STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2013AP002743

DANE COUNTY,

Plaintiff-Respondent,

vs.

JOSHUA H. QUISLING,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR
DANE COUNTY, THE HONORABLE
RHONDA L. LANFORD, PRESIDING

Respectfully submitted,

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Defendant-Appellant

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ISSUE PRESENTED

A. Was the seizure of the appellant justified under the community caretaker doctrine?

Trial Court's Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant does not request publication as this case may be resolved by

applying well-established legal principals to the facts of this case. Neither does the Appellant request oral argument, but stands ready to so provide if this Court believes that oral argument would be useful in the exposition of the legal arguments presented herein.

STATEMENT OF THE CASE

This is an appeal from the defendant-appellant's conviction of one count of Operating a Motor Vehicle While Impaired – 1st Offense ("OWI"). The citation for OWI was filed against the defendant-appellant (appellant) in the Dane County Circuit Court on November 1, 2012, for an incident occurring on October 24, 2012. The matter was assigned to Branch XVI, the Honorable Rebecca St. John, presiding. On March 19, 2013, the Appellant filed a motion to suppress evidence based upon an unlawful seizure. An evidentiary hearing was held on April 10, 2013. At the close of this hearing, the circuit court denied the defendant's motion to suppress. The defendant was convicted of the OWI charges following a bench trial on stipulated exhibits, Honorable Rhonda L. Lanford presiding, on November 21, 2013.

STATEMENT OF THE FACTS

On October 24, 2012, at approximately 12:45 a.m., Deputy John Vande Burgt of the Dane County Sheriff's Office was on patrol in the City of Madison, Dane County, Wisconsin (22: 5-6). At that date and time, Deputy Vande Burgt was contacted by dispatch and informed of a call from a female who indicated that

she had received text messages from a friend, later identified as the appellant, that she believed were suicidal in nature. The caller was concerned that her friend might be intoxicated and requested that law enforcement check on him (22: 7). Vande Burgt was unsure of why the caller was suggesting that the appellant might be intoxicated (22: 28). Dispatch also informed Vande Burgt that the caller stated that her friend had made suicidal statements approximately three or four weeks prior, including a statement that he would put a bullet in his head (22: 6-8). Dispatch also relayed a statement to the effect that the caller's friend stated that he would end it all after his last bottle (22: 8). Vande Burgt did not know whether this reference to a bottle regarded alcohol or something else (22: 29).

Dispatch provided Vande Burgt a home address for the appellant, where he lived with his mother and his son and also provided a name and address for the caller, Katherine Newcomber (22: 8-9). Vande Burgt intended to make contact with the caller at her home, but while en route was informed that Newcomber was in contact with the appellant who was in the area of highways 12 and 14 and had threatened to drive into oncoming traffic (22: 10). Vande Burgt then headed towards the vicinity of 12 and 14 in an attempt to locate and contact the appellant (22: 11).

At 1:21 a.m., dispatch aired that a deputy had made contact with the appellant, who was at a downtown Madison bar, Yukon Jack's or Whiskey Jack's, and would wait there for a deputy to arrive (22:12, 33). Vande Burgt was unsure

whether a deputy requested that the appellant remain at the bar, or if it was something the appellant simply offered to do (22: 36). Vande Burgt was also informed that his partner, Deputy Chris Moore, had contacted the appellant's mother who indicated that the appellant was not at home, and that the appellant's parents did not believe him to be suicidal (22: 12, 30). In further attempts to locate the appellant, Vande Burgt's sergeant, Jay Heil, also requested that dispatch attempt to "ping" the appellant's phone to determine an approximate location and asked State Patrol to check for other vehicles which might might be associated with the appellant (22: 14). State Patrol did not find any vehicles associated with the appellant matching the description of the vehicle provided by Newcomber (22: 31). Dispatch informed Vande Burgt that the ping had been successful and yielded an approximate location of 1313 John Q. Hammons Drive, which is the Marriot Hotel in Middleton, about a half mile from the area of 12 and 14 (22: 14).

Vande Burgt then headed towards this location and searched the Marriot hotel parking lot but did not locate any vehicle matching the description provided by dispatch (22: 15). Dispatch also aired that a deputy had responded to Yukon Jack's at approximately 1:30 a.m. and did not find the appellant there (22: 15). Shortly thereafter, Vande Burgt was informed that another deputy had made telephone contact with the Appellant who reported that he was not suicidal, was not intoxicated and was not driving and would make contact with law enforcement the next day (22: 16). Vande Burgt continued to search for the appellant and

widened the scope of this search to the area near the Middleton Marriot hotel and at approximately 1:54 a.m. he noted a black or dark-colored sedan travelling westbound on Greenway Boulevard (22: 17-18). Vende Burgt determined that the vehicle's plate matched one previously identified as possibly associated with the appellant and at 1:57 a.m. he initiated a traffic stop by activating his vehicle's emergency lights and the driver promptly pulled to the side of the road (22: 18, 26). Vande Burgt testified that this stop was conducted solely as a welfare check and was not based on any suspected violation of law (22: 29).

ARGUMENT

I. THE APPELLANT'S SEIZURE WAS NOT JUSTIFIED BY THE COMMUNITY CARETAKER DOCTRINE WHERE THE OBJECTIVES OF ANY COMMUNITY CARETAKING FUNCTION HAD ALREADY BEEN ACHIEVED BEFORE THE SEIZURE WAS CONDUCTED.

A. Standard of Review

The County bears the burden of "proving that the officer's conduct fell within the scope of a reasonable community caretaker function." State v. Kramer, 2009 WI 14, ¶17, 759 N.W.2d 598 (citing State v. Ziedonis, 2005 WI App. 249, ¶15, 287 Wis. 2d 831). Whether the actions of police constitute a constitutional violation is a question of constitutional fact reviewed independently by the appellate courts. Kramer, 2009 WI 14, ¶16. Thus, the appellate courts independently review, "whether an officer's community caretaker function satisfies the requirements of the Fourth Amendment and Article I, section 11 of the federal and state constitutions." Id.

B. The Community Caretaker Test.

The Wisconsin Supreme Court recently addressed the community caretaker doctrine in relation to vehicle seizures in the case of State v. Kramer, explicitly adopting the 3 part "Anderson I" test utilized in State v. Kelsey C.R., 2001 WI 54, ¶35 243 Wis. 2d 422, 626 N.W.2d 777. Kramer, 2009 WI 14, ¶21, fn. 8. In order to evaluate the constitutionality of a seizure of a person under the community caretaker doctrine, the trial court must determine:

> (1) that a seizure within the meaning of the *fourth amendment* has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.

Id. at ¶21 (quoting State v. Anderson, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987), rev'd on other grounds, 155 Wis. 2d 77, 454 N.W.2d 763 (1990)).

Courts must evaluate whether police action constitutes a bona fide community caretaker action under the totality of the circumstances. Kramer, 2009 WI 14, ¶30. Accordingly, "when under the totality of the circumstances an objectively reasonable basis for a community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns," rather the officer's subjective intent is one factor that may be considered in the totality of circumstances. Id. at ¶30-31. The Court in Kramer concluded that, "if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the

community caretaker function, [the officer] has met the standard of acting as a bona fide community caretaker." Id. at ¶36.

The third part of the community caretaker test is a balancing test which requires consideration of four factors set out in Kelsey C.R.:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability of alternatives to the type of intrusion actually accomplished.

Kramer, 2009 WI 14, ¶41 (citations omitted).

i. The Appellant Was Seized When Deputy Vande Burgt Conducted a Traffic Stop of His Vehicle.

The first step of a community caretaker analysis is to determine whether a seizure has occurred. When Deputy Vande Burgt activated his lights and the appellant submitted to this show of authority, the appellant was seized within the meaning of the 4th Amendment. State v. Young, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729; California v. Hodari D., 499 U.S. 621 (1991).

ii. Law Enforcement Was Initially Engaged in a Bona Fide Community Caretaker Action.

The appellant does not dispute that law enforcement's initial motivation to make contact with the appellant was to check on his welfare.

iii. Application of the Balancing Test.

The third prong of the test adopted in Kramer does not justify the Appellant's seizure in this case even if law enforcement was intending to act in

community caretaker capacity. The circumstances of the present case present a lesser public interest and possible exigency than those addressed in Kramer and the readily available alternatives to the seizure to achieve a community caretaker objective had already been employed and rendered the Appellant's seizure unreasonable.

a. The Degree of Public Interest and the Exigency of the Situation.

There are competing interests involved with the seizure of an individual in a motor vehicle. The public has a substantial interest in the prevention of suicide. State v. Horngren, 238 Wis. 2d 347, 354, 617 N.W.2d 508 (Ct. App. 2000). However, individual members of the public have an interest in "security free from the arbitrary interference by law officers." United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975); U.S. Const. amend. IV. This "inestimable" individual interest in and right to security from government intrusion "belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." Terry v. Ohio, 392 U.S. 1, 8-9, 88 S. Ct. 1868; 20 L. Ed. 2d 889 (1968). "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Id., at 9 (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

The selective interference with an individual's freedom of movement

inherent in the seizure of a motorist is not only inconvenient and time consuming, but also entails a risk of creating "substantial anxiety," Delaware v. Prouse, 440 U.S. 648, 657 (1979). Such selective seizures are more intrusive than a general stop of all vehicles at a given location. See United States v. Martinez-Fuerte, 428 U.S. 543, 558, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976).

The Court of Appeals' decision in Horngren reveals that this public interest only arises under and overrides the individual interest in privacy from government intrusion in circumstances where there is a reasonable and objective basis for an officer's belief that such assistance is required. The officers in Horngren were responding to a call of a suicide threat at a residence. The officers were aware that Horngren had previously made two suicide attempts which had resulted in a civil commitment, and were also aware that several firearms had previously been confiscated from Horngren and subsequently returned. Horngren, 238 Wis. 2d at 355. When they responded to the residence, they observed a naked and agitated individual running towards the door. Id. at 354. In short, they were presented with an individual with a known history of carrying out suicide attempts, possibly in possession of dangerous weapons, in a visibly unstable condition. In contrast, the appellant had no known history of suicide attempts. There was no reason to believe that he was in possession of a weapon or any other instrumentality particularly suitable for carrying out a suicide attempt, and when officers did make contact with him, there was no indication that he was in any way unstable. Instead,

Vande Burgt had been told that the appellant's parents did not believe him to be suicidal and was further informed that contact had been made with the appellant and the appellant denied that he was suicidal or even intoxicated. There was no report of slurred speech, incoherence or other observations suggesting agitation or otherwise disorganized behavior. The exigencies that justified the officers' actions in Horngren were simply and manifestly absent in the present case.

b. Attendant Circumstances Surrounding the Seizure.

The attendant circumstances surrounding the seizure in this matter do not support the seizure of the appellant. The appellant had been contacted by law enforcement and by the time he was seized at nearly 2:00 a.m. had made it entirely plain that he was not suicidal, was not in need of assistance, and most importandly, was not interested in having contact with officers, as is his right. The appellant had already indicated that law enforcement could contact him the next day. Yet a search that had lasted for over an hour continued and culminated in the appellant being detained in a traffic stop with no reason to believe he was violating any law. These actions were excessive and unreasonable under the circumstances.

c. Whether an Automobile Was Involved.

To the extent that the appellant was in a motor vehicle when he was detained, he did have a lesser expectation of privacy than a person would expect in their home. Nevertheless, it is well recognized that traffic stop is a "major interference in the lives of the [vehicle's] occupant," Coolidge v. New Hampshire,

403 U.S. 443, 479 (1971), which is "subject to the constitutional reasonableness requirement." Whren v. United States, 517 U.S. 806, 809-10 (1996).

d. The Feasibility and Availability of Alternatives.

Not only could law enforcement have feasibly, effectively and quickly carried out the objectives of any community caretaker by alternative means short of a traffic stop, they actually did so. By the time the appellant was seized, officers had spoken with him twice and his parents once and all of these contacts contradicted Ms. Newcomber's belief that the appellant was suicidal and in need of assistance.

In Horngren, the Court did consider the availability and feasibility of alternatives, including making telephone contact. The Court stated:

> Horngren suggested that the police could have telephoned before entering, or they could have knocked and announced themselves. While there were a number of less intrusive alternatives available,those less intrusive means, under the circumstances in this case, were simply not feasible.
>
> Horngren had made two previous suicide attempts, which resulted in his commitment. He had access to deadly weapons. The police did not know whether he was alone. Phoning to alert Horngren that the police were coming would have been counterproductive. The time before the police arrived may have provided him with sufficient time to carry out his threat, or given him the extra push needed to accomplish his threat, in order to avoid a third commitment. Further, as pointed out by the trial court, an individual threatening suicide is "under great stress and rather overwhelmingly unstable." Given that state of mind, a warning that police were on their way to offer assistance was not a reasonable alternative.
>
> Further, other suggestions, such as knocking at the door, were thwarted when the door popped open and the struggle ensued. If Horngren's door had been tightly closed and locked, the police officers would have faced a different decision. Here, that circumstance did not confront the police. The door was not locked or tightly closed. By slightly leaning on the door, the officer popped it open, which resulted in Horngren rushing to close it. At that point, the split-second decision the officer made to use force to open the door cannot be deemed unreasonable. We conclude that the balancing test tips in favor of police action.

Horngren, 238 Wis. 2d at 354-55

The facts of the present case did not hamper officers with the limited options available in Horngren. If there was any concern that making telephone contact would exacerbate the situation and potentially put the appellant at greater risk, that concern became moot when officer actually did make contact with the appellant. By the time the appellant was seized, he had spoken with officers more than once and had repeatedly attempted to assure them that he was not suicidal and not in need of assistance. And unlike in Horngren, events did not unfold at such a rapid pace that officers had little choice but to act immediately. Instead, the chain of events lasted for well over an hour, involved multiple phone contacts with the appellant and his parents, all of whom denied that the appellant was suicidal.

Moreover, it is unclear what purpose seizing the appellant would achieve after all of the above had already occurred. In continuing to pursue the appellant despite the multiple phone contacts, it is implicit that in-person contact must somehow be more effective at achieving the community caretaker goals than phone contact. Presumably the intention was to speak with the appellant once he was detained, yet the appellant had already spoken with officers more than once. Whatever minimal increase in effectiveness this may have yielded was not sufficient to justify seizing the appellant.

II. CONCLUSION

Certainly the community caretaker function of law enforcement officers

holds a valuable position in the array of activities with which officers are tasked. However, when executing that function entails a warrantless seizure of a citizen, it is the burden of law enforcement to demonstrate that the activity does not violate the requirements of the Fourth Amendment and Article I, section 11 of the federal and state constitutions. The State has not carried that burden in this case. It is unreasonable to impose upon an individual's liberty and privacy interests under the rationale of a community caretaking role where there are not reasonable, objective grounds for believing that the need for such assistance is more than a mere possibility or where the objectives of the caretaker role maybe effectively short of such an intrusion. In this case, not only were there alternatives, those alternatives were effectively utilized and any exigency which may have initially warranted a seizure had dissipated by the time the appellant was actually seized. For these and the reasons stated above, the conviction of the appellant must be reversed and this action remanded to the trial court with directions to grant the appellant's Motion to Suppress.

Dated at Middleton, Wisconsin, April 28, 2014.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 100 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and 60 characters per line. I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief. The length of the brief is 3287 words.

_____

JOHN C. ORTH