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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2013AP2743

DANE COUNTY,

Plaintiff-Respondent,

vs.

JOSHUA H. QUISLING,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Respectfully submitted,

JOSHUA H. QUISLING,
Defendant-Appellant

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ARGUMENT

I. THE APPELLANT'S SEIZURE WAS NOT JUSTIFIED BY THE COMMUNITY CARETAKER DOCTRINE.

A. Seizure

The respondent correctly notes that the parties are in agreement that a seizure had occurred at the time the appellant's vehicle was stopped.

B. While law enforcement was initially engaged in a bona fide community caretaker activity, the grounds for such activity were no longer present when the seizure occurred.

The respondent further correctly notes that the appellant has conceded that law enforcement was initially engaged in a valid community caretaker function when seeking the appellant out based on information provided to dispatch. However, by the time the actual seizure had occurred, the reasonableness of any belief that the appellant was in need of assistance had dissipated. Counsel for the appellant views this change of circumstances between the initiation of the pursuit of the appellant and the time of the seizure more as a questions of exigencies existing at the time of the seizure and the feasibility and availability of alternatives to a seizure, but taking the respondent's approach, the result is the same. There was no reasonable or objective reason to believe that a community caretaker intervention was needed when that seizure actually occurred.

The respondent cites several cases in support of the proposition that this type of activity has previously been endorsed by Wisconsin's appellate courts. In State v. Garcia, 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87, the Supreme Court found sufficient grounds to enter a locked bedroom within a home (after having been given consent to enter the home by another occupant) to check on a driver whose vehicle had suffered extensive damage in an apparent crash, despite the driving telling law enforcement to "go away." The similarity to the

present case is dim at best and offers little guidance. In Garcia, at the time of the seizure, police were confronted with compelling evidence of a significant crash that would yield a reasonable belief that injury to an occupant of the vehicle would be a strong possibility. There is nothing remotely analogous to this critical factor in the Appellant's case. Moreover, Garcia shouting "go away" is hardly comparable to the multiple telephone conversations between the appellant, his parents, and law enforcement that occurred over a period of well over an hour.

In State v. Pinkard, 2010 WI 81, 328 Wis. 2d 346, 785 N.W.2d 592, police entered a home based on a tip that that the occupants appeared to be sleeping next to cocaine, money and a digital scale. When police arrived the occupants did not respond to repeated knocking. When officers entered, two individuals who appeared to be sleeping were observed in a bedroom. When officers entered that bedroom, contraband was observed in plain sight. As in Garcia, the information provided to law enforcement pointed to the possibility of some dangerous event having already occurred. This information caused officers to be reasonably concerned that the occupants of the residence may have been victims of a crime, or may have overdosed, given the presence of drugs. Unlike in both Garcia and Pinkard, law enforcement in the present case had no information whatsoever to believe that any event requiring assistance had already occurred. Moreover, Pinkard and his guest were unresponsive to

law enforcement's attempts to rouse them for the purpose of confirming their welfare. On the contrary, law enforcement in the present case had on multiple occasions made contact with the appellant and his family to confirm his welfare.

The plaintiff also likens these circumstances to those present in State v. Horngren, 238 Wis. 2d 347, 617 N.W.2d 508. As the appellant has previously addressed, beyond the fact that both cases deal with an alleged suicide threat, there is very little similarity:

> "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."

Appellant's brief, p. 9-10.

While the officers may have possessed grounds for a legitimate community caretaker activity when first addressing this situation, by the time the seizure occurred, there was no longer an objective and reasonable basis to believe that the appellant was in need of assistance. The case law cited by the petitioner support this conclusion.

C. Balancing test

The petitioner has failed to establish that the public need and interest outweigh the intrusion upon the privacy of the individual under the applicable four part balancing test. State v. Anderson, 142 Wis. 2d 162, 169-70, 417 N.W.2d 411 (Ct. App. 1987).

i. Exigency

The appellant acknowledges that a threat of suicide may constitute an exigency sufficient to justify a warrantless seizure. Of course, the critical question is what was the level of exigency present at the time of the seizure? As the appellant has previously addressed, the exigency that initially may have justified seizing the appellant had long since dissipated by the time the seizure occurred. The respondent suggests that the appellant's operation of a motor vehicle elevates the level of exigency in a manner similar to the possible presence of firearms in Horngren. The comparison of a motor vehicle, a ubiquitous tool used for countless routine reasons in everyday life, to the firearm that officers knew had been confiscated from and returned to an individual such as Horngren, who had been committed due to previous suicide attempts, is inapt. In Horngren, officers were confronted by a naked and agitated individual with a known history of carrying out suicide attempts, possibly in possession of dangerous weapons, in a visibly unstable condition. Beyond that, the totality of the circumstances, in particular the

multiple contacts with the appellant and his family, plainly reveal a greatly diminished exigeny.

ii. Circumstances surrounding the seizure

The respondent suggests that the actions taken by Deputy Vande Burgt and the duration of the search for the appellant cuts in favor of the reasonableness of the actions taken in seizing the appellant. Specifically, the respondent argues that these factors "demonstrate that police explored less intrusive alternatives without success." This is not so. The police did in fact employ less intrusive means and did so successfully. To suggest that the appellant essentially declining the functional equivalent of a seizure, i.e., consenting to law enforcement contact he did not wish to have, justifies the seizure that ultimately occurred is circular and faulty reasoning.

iii. Whether an Automobile was involved

The respondent correctly notes that the appellant agrees that 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. But again, it is still true that that law views a traffic stop as "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). And at the inception of this

investigation, the appellant would agree that the presence of an automobile might have weighed in favor of the seizure, but by the time the seizure occurred, that concern was vastly diminished.

iv. The availability of alternatives to the type of intrusion that actually occurred.

The appellant has already discussed the successful employment of alternatives and for the sake of economy will not restate what has already been addressed. However, it is worth noting that in the respondent's view, it would appear that nothing short of a seizure would be sufficient. A review of Horngren, as the appellant has done in his previous brief, shows this to be an unreasonable view of the law regarding the employment of alternatives to a seizure in this type of case.

II. Conclusion

For the above reasons, and the reasons stated in the appellant's brief-in-chief, the appellant respectfully requests that this Court remand this matter to the trial court with directions to grant the defendant's Motion to Suppress.

Dated at Middleton, Wisconsin, August 12, 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. The length of the brief is 1421 words. I further certify that the text of the electronically filed brief is identical to that of this brief.

_____

JOHN C. ORTH