STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP2107-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DEAN M. BLATTERMAN,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, REVERSING A JUDGMENT OF CONVICTION ENTERED IN DANE COUNTY, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

J.B. VAN HOLLEN
Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

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STATEMENT OF ISSUES

I. Did the police have probable cause to arrest Blatterman for an operating while intoxicated (OWI), prohibited alcohol concentration (PAC) charge, when the police were aware that Blatterman had three prior OWI convictions and had a .02 PAC threshold, and the police detected an odor of an intoxicant emanating from Blatterman's person, observed that Blatterman had watery eyes, observed Blatterman's erratic and somewhat unresponsive behavior, and the police had received prior

information from dispatch that Blatterman was possibly intoxicated?

The trial court did not clearly rule that the police had probable cause to arrest Blatterman before his challenged transport to the hospital, but the trial court did specifically note that Blatterman's .02 threshold combined with the police observation of the odor of an intoxicant from Blatterman's person, and Blatterman's watery eyes, made it reasonable to take Blatterman to the hospital. The court of appeals recognized the argument that the police had probable cause to arrest Blatterman for a PAC violation, but dismissed it without opining on the merits because it felt the argument was not properly developed by the state.

II. Did the police have a legitimate community caretaker concern when they transported Blatterman from the stop site, ten miles to the nearest hospital, when they were advised by dispatch that Blatterman's wife felt that Blatterman might be suicidal, that Blatterman had apparently attempted to blow up his house by pulling gas or carbon monoxide into the home, and upon meeting with Blatterman observed that he was wearing a short-sleeved shirt in freezing weather and was complaining of chest pains?

The trial court did not clearly rule that Blatterman's transport to the hospital could be justified by the community caretaker doctrine, but the trial court did specifically note that the belief that Blatterman might have ingested carbon monoxide, Blatterman's complaint of chest pain, and Blatterman's odd behavior when first confronted by the police, made it reasonable for the police to transport him to the hospital. The court of appeals identified the community caretaker issue and discussed the relevant laws of this doctrine, but did not endorse this doctrine as justification for taking Blatterman to the hospital, largely because the court of appeals felt the state had not fully fleshed out the issue, and because

Blatterman had refused emergency medical services (EMS).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to have a petition for review granted by this court, the State requests both oral argument and publication of the court's opinion.

STATEMENT OF THE CASE

Blatterman was charged with OWI, 4th offense, contrary to Wis. Stat. §§ 346.63(1)(a) and 346.65(2)(am)(4); and PAC, 4th offense, contrary to Wis. Stat. §§ 346.63(1)(b) and 346.65(2)(am)(4). Because of the age of his prior offenses, the crime was a misdemeanor under Wis. Stat. § 343.307(1) (3:1-2; Pet-Ap. 114-15).

Blatterman filed a motion to suppress evidence on May 20, 2013 (7; Pet-Ap. 120-24). On July 22, 2013, a motion hearing was held before the Honorable William E. Hanrahan, Dane County Circuit Court (20; Pet-Ap. 125-68). The trial court denied Blatterman's motion (20:43; Pet-Ap. 167) and following the adverse decision, Blatterman pled guilty to OWI (21).

Blatterman appealed the trial court's denial of his motion to suppress and on April 24, 2014, the Wisconsin Court of Appeals, District IV, in a one-judge opinion, reversed the trial court and remanded the cause. The state filed a petition for review with this court on May 21, 2014, and this court granted the petition on September 24, 2014.

STATEMENT OF FACTS

One witness testified at the suppression hearing: Deputy James Nisius of the Dane County Sheriff's Department. From Deputy Nisius's testimony, the following facts were gleaned: Deputy Nisius had 19 years of law enforcement experience when he received a dispatch at approximately 8:47 a.m. March 19, 2013 (20:3-5; Pet-Ap. 127-29). The dispatch advised Nisius that an individual was putting gas in a house through a stove or a fireplace (20:5; Pet-Ap. 129). The dispatch advised that the complainant was the alleged perpetrator's wife (*id.*). While en route to respond to this call, Deputy Nisius received, via dispatch, an update that the alleged perpetrator was leaving the house in a white minivan, and that the subject's name was Dean Blatterman (*id.*). Nisius was further advised that apparently Blatterman was trying to blow up the house by pulling gas or carbon monoxide into the residence (20:6; Pet-Ap. 130). Also, Nisius was told that Blatterman could possibly be intoxicated and that the white minivan he was driving had the license plate, ANNA92 (*id.*). Dispatch further advised Deputy Nisius that Blatterman had in the past mentioned suicide by cop (20:8; Pet-Ap. 132).

Shortly thereafter, Nisius observed a white minivan with a plate reading ANNA92 approaching him (20:7; Pet-Ap. 131). Nisius allowed the minivan to pass him so that he could make a U-turn and in that manner follow the minivan (*id.*). Deputy Nisius did not stop the minivan right away as he was concerned because of Blatterman's past references to suicide by cop, and by the facts that Blatterman might be intoxicated and also had just been seen trying to ignite a home (20:7-8; Pet-Ap. 131-32). Nisius waited for backup officers to arrive (20:8; Pet-

Ap. 132). After backup arrived, Nisius made what he characterized as a high risk stop of the minivan (20:11; Pet-Ap. 135). Deputy Nisius drew his revolver and approached the minivan and ordered the driver to stick his hands outside his car window (*id.*). The driver, later identified to be Blatterman, opened up his car door and started walking back with his hands in the air, although he seemed to be holding something in one of his hands (*id.*). The item he was holding was later discovered to be a cell phone (20:25; Pet-Ap. 149). Nisius had not commanded Blatterman to exit the minivan and did not want him to do so (20:12; Pet-Ap. 136). Nisius along with backup officers yelled at Blatterman to stop walking (20:12-13; Pet-Ap. 136-37). One of the backup officers warned Blatterman that if he did not stop walking he would be tasered and finally Blatterman stopped (20:13; Pet-Ap. 137). After Blatterman was detained, the police conducted a cursory search to see if Blatterman was armed (20:14; Pet-Ap. 138). Then Nisius asked Blatterman what was wrong, and asked if Blatterman was all right (*id.*). Blatterman advised that his chest hurt, and at this point Deputy Nisius contacted Oregon's EMS (*id.*).

Deputy Nisius observed that Blatterman was wearing a T-shirt and jeans, and he could smell an odor of an intoxicant emanating from Blatterman's person (*id.*). Nisius further noted that Blatterman had watery eyes (*id.*). Deputy Nisius found it odd that even after pointing a weapon at Blatterman's vehicle that Blatterman acted as though he wasn't listening to any of the police officers (*id.*). Deputy Nisius and the backup officers placed Blatterman in the back of a police squad and waited for the EMS to arrive (20:15; Pet-Ap. 139). Nisius placed Blatterman in the

squad because it was freezing outside and Blatterman was wearing a short-sleeved shirt (*id.*). After several minutes, EMS arrived and Blatterman refused the EMS (20:16-17; Pet-Ap. 140-41). Deputy Nisius felt it prudent to transport Blatterman to a hospital since he had complained of chest pains, was potentially suicidal, and had possibly been involved with carbon monoxide (20:17-18; Pet-Ap. 141-42). Nisius asked Blatterman what hospital he would go to and Blatterman responded by saying, St. Mary's (*id.*). Before leaving for the hospital, Deputy Nisius ran Blatterman's driving record and discovered that Blatterman had three prior OWI convictions (20:17-18, 38; Pet-Ap. 141-42, 162).

Upon arrival at St. Mary's Hospital, approximately ten miles away from the stop site, Deputy Nisius advised hospital staff why he had taken Blatterman there (20:19, 29; Pet-Ap. 143, 153). Nisius advised the hospital as to his concerns about carbon monoxide, about Blatterman's chest pains, and Blatterman's possible suicidal tendencies (20:17, 19; Pet-Ap. 141, 143). Nisius further advised that he also had a need for a phlebotomist for a legal blood draw (*id.*). Nisius and Blatterman were taken to an examination room where a nurse checked Blatterman's vitals and also found out that Blatterman's monoxide levels were at a normal level (*id.*). After the examination Nisius unhandcuffed Blatterman and performed field sobriety tests (20:20; Pet-Ap. 144).[1]

[1] From this point the police handled the matter as an OWI contact resulting in a blood test reading of an alcohol level of .118. There is no allegation that the police did anything improper in the administration of the blood test. The dispute is over the propriety of transporting Blatterman from the stop site to the hospital.

ARGUMENT

I. DEPUTY NISIUS HAD PROBABLE CAUSE TO ARREST BLATTERMAN FOR A .02 PAC VIOLATION PRIOR TO TRANSPORTING HIM TO THE HOSPITAL.

A. Introduction.

The core issue at trial court was whether Deputy Nisius's transporting Blatterman ten miles to a hospital was compatible with the Fourth Amendment restrictions as to a "*Terry*"[2] reasonable suspicion detention, and within the movement limitations articulated in *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997). The trial court found that the transport was permitted under the "*Terry*" doctrine as expanded by *Quartana.* The court of appeals disagreed with the trial court on this issue holding: "Because Blatterman was not moved within the vicinity when Deputy Nisius transported him to the hospital, I conclude that the stop in this case exceeded the scope of an investigative detention." *State v. Dean M. Blatterman*, No. 2013AP2107-CR, ¶ 33 (Ct. App., Dist. IV, Apr. 24, 2014) (Pet-Ap. 101-13, at 112).

The state has no quarrel with the court of appeals' opinion on this score. Nevertheless, two other issues emerged, both during the motion hearing at trial and during the parties' court of appeals' briefing: 1) whether Deputy Nisius had probable cause to arrest Blatterman for a PAC violation prior to the transport; and 2) whether the transport could also be justified under the community caretaker doctrine.[3] The court of appeals ruled against the

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[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

[3] While it is true that neither party specifically referred to the community caretaker doctrine by name, it is also true that the police's concern as to Blatterman's physical condition (outside of the OWI context) was well ventilated by Blatterman in his initial brief to the court of appeals, Blatterman's court of appeals' brief at 21-22, (footnote continued)

state as to both the probable cause to arrest and community caretaker issues, and it is from these two findings that the state seeks relief from this court.

The state is particularly troubled that the court of appeals did not decide either of these issues on their merits. The court of appeals rested its conclusions, rejecting both the probable cause to arrest and the community caretaker justification for transporting Blatterman, primarily on what it perceived to be poor state scholarship in presenting the issues. *Blatterman*, slip op. ¶¶ 29, 33; Pet-Ap. 110, 112). These issues were raised and argued by the parties. Therefore, they should not be decided by an analysis of the relative skill of the advocates, but rather by an application of the facts to the relevant law, as the court of appeals properly did in its holding on the "*Terry*" detention/*Quartana* issue.

The state will show that the facts of this case, applied to the law, will satisfy the requisite probable cause standard for arresting Blatterman for a .02 PAC violation. Alternatively, the state will show that the police properly moved Blatterman as part of their community caretaker function.

B. Applicable law.

In determining whether probable cause exists, this court upholds the trial court's findings of fact, unless clearly erroneous, and reviews de novo whether those

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the state in its brief to the court of appeals, State's court of appeal's brief at 15-18, and again by Blatterman in his reply brief, Blatterman's court of appeals' reply brief at 7-9. The court of appeals understood that the underpinnings of the community caretaker doctrine was at issue as reflected by its somewhat lengthy discussion of the doctrine and the quandaries it can present to the police. *Blatterman*, slip op. ¶¶ 30-33; Pet-Ap. 111-12). Accordingly, Blatterman's contention that the state is now ambushing him with this issue is without merit. *Blatterman's* response in opposition to petition for review at 3-4.

facts satisfies the constitutional standard. *State v. Goss*, 2011 WI 104, ¶ 9, 338 Wis. 2d 72, 806 N.W.2d 918. A warrant-less arrest is not lawful unless it is supported by probable cause. The burden is on the state to show that the police have probable cause to arrest. *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551. In determining whether probable cause to arrest exists, the courts look at the totality of the circumstances. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).

Probable cause to arrest for OWI refers to that quantum of evidence that would lead a reasonable law enforcement officer to believe that a defendant is operating a vehicle while under the influence of an intoxicant.[4] *Id*. The test for probable cause is a practical test based on considerations of everyday life on which reasonable and prudent men act. *State v. Drogsvold*, 104 Wis. 2d 247, 254, 311 N.W.2d 243 (Ct. App. 1981). In order to find probable cause, the objective facts before the police need only lead to the conclusion that guilt is more than a possibility. *State v. Richardson*, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990); *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985). The quantum of information constituting probable cause must be measured by the facts of the particular case. *State v. Wilks*, 117 Wis. 2d 495, 502, 345 N.W.2d 498 (Ct. App. 1984). The evidence supporting probable cause need not show that guilt is more likely than not. *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994).

Among the factors that can be considered in the probable cause calculus in the OWI context, is whether the defendant has prior convictions for OWI related

[4] While this case is for a PAC violation and not OWI, the state reasons that this same standard would apply after inserting "with a prohibited alcohol concentration" for "while under the influence of an intoxicant."

offenses. *Goss*, 338 Wis. 2d 72, ¶ 22*; Lange*, 317 Wis. 2d 383, ¶ 33.

1999 Wisconsin Act 109, enacted on May 3, 2000, and published on May 17, 2000, created Wis. Stat. § 340.01(46m)(c), establishing a lower PAC of .02 for people with three or more prior OWI convictions.

A fair summary of the applicable law is that probable cause to arrest is an objective standard based on the totality of the circumstances confronted by the police officer. Among the circumstances that can be considered in the formulation of probable cause in an OWI context, is whether the defendant has prior convictions for OWI-related offenses. The probable cause standard is a relatively low one, not requiring a showing that guilt is more likely than not, but only requiring a showing that guilt is more than a possibility. The PAC threshold for a person with three or more prior OWI convictions is an extremely low .02.

C. Application of the facts to the law.

At the time Blatterman was transported to the hospital, Deputy Nisius was aware of the following facts relevant to a determination as to whether probable cause existed that Blatterman was operating a vehicle with a PAC above .02:

- Deputy Nisius smelled the odor of an intoxicant emanating from Blatterman's person (20:14; Pet-Ap. 138);

- Blatterman had watery eyes (20:14; Pet-Ap. 138);

- Deputy Nisius was told by dispatch prior to stopping Blatterman that Blatterman's wife had

advised that Blatterman could possibly be intoxicated (20:6; Pet-Ap. 130);

- Blatterman was wearing a short-sleeved shirt and jeans in freezing weather (20:15; Pet-Ap. 139);

- Blatterman acted as though he was not listening to the police even after they pointed a weapon at his vehicle in stopping him (20:12, 14; Pet-Ap. 136, 138); and

- Deputy Nisius ran Blatterman's driving record and discovered that Blatterman had three prior OWI convictions (20:17-18, 38; Pet-Ap. 141-42, 162).

So the question is whether the above-recited facts in composite, constitute an objectively reasonable basis upon which to believe that it is more than a possibility that Blatterman was operating a vehicle with a PAC above .02. Although not necessary to do so in this case, as the state has more than the odor factor, it can be argued that the odor of an intoxicant is sufficient by itself to establish probable cause of a .02 PAC violation. In the conventional OWI arrest context odor, while probative, is hardly determinative, as odor is better at establishing that drinking has taken place than it is in showing how much alcohol has been consumed. The state submits that in a .02 case, any evidence showing conclusively that drinking has occurred is determinative, and beyond that there is no reason in a probable cause analysis to go further to explore the extent of the consumption. Odor is an extremely compelling factor in an .02 case, as watery or bloodshot eyes, or poor balance, or slurred speech, by themselves can be explained by reasons other than alcohol consumption. Conversely, the odor of an intoxicant is not vulnerable to any other reasonable explanation, other than the subject has consumed alcohol.

This court recognized in *Goss* the power of an odor of an intoxicant in a .02 PAC context when it wrote: "In this case, both the smell of alcohol on Goss and the officer's knowledge that Goss could drink only a very small amount before exceeding the legal limit that applied to him make the conclusion that Goss was likely in violation of the statute highly plausible." *Goss*, 338 Wis. 2d 72, ¶ 26.

While it is true that *Goss* dealt with the probable cause necessary to administer a preliminary breath test in a .02 PAC case, this distinction does not alter the inevitable conclusion that the odor of an intoxicant has great probative value in determining that a person has been drinking, and therefore whether there is probable cause that a subject is above .02.

The legislative intent for the reduced .02 threshold for certain Wisconsin drivers, drivers with three or more prior OWI convictions, and drivers subject to an ignition interlock order is transparent. *See* Wis. Stat. §§ 340.01(46m)(c), 343.301. People who qualify for this reduced threshold standard have demonstrated their propensity for dangerously mixing drinking with driving. Consequently, the legislature seeks to strongly discourage these drivers from driving and drinking at any level. A driver is not anointed with a .02 threshold; he/she is burdened with it by his/her prior irresponsible and dangerous actions in an automobile. The state respectfully submits that such a low PAC threshold requires as its partner a low probable cause standard for an arrest for a .02 PAC violation.

As argued above, the state believes that the odor of alcohol emanating from Blatterman's person is sufficient by itself for probable cause to believe Blatterman is violating the .02 law. However, here the state has more: Blatterman's watery eyes; Blatterman's odd behavior when confronted by the police; and Blatterman's wife advising dispatch that he might be intoxicated. Moreover, Blatterman had three prior OWI convictions, which not

only qualified him for the low .02 standard but is also a legitimate factor in the probable cause analysis. While this dual consequence as to an OWI history might seem unfair to Blatterman, it is compatible with a statutory regime designed to tell a person in Blatterman's position, "Don't Drive and Drink" period.

The court of appeals duly noted the state's recitation of factors supporting probable cause to arrest, and then dismissed them all because it felt that the state's argument on this score was underdeveloped, and therefore not worthy of full consideration. Blatterman's slip op. ¶¶ 28-29; Pet-Ap. 110. The state, with due respect, submits that such short shrift as to such an important issue to the safety of Wisconsin drivers needs correcting by this court. The state asks this court, on this case of first impression, to find that the state met its burden of showing that the police had probable cause to arrest Blatterman for the .02 PAC violation, before transporting him ten miles to the hospital.

II. DEPUTY NISIUS TOOK BLATTERMAN TO THE HOSPITAL AS A LAWFUL EXERCISE OF HIS COMMUNITY CARETAKER FUNCTION.

A. Applicable law.

In reviewing a motion to suppress evidence, this court will uphold a circuit court's findings of fact unless they are clearly erroneous. *State v. Pinkard*, 2010 WI 81, ¶ 12, 327 Wis. 2d 346, 785 N.W.2d 592. However, this court reviews independently the trial court's application of constitutional principles to those facts. *Id.* Therefore, this court conducts an independent review as to whether the police action under the community caretaker function satisfies the requirements of the Fourth Amendment of the United States Constitution and art. I, § 11 of the Wisconsin Constitution. *State v. Kramer*, 2009 WI 14, ¶ 16, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Kelsey*

C.R., 2001 WI 54, ¶¶ 29, 34, 243 Wis. 2d 422, 626 N.W.2d 777.

This court has interpreted the community caretaker exception to the warrant requirement in the same manner as it relates to either the federal or state Constitution. *Kramer*, 315 Wis. 2d 414, ¶ 18; *State v. Pinkard*, 327 Wis. 2d 346, ¶ 14; *State v. Gracia*, 2013 WI 15, ¶ 14, 345 Wis. 2d 488, 826 N.W.2d 87. Police officers may exercise a community caretaker function when an officer discovers a member of the public who is in need of assistance. *Kramer*, 315 Wis. 2d 414, ¶ 32; *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

The state bears the burden of showing that the officer's conduct fell within the scope of a community caretaker function. *State v. Ziedonis*, 2005 WI App 249, ¶ 15, 287 Wis. 2d 831, 707 N.W.2d 565. In evaluating whether a community caretaker function is lawful, the court looks at the totality of the circumstances as they existed at the time of the police action. *Kramer*, 315 Wis. 2d 414, ¶ 30; *Kelsey C.R.*, 243 Wis. 2d 422, ¶ 37. The nature of police work is multifaceted and an officer may have both investigatory and community caretaker motivations within the same contact. *Kramer*, 315 Wis. 2d 414, ¶ 32. Accordingly, a police officer may have law enforcement concerns and still have an objectively reasonable basis for exercising a community caretaker function. *Id.* A police officer's subjective intent is relevant to determining whether an officer was acting as a bona fide community caretaker but it is not determinative. *Id.* ¶ 36. When, under the totality of the circumstances, there is an objectively reasonable community caretaker basis for police action, this basis is not undermined by the officer's subjective law enforcement concerns. *Gracia*, 345 Wis. 2d 488, ¶ 19. The key inquiry is whether there is an objectively reasonable basis to believe there is a member of the public in need of assistance. *Kramer*, 315 Wis. 2d 414, ¶¶ 30, 32; *State v. Ultsch*, 2011 WI App 17, ¶ 15, 331 Wis. 2d 242, 793 N.W.2d 505.

The fact that a subject is not expressing a need for assistance, or is seeking to reject assistance, is not dispositive of the community caretaker inquiry. *State v. Gracia*, 345 Wis. 2d 488, ¶ 28. People can be in need of assistance, even though they expressly tell the police that they do not want help. *Id.*

A fair summary of the applicable law is that the state must show the propriety of a community caretaker justification, based on the totality of the circumstances. In reviewing whether the police were engaged in a bona fide community caretaker action, the court may consider the officer's subjective motivations, but the key inquiry is to whether there is an objectively reasonable basis for the police to believe that someone needs assistance. The police may have a dual purpose: the pursuit of an investigatory agenda, and the fulfillment of their community caretaker function, if there is an objectively reasonable basis for their community caretaker concerns. A subject expressing no desire for assistance, or rejecting offered assistance, is not dispositive of the community caretaker analysis, if despite the subject's protestations, there is an objectively reasonable basis for community caretaker actions.

B. Application of facts to law.

Deputy Nisius was confronted with the following facts relevant to the community caretaker doctrine:

- Dispatch advised Deputy Nisius that they had received a complaint that an individual was putting gas in a house through a stove or fireplace. Dispatch further advised that the complainant was the alleged perpetrator's wife (20:5; Pet-Ap. 129);

- Dispatch further advised Deputy Nisius that the alleged perpetrator's name was Dean

Blatterman and that he was leaving his house in a white minivan. Dispatch continued to advise Nisius that apparently Blatterman was trying to blow up the house by pulling gas or carbon monoxide into the residence (20:6; Pet-Ap. 130);

- Dispatch told Deputy Nisius that Blatterman could possibly be intoxicated and that Blatterman in the past had mentioned suicide by cop (20:8; Pet-Ap. 132);

- Shortly after being advised by dispatch as to the ongoing situation, Deputy Nisius observed Blatterman's white minivan; and because of Blatterman's past references to suicide by cop, Nisius waited for backup to arrive (20:7-8; Pet-Ap. 131-32);

- Once backup arrived, Deputy Nisius made a "high-risk" stop, and after drawing his revolver ordered Blatterman to stick his hands outside his van window. Blatterman responded by opening up his van door, and started walking with his hands in the air, though Nisius had not asked him to get out of the van and did not want him to do so (20:11-12; Pet-Ap. 135-36);

- Blatterman was warned that if he continued walking he would be tased and then Blatterman finally stopped. Deputy Nisius asked Blatterman what was wrong. Blatterman said his chest hurt, and at this point, Nisius contacted the Oregon EMS (20:13-14; Pet-Ap. 137-38);

- Deputy Nisius noted that despite the freezing temperature Blatterman was only wearing blue

jeans and a short-sleeved shirt[5] (20:15; Pet-Ap. 139); and

- Blatterman refused the EMS (20:17; Pet-Ap. 141).

Confronted with these facts, Deputy Nisius decided to transport Blatterman to St. Mary's Hospital, a hospital Blatterman identified as the one he would go to.[6] The trial court summarized the situation Deputy Nisius encountered, when it stated:

> Complaints of chest pain, the belief that the defendant may have ingested carbon monoxide, he [Blatterman] was asked to sit in the back of the squad car because he was just in shirt sleeves, in his shirt sleeves. The uncontradicted testimony was that it was quite cold out. He [Blatterman] was having trouble breathing.[7] All of that I think is consistent with the officer's instincts to take him [Blatterman] to the hospital.

(20:41-42; Pet-Ap. 165-66).

The state agrees with the trial court's assessment of the situation, and also adds to the calculus the fact that Nisius was aware that in the past Blatterman had apparently referenced suicide by cop. All of these facts in the composite create a clear picture of a man in distress.

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[5] There is nothing in the record specifying what the temperature actually was, but Deputy Nisius described the climate as freezing and there was no contradiction of this characterization. Also, since it was March 19th in Wisconsin, there is little question that Blatterman was not appropriately dressed for the weather.

[6] The state is not suggesting that Blatterman asked to go to the hospital. Rather, the state includes this fact to buttress its contention that Nisius acted reasonably in handling this situation, as he selected a hospital Blatterman was seemingly most familiar with.

[7] In fairness, there is nothing in the record dealing with Blatterman's breathing. The state submits that this error is insignificant in light of all the other compelling factors justifying the objective propriety of Nisius exercising his community caretaker function.

He is inappropriately dressed, he is curiously unresponsive to police commands, he had allegedly tried to blow up his home and possibly had been dealing with carbon monoxide, he in the past had referenced suicide by cop, and he was complaining of chest pains. Under the totality of these circumstances, Deputy Nisius acted reasonably in summoning the EMS. Indeed, it would have been unreasonable if he had not done so.

Ultimately, Blatterman refused the EMS and he argues that this fact should have ended Deputy Nisius's inquiry into the matter. Blatterman argues that since he should be the best judge of his condition, Nisius's continued concern as to his medical situation was pretextual. Blatterman's court of appeals' brief at 21-22. Blatterman supports this contention by noting that he had refused care, that Nisius continued to investigate a possible OWI, and emphasized that his self-diagnosis was confirmed by the emergency room doctors. Blatterman's court of appeals' brief at 21-22; Blatterman's court of appeals' reply brief at 8. None of these points show that Nisius acted unreasonably.

First, this court has clearly established in its trilogy of recent community caretaker cases; *State v. Kramer*, *State v. Pinkard*, *and State v. Gracia*, that the police can pursue an investigatory agenda while also lawfully fulfilling a community caretaker function. Second, this court made clear in *Gracia* that a subject refusing medical care or stating he is all right is not dispositive of the community caretaker issue. In *Gracia,* the defendant clearly told the police that he was fine and they should go away, and yet the police continued their community caretaker actions. Here, Blatterman had exhibited a confused persona as reflected by his unresponsiveness, his odd attire, and the bizarre and potentially dangerous allegations that led to the police contact in the first place. It is very reasonable in this context for Nisius to continue to believe there was a legitimate community caretaker concern, even though Blatterman had refused the EMS. Finally, the fact that Blatterman was found to be

medically sound at the hospital is not determinative in a totality of circumstances/reasonableness inquiry. It should be noted, that in *Kramer, Pinkard, and Gracia* all three defendants were ultimately found to be medically sound. The community caretaker doctrine, like most aspects of Fourth Amendment jurisprudence, is evaluated by a look at the totality of circumstances the police are faced with at the moment the Fourth Amendment intrusion occurs. Bad police judgment cannot be salvaged by facts that develop later. Similarly, good police judgment is not condemned by later discoveries.

The court of appeals took a curious approach in disposing of the community caretaker issue presented in this case. Initially, the court sympathetically discussed the challenges the police face when confronted with a mixture of investigatory and medical issues, and referenced applicable law and statutes. After doing this, and without discussion of the facts in this case as compared to case law, the court summarily dismisses the justification, because Blatterman had refused EMS services and the state had not shown the court a roadmap for resolving the issue. *Blatterman*, slip op. ¶¶ 32-33; Pet-Ap. 111-12. If there is a decision on the merits, it is based solely on Blatterman refusing medical services, which seemingly contradicts this court's reasoning in *Gracia*; and if, which seems more likely, the opinion on this issue reflects the appellate court's frustration with the state briefing acumen, the state respectfully submits this is not a proper basis for the suppression of evidence.

This court has provided direction to law enforcement as to the parameters of the community caretaker doctrine. It is clear from *Kramer, Pinkard, and Gracia*, that the doctrine is not dependent on the police being devoid of a concurrent investigatory objective. It is equally clear that the police cannot contrive to seek benefits of the doctrine. Here, the state submits that Nisius's decision to take Blatterman to the hospital was a proper exercise of his community caretaker function rather than a concocted ruse to assist an OWI investigation.

Blatterman was improperly dressed for the weather, was acting strangely, was accused of acting more bizarrely before the police contact, perhaps had been exposed to carbon monoxide, and was complaining of chest pains. Calling for the EMS or transporting Blatterman to the hospital did not create possibilities for discovering additional OWI evidence that the police could not have garnered under a traditional OWI investigation. The state submits that under the totality of circumstances in this case, Deputy Nisius was legitimately and lawfully exercising his community caretaker function.

As argued above, the state contends that the police had probable cause to arrest Blatterman for a .02 PAC violation prior to transporting him to St. Mary's Hospital. Also, the police had a lawful, concurrent community caretaker justification for the challenged transport. The state respectfully asks this court to reverse the appellate court's decision, which improperly refused to look at the PAC issue because it felt it was not well developed, and which without discussion of almost all of the relevant facts dismissed the community caretaker justification because it felt the state had not provided a good roadmap and because Blatterman had refused the EMS.

CONCLUSION

For all of the forgoing reasons, the State respectfully requests this court to reverse the court of

appeals and reinstate the trial court's judgment of conviction.

Dated this 24th day of October, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,541 words.

Dated this 24th day of October, 2014.

_____
DAVID H. PERLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of October, 2014.

_____
DAVID H. PERLMAN
Assistant Attorney General