STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2013AP2743

DANE COUNTY,

Plaintiff-Respondent,

vs.

JOSHUA H QUISLING,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH #16, THE HONORABLE RHONDA L. LANFORD, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED **PAGE(S)**

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Dane County does not request oral argument or publication. This case involves only the application of established principles of law to the particular facts presented.

ISSUES PRESENTED

1. Did police validly act under the community caretaker function when they stopped Joshua Quisling's vehicle after a friend of Quisling reported to police that Quisling was threatening to commit suicide by driving his vehicle into oncoming traffic, that Quisling was intoxicated, and where Quisling had first informed police that he would wait for police at a bar, but was not found at that location and only later informed police that he did not want to have police contact.

The Circuit Court Answered: Yes.

I. STATEMENT OF THE CASE

In this case, Joshua Quisling appeals his conviction for operating a motor vehicle while intoxicated as a first offense. Specifically, Quisling claims that police unlawfully seized him without a warrant and that the Circuit Court erred by denying his motion to suppress evidence. Def. Br. at 5. The Circuit Court held that police did not violate Quisling's constitutional rights because police reasonably stopped the vehicle that Quisling was driving pursuant to the "community caretaker exception". (22:63).

At the Suppression hearing, Deputy John Vande Burgt of the Dane County Sheriff's Department was the sole witness and his testimony was uncontroverted. (22). Vande Burgt testified that on October 24, 2012, he had been on duty at approximately 12:45 a.m. when dispatch relayed a report that Katherine Newcomber had called to report that she was receiving suicidal text messages from her friend, Joshua Quisling. (22:6-7, 9-10). Dispatch relayed that Quisling was threatening to "end it all after his last bottle." (22:8).

Vande Burgt was assigned as the primary unit for the incident and initially intended to respond to Newcomber's

address to take her statement. (22:9). However, dispatch advised that Newcomber was in contact with Quisling and that she was reporting his location as in the area of 12 and 14 in the City of Middleton. (22:10, 11). Newcomber further reported that Quisling was threatening to "drive his car into oncoming traffic." (22:10). Ms. Newcomber reported that Quisling was "angry" and "intoxicated." (22:10). Based on the updated information from dispatch, Vande Burgt changed course and immediately headed for the area of 12 and 14 in an attempt to locate Quisling. (22:11).

As Vande Burgt was traveling to the area and looking for Quisling, he continuously received further updates from Dispatch and other police officers. (22:12-13). In one of these updates, Vande Burgt heard that a deputy had made phone contact with Quisling. (22:12-13). During this initial phone contact, Quisling reported that he was at a downtown Madison bar and that he would stay there and wait for police. (22:12, 13). However, later, dispatch relayed that a deputy had reported to the downtown Madison bar and that Quisling was not found at that location. (22:15).

Deputy Chis Moore advised Vande Burgt via radio that Quisling was not at his home address. (22:12). Deputy

Moore had gone to that address and had been in contact with Quisling's mother who lived there with Quisling. (22:12). Deputy Moore reported that Quisling's mother did not believe that Quisling was suicidal. (22:12). Deputy Moore also provided information that Quisling may be driving a black Cadillac, and Vande Burgt received a license plate number associated with that vehicle. (22:13).

Also during this time, Sergeant Jay Heil asked dispatch to "ping" Quisling's cell phone to determine Quisling's approximate location. (22:13-14). A dispatch supervisor aired that the ping was successful and that the approximate location of the phone was 1313 John Q. Hammons Drive, approximately half a mile from the area of 12 and 14. (22:14). Vande Burgt went to that area but did not find a vehicle matching the information he had received. (22:15).

After Vande Burgt heard that Quisling had not been found at the downtown bar where he was supposedly waiting, dispatch conveyed that another deputy had again made phone contact with Quisling. (22:15-16). During this second call, Quisling indicated that he was not suicidal, that he was not intoxicated, and that he was not driving. (22:15-16).

Vande Burgt testified that he "did not take [Quisling's] statements as truth – as truthful" because he had not been found waiting at the downtown bar as he had initially told police that he would be. (22:17). Vande Burgt testified that

> Based on my training and experience, individuals who are under the influence of an intoxicating beverage, make suicidal statements and have a plan to carry out that act can be dangerous to themselves and others, and it was my obligation to check on Mr. Quisling's welfare.

(22:16). Vande Burgt further testified that he believed that this obligation required "[i]n person" contact. (22:16).

At approximately 1:54 am, while he was still looking for Quisling, Vande Burgt observed a black, dark colored sedan travelling westbound on Greenway Boulevard. (22:17-18). Vande Burgt caught up to the vehicle and determined that the license plate matched the license plate that had previously been aired by dispatch as being associated with Quisling. (22:18). Vande Burgt immediately initiated a traffic stop on this vehicle "to check Mr. Quisling's welfare due to the suicidal statements and the possible mental state he was in." (22:18). Vande Burgt did not draw a weapon. (22:18-19).

ARGUMENT

I. Constitutional Principles

Article I, Section 11 of the Wisconsin Constitution and the Fourth Amendment to the United States Constitution prohibit unreasonable searches and seizures.
The contours of these sections have typically been interpreted as equivalent by the Wisconsin Supreme Court, and expressly so when evaluating police acting in the "community caretaker" function. State v. Kramer, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598.

II. Standard of review

The Circuit Court's findings of historical fact are reviewed only for clear error. State v. Pinkard, 2010 WI 81, ¶ 12, 327 Wis. 2d 346, 785 N.W.2d 592. The application of those facts to the constitutional standard presented is reviewed independently of the Circuit Court. Id.

III. Deputy Vande Burgt did not violate Quisling's rights because he reasonably seized Quisling pursuant to a bona fide community caretaker function, and because, at that moment, the public's interests and needs outweighed Quisling's.

The Wisconsin Supreme Court has recognized that some warrantless seizures are constitutionally reasonable, even

absent probable cause or reasonable suspicion, when police are engaged in valid community caretaking functions. State v. Kramer, 315 Wis. 2d 414, ¶ 17. Recently, the Wisconsin Supreme Court stated that

> the nature of a police officer's work is multifaceted. An officer is charged with enforcing the law, but he or she also serves as a necessary community caretaker when the officer discovers a member of the public who is in need of assistance.

State v. Kramer, 315 Wis. 2d 414, ¶ 32.

The test to determine what police actions are thus justified consists of three prongs:

> (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.

State v. Kramer, 315 Wis. 2d 414, ¶ 21. In applying the three part test to evaluate police conduct, the Court "looks at 'the totality of the circumstances as they existed at the time of the police conduct.'" State v. Gracia, 2013 WI 15, ¶ 14, 345 Wis. 2d 488, 826 N.W.2d 87; (quoting State v. Kramer, 315 Wis. 2d 414, ¶ 30).

A. The parties agree that Quisling was seized when Deputy Vande Burgt conducted a traffic stop.

"The stop of an automobile by law enforcement constitutes a seizure of the vehicle, as well as its occupants." State v. Brereton, 2013 WI 17, ¶ 24, 345 Wis. 2d 563, 826 N.W.2d 369, cert. denied, 134 S. Ct. 93, (U.S. 2013); Whren v. United States, 517 U.S. 806, 809, 116 S. Ct. 1769, 1772, (1996). Therefore, Vande Burgt seized the Defendant for the purposes of the Constitutional question presented here when he initiated a traffic stop of Quisling's vehicle. (22:18).

B. Deputy Vande Burgt was engaged in bona fide community caretaker activity.

The Wisconsin Supreme Court employs an objective test to determine whether an officer is acting as a bona fide community caretaker. State v. Kramer, 315 Wis. 2d 414, ¶ 36. This standard is met when there exists an objectively reasonable basis to believe that there is a member of the public who is in need of assistance. State v. Maddix, 2013 WI App 64, ¶ 20, 348 Wis. 2d 179, 831 N.W.2d 778. A court may also consider an officer's subjective intent as a relevant factor in evaluating whether the officer was

acting as a bona fide community caretaker. State v. Kramer, 315 Wis. 2d 414, ¶ 36.

At first blush, Quisling concedes that police were engaged in a bona fide community caretaker function. Def. Br. at 7. However, later, Quisling asserts that police lacked a "reasonable and objective" basis to believe that Quisling required assistance when they stopped his vehicle. Def. Br. at 8. This inconsistency muddles the question and therefore requires further attention. To that end, it is useful to examine several cases in which courts have found objectively reasonable bases for action. This review dispels Quisling's contention that Vande Burgt lacked the necessary basis to act as a bona fide community caretaker.

In State v. Gracia, the Wisconsin Supreme Court held that police were acting in a bona fide community caretaker role when they entered a home and locked bedroom to determine if an individual had been injured in a car crash. State v. Gracia, 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87. The Defendant had locked himself in a bedroom and shouted "go away." Id. at ¶ 8. In finding that Police had an objectively reasonable basis for believing that the Defendant needed medical attention, the Court noted that the Defendant's vehicle had extensive damage from an

apparent crash. Id. at ¶ 21. Further, police consistently articulated their concern for the Defendant's medical condition as the motive behind their entry. Id. The conduct of the Defendant's brother, who allowed police into the home and even broke open the bedroom door, further gave credence to the possibility that the Defendant required medical help. Id. at ¶ 8, ¶ 22. Regardless of the Defendant's shouts that police should "go away", the Supreme Court held that information available to police provided an objectively reasonable basis for police to conclude that the Defendant required assistance, in spite of his desire to avoid police. Id. at ¶ 22.

In State v. Pinkard, the Wisconsin Supreme Court again considered the entry of police into an apartment. State v. Pinkard, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592. Police responded to the address after receiving a "reliable anonymous tip" that the occupants appeared to be sleeping near drugs, money and drug paraphernalia and that the back door was open. Id. at ¶ 32. The police officer testified that he was concerned for the occupants. Id. at ¶ 2. The occupants could be seen sleeping from outside the apartment but did not respond to repeated knocking and the loudly announced presence of police. Id. at ¶ 32. The court held

that under those facts and circumstances an officer could "reasonably be concerned that Pinkard and his companion may have overdosed on drugs." Id. at ¶ 35. The Supreme Court further explained that "we heed the Horngren court's caution against 'taking a too-narrow view' in determining whether the community caretaker function is present." Id. at ¶ 33 (quoting State v. Horngren, 238 Wis. 2d 347, 617 N.W.2d 508).

Horngren, itself, is a case of importance. State v. Horngren, 238 Wis. 2d 347, 617 N.W.2d 508. There, Police responded to an apartment after a caller alerted police that an occupant was threatening to commit suicide. Id. at 349. While en route, police learned that the individual had attempted suicide several times before and possibly had access to firearms. Id. Upon arriving, one officer leaned on the front door, whereupon it opened slightly. Id. at 349. Police then observed a naked man rush to the door and attempt to close it. Id. at 350. Police pushed through and entered the apartment despite the nude man's physical resistance. Id. The Court of Appeals held that entry into the apartment was permissible under the community caretaker function and that the reported suicidal individual and

attendant facts raised a bona fide community caretaker role for police. Id. at 353.

In Pinkard, Garcia, and Horngren, police had objectively reasonable bases for action despite contrary information, no information, or even physical resistance from the respective subjects. Similarly the facts here invoke the State's interest in preventing self-inflicted harm; it was objectively reasonable for police to decide that Quisling may have been in need of immediate assistance.

In denying Quisling motion to suppress evidence, the Circuit Court in this case began by explicitly weighing the reliability of the information being supplied by Newcomber:

> Here we had an informant who identified herself—had a relationship with the defendant, including knowledge about previous suicidal statements, gave her address and phone number to police officers, and updated the police officers about repeated texts and conversations or communications she was having with the defendant. She also was very specific, talking about where the defendant was in traffic and a lot of her information was actually confirmed during the investigation.

(22:60). Without explicitly stating so, it appears that the Court found this information to be a reliable report and indeed, the report bears reasonable indicia of

reliability. See, State v. Rutzinski, 2001 WI 22, ¶ 18, 241 Wis. 2d 729, 623 N.W.2d 516.

It is also apparent that Newcomber genuinely feared for Quisling's safety when she first contacted police to report that Quisling had sent text messages that threatened suicide. (22:7). Moreover, Newcomber continued to provide police with updated information and, therefore, further give credence to the belief that Quisling may harm himself. (22:60).

Quisling ultimately argues that "any exigency which may have initially warranted a seizure had dissipated." Def. Br. at 13. In doing so, Quisling suggests that the passage of an hour and Quisling's denial of suicidal ideations fatally undermines Vande Burgt's decision to conduct the traffic stop at issue. Def. Br. at 12. The record in this case establishes otherwise.

Neither the passage of an hour nor Quisling's phone contacts with police dissipated the basis for community caretaker activity here. First, though slightly more than an hour had passed since Newcomber's first reports to police and the eventual traffic stop conducted by Vande Burgt, during that period it is clear that Vande Burgt and other officers were continuously engaged in efforts to

locate and contact Quisling. (22:17). Next, when contrasted with the reliability of Newcomber's reports, Quisling's contact with police lacked reliability, and, in the context of the events, could be seen as intended to give Quisling the opportunity to carry out his suicidal plan. Indeed, the Circuit Court expressly considered this possibility. (22:62).

C. Under the totality of the circumstances as they existed at the time of the seizure, the public interest and need outweighed Quisling's right to privacy.

In resolving the question presented in this case, the Court must balance the public's need and interest against Quisling's individual rights in the third step of the Community caretaker test. In balancing these competing interests, the Wisconsin Supreme Court has noted that "[t]he stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable." State v. Kramer, 315 Wis. 2d 414, ¶ 41.

According to the Wisconsin Supreme Court, four factors must be considered at this step:

> (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, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

State v. Kramer, 315 Wis. 2d 414, ¶ 41. No single factor is determinative. State v. Gracia, 345 Wis.2d 488, ¶ 23.

i. The high degree of public interest and exigency of the situation factored in favor of the stop initiated by Deputy Vande Burgt.

"Preventing someone from taking his own life is of the utmost of public concern... The exigency of such a situation is obvious. A suicide can occur in a matter of minutes." State v. Horngren, 238 Wis. 2d 347 at ¶ 15. Thus, despite the Defendant's arguments, the first factor weighs in favor of the Vande Burgt's traffic stop.

Adding to the public concern and exigency of this situation, Quisling threatened to commit suicide in a manner that would put other members of the community at risk. Quisling argues that police had "no reason to believe that [Quisling] was in possession of a weapon or any other instrumentality particularly suitable for carrying out a suicide attempt." Def. Br. at 9. But, Police found Quisling behind the wheel of a car, the very instrumentality he had reportedly threatened to use to "end

it all." (22:8, 10). Had Quisling been found walking on the street or at his home, the exigency would not have been as great. However, with Quisling apparently already driving, Vande Burgt was confronted with a situation of grave importance and high exigency.

At this stage of analysis, Quisling argues police did not have a "reasonable and objective basis" to believe that such assistance was required. Def. Br. at 9. As noted previously, these arguments are more properly recast as challenging the bona fide community caretaker activity. See Supra at 11-17.

ii. The attendant circumstances favored the minimal intrusion caused by Deputy Vande Burgt's traffic stop.

Deputy Vande Burgt did not choose the time or the location of interaction with Quisling. Instead, police tried to contact Quisling in public at a mutually agreed upon location, a downtown Madison bar. Quisling indicated that he would be present, but then reneged and later told police that he did not want contact.

Quisling also ventures that a "police search that lasted over an hour" somehow factors against Vande Burgt's decision to stop Quisling. Def. Br. at 10. First, it is crucial to note that only the ultimate traffic stop

constituted a seizure. Quisling does not challenge police efforts prior to that point in this case. Next, to the extent that they are relevant here, the efforts that police undertook to locate Quisling actually factor in favor of the Vande Burgt's decision to conduct a traffic stop as they demonstrate that police explored less intrusive alternatives without success. Undoubtedly, a lengthy passage of time could reduce or dissipate police concerns. That is not the case here, however, as police were continuously actively seeking an individual that posed a risk to himself and others. (22:17).

It is true that a seizure occurred at the moment of the traffic stop. However, Vande Burgt employed the lowest level of force and authority that would allow him to make contact in that context. Vande Burgt activated his emergency lights and approached the vehicle to make contact with the driver. (22:18). Vande Burgt did not draw a weapon. (22:18-19). Under these circumstances, where the defendant was threatening to commit suicide with a vehicle, and where a vehicle associated with the Defendant was found in an area in which the defendant is reported to be, the stop was reasonably conducted.

iii. Quisling had a diminished right to privacy because a vehicle was involved here.

As Quisling correctly identifies, because a vehicle was involved here, Quisling had a lesser expectation of privacy. Def. Br. at 10; State v. Anderson, 142 Wis. 2d 162, 171, fn. 4. 417 N.W.2d 411, (Ct. App. 1987). This factor also favors the traffic stop initiated by Vande Burgt. Moreover, this factor further favors the traffic stop because the automobile in question was the very instrumentality Quisling had reportedly threatened to use to kill himself. (22: 8, 10).

iv. Alternatives to the traffic stop initiated by Vande Burgt were not feasible and actually proved to be ineffective.

The Fourth and final factor to consider when balancing the benefits of the traffic stop against Quisling's interests also supports Vande Burgt's decision to initiate a traffic stop. By the time that Vande Burgt encountered Quisling's vehicle, Quisling had already apparently misled police about his location and willingness to make contact. (22:17). What's more, Quisling was apparently behind the wheel of the very instrument that he was reportedly threatening to use to end his life. (22:8, 10).

Quisling argues that police had already effectively used alternative measures to rule out the possibility that Quisling posed a risk to himself. Def. Br. at 12. In fact, the opposite is true. Quisling's first phone contact with police proved fruitless as he apparently either misled police about his location, or reneged on his agreement to wait for police at that location. (22:17). Quisling suggests that police should thereafter have taken him at his word, without further verification. Def. Br. at 12. This, as the trial court noted, "could be seen, given the totality of the circumstances, as just an effort to push off police officers so he could do something potentially fatal to himself and other people as well." (22:62).

Quisling also argues that the traffic stop initiated by Vande Burgt provided no additional value. Def. Br. at 12. Not so. In this situation, in person contact would have given Police a chance to evaluate the Quisling's demeanor and determine whether he was indeed under the influence of alcohol or another drug. Perhaps most importantly, unlike further phone calls, personal contact would allow police to intervene and forestall imminent self-harm if Quisling attempted to carry out his suicidal threats.

CONCLUSION

For the reasons above, the State respectfully requests that the Court deny Quisling's appeal and, instead, affirm the conviction.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

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Dane County, Wisconsin

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