *Id.*

¶6 This case is controlled by *State v. Newer*, 2007 WI App 236, ¶2, 306 Wis. 2d 193, 742 N.W.2d 923, where we

adopt[ed] the view articulated by the supreme court of Minnesota in *State v. Pike*, 551 N.W.2d 919, 922 (Minn. 1996): 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.

There, the officer knew the vehicle's owner had a revoked license, but had no information about who was actually driving the vehicle, not even the gender. *Id.*, ¶¶1, 4. We held:

Here, the officer did not observe the driver of the vehicle and had no reason to think that it was anyone other than the vehicle's owner at any time during the stop. The officer was entitled to rely on the reasonable assumption that the owner of a vehicle is most likely the driver.

Id., ¶9.

¶7 Peacock argues this case, however, falls within the exception recognized in *Pike* and *Newer*. In *Newer*, we explained that because reasonable suspicion is based on the totality of the circumstances, “[i]f an officer comes upon information suggesting that the assumption 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, reasonable suspicion would, of course, dissipate.” *Id.*, ¶8.⁴ Peacock emphasizes that Wellen testified he saw Peacock with two others earlier in the evening and observed three people in the vehicle before stopping it. Thus, Peacock argues, “it is clear that Wellens had good reason to believe that Peacock may not have been driving prior to the stop.”

¶8 Wellens was not, however, aware of any facts inconsistent with Peacock being the driver. Just because it might also be reasonable to suspect Wellens was not the driver, this does not mean there was not reasonable suspicion that he was the driver; i.e., the standard is not reasonable doubt. “[T]he requirement of reasonable suspicion is not a requirement of absolute certainty: ‘sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment’” *Id.*, ¶7 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985)). Further, that Wellen was revealed disclosing to dispatch that he could not tell who was driving merely demonstrates the facts here are comparable to those in *Newer*.

¶9 Peacock also argues Wellens lacked reasonable suspicion because he was unable to confirm Peacock’s license status prior to the stop and had no knowledge of the length of Peacock’s license suspension. We disagree. Wellen’s six-day-old knowledge was sufficiently fresh that it was reasonable to assume Peacock’s license was still suspended. And while Wellen’s credibility was certainly called into question, the circuit court’s acceptance of Peacock’s

⁴ *Pike* similarly stated the exception: the assumption “applies only while the officer remains unaware of any facts which would render unreasonable the assumption that the owner is driving the vehicle.” *State v. Pike*, 551 N.W.2d 919, 922 (Minn. 1996). It also gave the examples of differing ages or gender. *Id.*

testimony that he held such knowledge was not clearly erroneous. Therefore, under the totality of the circumstances, we conclude it was reasonable to suspect Wellen was driving his vehicle with suspended operating privileges.

By the Court.—Judgment affirmed.

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

