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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 14AP2199-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUAN FRANCISCO ROSAS VIVAR,

Defendant-Appellant.

On Appeal From the Denial of a Pretrial Motion to Suppress Evidence and the Judgment of Conviction Entered in the Jefferson County Circuit Court, the Honorable Jennifer L. Weston, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

Did the court err in denying Mr. Rosas-Vivar's motion to suppress evidence based on an illegal stop?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Rosas-Vivar does not request oral argument. This is a one-judge appeal under Wis. Stat. §§ 753.31(2) and (3); therefore, Wis. Stat. § 809.23(4)(b) prohibits a request for publication.

STATEMENT OF THE CASE

The state charged Mr. Rosas-Vivar with operating while intoxicated-2nd offense, contrary to Wis. Stats. §§ 346.63(1)(a) and 346.65(2)(am)2, and operating with a prohibited alcohol concentration, 2nd offense, contrary to Wis. Stats. §§ 346.63(1)(b) and 346.65(2)(am)(2). (1:1). In an amended complaint the state added an additional charge of operating while revoked, contrary to Wis. Stats. §§ 343.44(1)(b) and 343.44(2)(ar)2. (4:2).

According to the complaint, Officer Rupprecht responded to a call for service from a trailer park in Waterloo, WI. En route to the caller's address, the officer observed a car leaving the trailer park. (4:2). The car was a red Pontiac with a black hood and had a single male occupant. (4:2).

At the residence, the caller, Ms. Peralta told the officer that her ex-husband, Mr. Rosas-Vivar had been knocking at her door to try and discuss a vehicle. (4:2). She also told the officer that the car he saw leaving was Mr. Rosas-Vivar's. (4:2). According to the complaint, Ms. Peralta told Mr. Rosas-Vivar to leave because it was too late to talk. (4:2). The complaint also states that Ms. Peralta expressed concern that

Mr. Rosas-Vivar had been drinking and was driving, and that she did not know whether their son was in the car. (4:2). She provided the officer with Mr. Rosas-Vivar's address. (4:2).

The officer then drove to Mr. Rosas-Vivar's address and observed him walking away from the same vehicle he saw earlier. (4:2). The officer confirmed Mr. Rosas-Vivar's identification by asking for ID. (4:2). According to the complaint, Mr. Rosas-Vivar told the officer that he had been at his ex-wife's house and that it was him that the officer had observed driving. (4:2).

While talking to Mr. Rosas-Vivar, the officer smelled the odor of intoxicants, observed bloodshot eyes, and Mr. Rosas-Vivar admitted to drinking. (4:2-3). Subsequently, field sobriety tests were administered, which Mr. Rosas-Vivar did not pass. (4:3). The complaint asserted that his driving privileges had been revoked in 2009 following a first OWI offense. (4:3).

Mr. Rosas-Vivar filed a pre-trial motion to suppress the evidence obtained as a result of the illegal stop. (8). Following a hearing, the court denied the motion. (24:44). The court denied a subsequent motion to reconsider. [1](9). Defense counsel filed another motion for reconsideration at the plea hearing, which the court denied. (12; 35, 10, App. 160). Mr. Rosas entered a plea to operating while intoxicated, 2nd offense. (35:15). The court sentenced Mr. Rosas-Vivar to fifteen days of jail with privileges for Huber release, as well as a $350 fine, court costs and the DNA surcharge. (35:17-18). The court also ordered a 12-month driver's license suspension, the ignition interlock device and an alcohol assessment. (35:20). The court stayed the entire judgment pending appeal. (35:20).

[1] The first motion for reconsideration included a challenge to the administration of field sobriety tests. Mr. Rosas-Vivar is not challenging that aspect of the motion to suppress. He is only appealing the court's decision as to the original stop.

On June 20, 2014, he filed a postconviction motion related to the DNA surcharge. (20). In a written memorandum and decision, the circuit court granted that motion and vacated the DNA surcharge. (27).

Mr. Rosas-Vivar then filed a timely notice of appeal regarding already preserved issues. (29).

STATEMENT OF THE FACTS RELATED TO THE SUPPRESSION OF EVIDENCE

On December 6, 2013 the court held a hearing on Mr. Rosas-Vivar's motion to suppress evidence as a result of an illegal stop. Officer Rupprecht and Mr. Rosas-Vivar testified.

Officer Rupprecht, who had been working as a police officer for under a year, responded to a female caller on the night of October 11, 2013. (34:4-6; App. 104-106). En route to the caller's address he observed a red Pontiac with a black hood. (34:8; App. 108). He did not see any erratic driving, speeding, or otherwise bad driving. (34:17; App. 117). The strength of both the streetlights and the headlights of his squad car allowed the officer to faintly see the face of the male driver and that he was the sole occupant. (34:8; App. 108).

Officer Rupprecht testified that he arrived at the residence and had contact with Ms. Peralta. (34:8; App. 108). She complained that her ex-husband, Mr. Rosas-Vivar, had knocked on her door to talk about a vehicle and she did not want to talk because it was too late at night. (34: 9, App. 109). Ms. Peralta also told the officer that she told Mr. Rosas-Vivar that it was too late and that they would talk another time. (34:17; App. 117). Mr. Rosas-Vivar apparently complied with Ms. Peralta's request and left without incident. (34:17; App. 117). There was also no report of him being loud, abusive or otherwise disruptive in any way. (34:17, App. 117).

Ms. Peralta complained to Officer Rupprecht that the visit from Mr. Rosas-Vivar woke her up and bothered her because it was late and that she believed he had been drinking. (34:9, App. 109). Ms. Peralta told the officer that she partially opened her door to see who was knocking and that through that partial opening she was able to smell alcohol. (34:11, App. 111). She further told the officer she was concerned that her son was in the car. (34:10, App. 110).

She provided a description of Mr. Rosas-Vivar's vehicle, which the officer concluded was the same vehicle he observed while on his way to the residence. (34:11, App. 111). According to the his report, which was introduced into evidence, the son was fourteen years old and the officer informed Ms. Peralta that he observed Mr. Rosas-Vivar's car on the way to the call and that there was just a single male in it. (Envelope, Defendant's Exhibit 1; App. 161).

The officer ascertained that Mr. Rosas-Vivar lived nearby, and obtained his phone number. (34:12, 18-19; App. 112, 118-119). After he left Ms. Peralta's house, he went to look for Mr. Rosas-Vviar "to make contact with him in reference to the complaint." (34:12; App. 112). He planned to advise Mr. Rosas-Vivar, who had left at Ms. Peralta's request, that she did not want him at her door so late at night. (34:12; App. 112).

The officer drove to where Mr. Rosas-Vivar lived and stopped his squad at the entrance the apartments. (34: 20; App. 120). The officer saw the same car he had seen earlier. (34:12; App. 112). The officer was alone, in uniform and in his marked squad car, but the squad lights were not activated. (34:12-13; App.112-113). Mr. Rosas-Vivar saw the officer in his squad and went over and leaned into the passenger side window to talk. (34:13-14; App. 113-114).

The officer clarified that Mr. Rosas-Vivar did not come over to the squad until he called him by name and told him to do so. (34:19-20, 126; App. 119-120, 126). He further

testified that if Mr. Rosas-Vivar had not responded to his first attempt to call him over, he would have continued to try and engage him. (34:20; App. 120). Officer Rupprecht said that Mr. Rosas-Vivar would not have been free to leave or ignore him because he wanted to talk to him. (34:20; App. 120). The officer's tone in telling Mr. Rosas-Vivar to come over to the squad car was authoritative. (34: 26; App. 126). Mr. Rosas-Vivar complied with the officer's command, and once he started talking, the officer smelled alcohol and observed bloodshot eyes. (34:14; App. 114). The investigation changed into an OWI investigation. (34:14; App. 114).

The officer agreed that Mr. Rosas-Vivar, who left without incident when Ms. Peralta told him to, had committed no crime. (34:17; App. 117). The officer also testified that the mere odor of alcohol did not mean that a person is intoxicated. (34:18; App. 118). He stated that when he went to look for Mr. Rosas-Vivar he was doing so to "investigate the—him knocking on the door and to make contact with him in regards to that."(34:18; App. 118). But, the officer also testified that he was investigating a potential drunk driving case. (34:26; App. 126).

When the court questioned Officer Rupprecht, he said that the purpose of going to Mr. Rosas-Vivar's home was to "make contact with him in reference to the initial complaint." (34:29: App. 129). When the court asked why the officer would do that, he stated, "[j]ust to advise him of [Ms.Peralta's] wishes for that evening." (34:29; App. 129). He told the court that he was not going to investigate an OWI. (34:30; App. 130). But he also told the court that he was concerned about the well-being of Ms. Peralta's child and to make sure Mr. Rosas-Vivar was not driving intoxicated with the son in the vehicle. (34:30-31; App. 130-131).

Officer Rupprecht then denied telling Ms. Peralta that he had not seen anyone else in the vehicle. (34:31; App 131). When counsel questioned the officer about his report, which

indicated that he had only seen one person, he stated, "[t]hat I could tell, based on the lighting." (34:31, 131). However, early in direct examination the officer testified that the streetlights and his headlights were illuminating enough to discern that the driver was alone, a male, and to see his a little of his face. (34:8; App. 108). The officer then agreed that he saw just one person in the vehicle. (34:31; App. 131). Finally, the officer testified that he was never investigating a crime and that when he made contact Mr. Rosas-Vivar outside of his home he did not believe he was about to commit a crime nor was he in the process of committing a crime. (34:32; 132).

Mr. Rosas-Vivar testified that the officer told him to go to the officer's squad to talk and that he obeyed. (34:38; 138). Mr. Rosas-Vivar did not feel as though he could ignore the officer and felt obligated to talk to him. (34:38; 138). Mr. Rosas-Vivar, who was using a court interpreter, testified that he understands enough English to know that the officer was telling him to come over to the squad. (34:39-40; 139-140). The officer did not have the lights activated, did not draw a gun, and did not immediately put him in handcuffs. (34:40-41; 140-141).

The defense argued that there was no basis to justify the stop because there was no indication that a crime had been committed, was in the process of being committed, or was about to be committed. (34:42; App. 142). The court denied the motion. It noted that the officer's "intention wasn't to conduct an investigation. (34:43; App. 143). Rather, it was to do what law enforcement officers do when they receive calls and complaints, which is to respond and then take that information and do something with it." (34:43; App. 143). The officer was responding to the complaint that Mr. Rosas-Vivar's ex-wife did not want him at her residence so the officer went to see him to tell him not to do that anymore because it is not appropriate. (34:43; App. 143).

In regards to the fact that Mr. Rosas-Vivar obeyed the officer's request to come to the squad car, the court said, "he may have felt like he had no choice, but it was a voluntary action on his part. No different that getting up out of bed and walking down my stairs and opening the front door to a doorbell."(34:43; App. 143). The court stated that the officer's credibility was "solid" and that he really just intended to talk to Mr. Rosas-Vivar about going to his ex-wife's home at night. (34:44; App. 144). The court stated that the officer was performing a "sort of minor community care-taking function, the goal being to keep the peace and make sure that everybody sort of behaves in an appropriate manner with each other so that things such as disorderly conduct/domestic abuse cases don't arise." (34:44; App. 144).

The court denied the motion because it did not "believe he was engaging in an investigation, and it wasn't a stop, and any action by Mr. Rosas was voluntary on his part, with nothing to suggest that he wasn't free to just walk away if he chose to do that, other than a tone of voice perhaps." (34:44; App. 144).

The state reiterated its argument that this was not a stop, and that it was either a community caretaker or a situation of voluntary contact. (34:45; App. 145).

The court recited its findings of fact:

- Mr. Rosas-Vivar was at his ex-wife's home around 11:30p.m. to talk about a car.
- Ms. Peralta told the officer she that her ex-husband had consumed alcohol.
- Ms. Peralta voiced concern about the well-being of her son.[2]

[2] The court noted that the age of Mr. Rosas-Vivar and Ms. Peralta's son was unknown. The police report, which was admitted into evidence indicates he was 14 at the time. (Envelope, Defense Exhibit, 1; App. 161).

- The officer's observations gave no indicia of either alcohol consumption, or drunk driving.
- The three indicators would be the time of night, the "somewhat unusual behavior" of talking to his ex-wife at that time of night about a vehicle, and the ex-wife's statements that she could smell alcohol.

(34:47-48; App. 147-148). The court then made a finding that those factors "do rise to the level of reasonable suspicion to stop Mr. Rosas to inquire – further inquire about alcohol consumption and possible drunk driving." (34:48; App. 148). The court also stated, "I recognize that they are slim, but I also recognize the legislative purpose of the laws surrounding drunk driving." (34:48; App. 148). The court called those finding peripheral because its ultimate ruling was that no stop occurred. (34: 48; App. 148)

On the day of the plea and sentencing hearing the defense filed another motion for reconsideration. (12). The basis of the motion was to challenge the officer's credibility regarding his testimony that Ms. Peralta told him that she smelled alcohol. (12). At the hearing the court summarized its ruling that what occurred was not a stop, but rather it was a voluntary encounter. (35: 5-9; App. 155-159). The court did not make a factual finding regarding whether or not Ms. Peralta told the officer that Mr. Rosas-Vivar smelled like alcohol. It stated, "I take your affidavit to the extent that it is offered. Again, I just don't think that there was even a stop here." (35: 9; App. 159). The court denied this motion for reconsideration. (35:10; App. 160).

ARGUMENT

I. The Circuit Court Erroneously Denied the Suppression Motion.

A. Introduction and Standard of Review.

The first question presented is whether the officer's actions and Mr. Rosas-Vivar's submission to the order to go over and talk to the officer was a stop within the meaning of the Fourth Amendment. The second question presented is whether the community care taker function justifies the stop. Finally, the third question is whether there was reasonable suspicion to justify the stop.

When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court upholds the trial court's findings of fact unless they are clearly erroneous. ***State v. Washington***, 2005 WI App 123, ¶ 11, 284 Wis. 2d 456, 700 N.W.2d 305. citing ***State v. Eskridge***, 2002 WI App 158, ¶ 9, 256 Wis. 2d 314, 647 N.W.2d 434. However, an appellate court independently determines "whether the facts establish that a search or seizure occurred and, if so, whether it violated constitutional standards." ***Washington***, ¶ 11, citing ***State v. Richardson***, 156 Wis. 2d 128, 137-138, 456 N.W.2d 830 (1990).

B. The officer stopped Mr. Rosas-Vivar within the meaning of the Fourth Amendment.

Citizens are guaranteed the right to be free from unreasonable searches and seizures under both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution. ***Washington***, 284 Wis. 2d 456, ¶ 12. (citing ***Richardson***, 156 Wis. 2d at 137). Wisconsin "consistently follows the United States Supreme Court's 'interpretation of the search and seizure provision of the [F]ourth Amendment in construing the same provision of the state constitution.'" ***Id***.

A seizure under the meaning of the Fourth Amendment requires restraint of movement either by physical force, or by a show of authority. ***Washington***, ¶ 13, citing ***United States v. Mendenhall***, 446 U.S. 544 (1980). Police approaching a person in public and asking if they can ask questions is not a seizure, as long as long as they do not convey a message that compliance is required. ***Florida v. Bostick***, 501 U.S. 429, 434-435 (1991). The test for determining whether an individual is seized within the meaning of the Fourth Amendment is, if in light of the totality of the circumstances surrounding the incident, a reasonable person would not have believed he was free to leave. ***Washington,*** 284, Wis. 2d, 456 ¶ 12***.*** *citing* ***Mendenhall*** at 554. Furthermore, a person must yield to law enforcement's show of authority in order to be seized within the meaning of the Fourth Amendment. ***California v. Hodari D.***, 499 U.S. 621, 626 (1991).

It is undisputed that Mr. Rosas-Vivar obeyed the officer's order to go and talk to him. Therefore, the only inquiry necessary to determine whether he was seized is if under the circumstances there was a show of authority such that a reasonable person would not have felt free to leave. ***Washington***, 284, Wis. 2d 456, ¶ 13; ***Mendenhall***, 446 U.S. 544, 554.

The circuit court found that there was no stop because Mr. Rosas-Vivar spoke with the officer voluntarily. (34:44; App. 144). It found nothing to suggest that he was not free to walk away, other than perhaps the officer's tone. (34:44; App. 144). The circuit court further characterized the encounter as being no different than opening the door when the doorbell rings. (34:43; App. 143).

An order from an officer to do some action, even absent a uniform, flashing lights, a siren, drawn weapons, or physical restraint can be a show of authority. In ***State v. Washington***, plain clothes officers in an unmarked vehicle

responded to a complaint of loitering. ***Id***. ¶ 2. Mr. Washington was walking in front of the house that was the subject of the complaint. ***Id***. The officers recognized him from previous dealings and were aware that he did not live in the area. ***Id***. ¶ 3. Within a few feet of the defendant, the officer ordered him to stop. ***Id***. This Court determined that the officer's order to stop was a show of authority and that because Mr. Washington yielded to that show of authority, he was seized. ***Id***. ¶ 15.

Here, as in ***Washington***, the officer shouted an order at Mr. Rosas-Vivar. In an authoritative tone he ordered him to come to the squad car to speak with him. (34:26; App. 126). There, the officers stepped out of their vehicle and based on their past experiences with the defendant and the complaint they ordered him to stop. ***Washington***, ¶ 2. Just as the officers were specifically ordering him to do something, here, when the officer here called out "Juan", he was making it clear that he was ordering Mr. Rosas-Vivar to do something. The officer was doing so based on the complaint he received from Mr. Rosa-Vivar's ex-wife.

In this case, the officer's authority was even more apparent than in ***Washington*** because he was in uniform and in a marked squad, as opposed to plain clothed in an unmarked car. (34:12-13; App. 112-113). A reasonable person would not believe he was free to leave or to ignore a direct order from a uniformed officer who was calling him by name in an authoritative tone.

Similarly, an order to "stay put" is also a show of authority effecting a seizure within the meaning of the Fourth Amendment. ***In re Kelsey C.R.***, 2001 WI 54, 243 Wis. 2d 422, 626 N.W.2d 777. In that case, two uniformed officers in an unmarked squad noticed a young girl on her own, after dark and in a high-crime area. ***Id***. ¶5. From their vehicle across the street, the officers engaged her in questions as they thought she may be a runaway. ***Id***. Thinking the answers were evasive, one of the officers told the girl to "stay put" so he

could move the car to the other side of the street and ask more questions, but she fled. ***Id***. One of the questions the Court decided was whether or not the officer telling Kelsey to "stay put" invoked her constitutional protections. ***Id***. ¶¶ 11-12.

Although the officer's order to "stay put" was a show of authority, the girl's constitutional protections were not invoked because she fled. ***Id***. ¶¶13-14. The Wisconsin Supreme Court concluded that the officer telling Kelsey to "stay put" was analogous to an officer telling someone to "stop in the name of the law[,]" thereby constituting a stopin within the meaning of the Fourth Amendment. ***Kelsey C.R.***, 243 Wis. 2d 422, ¶ 33. Also analogous is being ordered to "come over" to where an officer's squad car because it signifies that the person must stop what they are doing and yield to the command.. Furthermore, in this case, there is the additional fact the officer's tone was authoritative, which contributes to his show of authority.

The officer here was in uniform and a marked car, which made his authority as law enforcement much more apparent than perhaps in ***Kelsey C.R.*** where the officers were at a distance across the street in an unmarked car. (34:12-13; App. 112-113); Wis. 2d 422, ¶ 5. While he did not have sirens or lights activated, neither did any of the officers in either ***Washington*** or ***KelseyC.R.***. Just as the officer showed authority by telling Kelsey to "stay put" from his vehicle parked across the street, the officer in this case made a similar show of authority from his squad car by authoritatively instructing Mr. Rosas-Vivar to come talk to him. (34:26; App. 126; ***Kelsey C.R.***, 233 Wis. 2d 422, ¶ 5. Here the officer stopped his squad at the entrance to the rental apartments where Mr. Rosas-Vivar lived, which was much closer in proximity than the officer in ***Kelsey C.R.***. (34:20, App. 120).

The defendants in ***Washington*** and ***Kelsey C.R.*** were in public. Here, although in public, the officer's squad was next to the entrance of Mr. Rosa-Vivar's apartment. Such close proximity to the entrance of a person's home further

illustrates that a reasonable person would not feel free to leave or ignore the direct order of an officer who showed up in a squad car outside of their home.

Mr. Rosas-Vivar, a native Spanish-speaker testified that he understood that he should go to the officer and that he was not free to leave or ignore him. (34:38; 138). The officer's tone was authoritative, which the trial court found would have suggested to Mr. Rosas-Vivar that he wasn't free to leave. (34:44; App. 144). This was not simply a voluntary encounter where an officer approaches someone in public as asks questions. The officer did not ask Mr. Rosas-Vivar if he would mind talking to him or in a tone that would suggest doing so was voluntary. Rather, this was a stop within the meaning of the Fourth Amendment because the officer's authoritative tone calling him by name outside of his home conveyed to Mr. Rosas-Vivar that he was required to comply with the officer. *See* ***Florida v. Bostick***, 501 U.S. 429, 434-435 (1991). (police can approach in public and ask questions as long as they do not convey that compliance is required).

Under totality of the circumstances, a reasonable person would not feel free to leave when a uniformed officer in a marked squad car, which is parked next to the entrance of his apartment building, authoritatively calls him by name to come over to the squad car. Therefore, Mr. Rosas-Vivar was seized within the meaning of the Fourth Amendment.

C. The community care-taker exception does not apply.

The circuit court described the officer as performing a "sort of minor community care-taking function, the goal being to keep the peace and make sure that everybody sort of behaves in an appropriate manner with each other so that things such as disorderly conduct/domestic abuse cases don't arise." (34:44; App. 144).

The function of "community caretaker" allows the police to act in situations that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***State v. Anderson***, 142 Wis. 2d 162, 166, 417 N.W.2d 411 (Ct. App. 1987) (internal quotations omitted). However, a seizure that occurs under the function of the community caretaker role of the police must still be reasonable under the Fourth Amendment. ***Id***. at 167-168.

To determine the reasonableness of a seizure under the community caretaker function, the court has to balance "the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen." ***Id***. at 168. This court pronounced a three-step test: 1.) that a seizure for purposes of the Fourth Amendment has occurred, 2.) whether the conduct of the police was a "bona fide community caretaker activity"; and 3.) if the instruction of the privacy of the individual is outweighed by the need of the public. ***Id***. at 169.

Assuming that Mr. Rosas-Vivar was seized within the meaning of the Fourth Amendment, step one is satisfied. The next question is whether the officer's purpose of stopping Mr. Rosas-Vivar was a bona fide action of a community caretaker. Whether or not an action is one of a bona fide community caretaker is determined objectively from the totality of the circumstances. ***State v. Kramer***, 2009 WI 14 ¶ 30, 315 Wis. 2d 414, 759 N.W.2d 598. An officer's subjective fear or belief is one of the factors a court may consider when making that determination. ***Id***. ¶ 36.

For example, in that case, the Court determined that the officer was acting as a bona fide community care taker when he decided that a motorist parked on the side of the road with hazard lights flashing may be in need of assistance. ***Kramer***, 315 Wis. 2d 414, ¶ 37. Although the officer did not know what was going on inside the vehicle, it was reasonable for him to conclude that assistance was needed since that is

what hazard lights typically signify. ***Id***. Moreover, the officer's first interaction with the defendant was to ask him if he needed help. ***Id***.

Similarly, in ***Kelsey C.R***. the Court determined that if there was a seizure at the outset of police questioning, it was justified by the police function of community caretaker. 243 Wis. 2d 422, ¶ 34. There the police approached a young female alone at night in a high crime area because they were concerned she was a runaway. ***Id***. ¶ 5. The defendant conceded that the officers were actions were that of a community caretaker.

Unlike in those situations, here, the officer was not checking on Mr. Rosas-Vivar's well-being. He did not ask if he was ok or tell him that he was checking in on his welfare. There was no indication that Mr. Rosas-Vivar was in any distress or in need of any assistance. There was also no "peace-keeping" that was necessary, as Mr. Rosas-Vivar had left his ex-wife's residence when asked and without incident. (34:29; App.129). The officer had no objective basis for believing assistance was needed. Moreover, his intention of simply telling Mr. Rosas-Vivar not to go to his ex-wife's house so late, should not qualify as a bona fide community caretaker action.

Finally, even if the officer's actions were a bona fide community care taker action, the third step in the analysis cannot be met. For step three, the court must consider four factors:

> (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.

Anderson, 142 Wis. 2d 162, at 169-170.

Unlike in ***Kelsey C.R.*** where there was public interest in police locating runaway children, or in ***Kramer***, where there was public interest in police officers assisting stranded motorists, there is little to no public interest in the police becoming involved in grievances between ex-spouses that are in no way dangerous and that have already been resolved. Furthermore, there is no exigency here as there is no indication that either Mr. Rosas-Vivar or Ms. Peralta were in any type of distress or in need of any medical or other kind of assistance.

In regards to the second factor, the officer's authority was overt because he went to Mr. Rosas-Vivar's home and parked near its entrance. He then called him by name and instructed him authoritatively to come over to the squad. In relation the third factor, Mr. Rosas-Vivar was outside of his vehicle walking up to his apartment when the police stopped him. Moreover, the officer had not observed any problematic driving.

Lastly, the officer had a feasible and effective alternative way to tell Mr. Rosas-Vivar that his ex-wife did not want him to stop by so late at night. Mr. Rosa-Vivar's ex-wife provided the officer with his phone number. (34:12, 18-19; App. 112, 118-119). Because there was no exigency it was unnecessary for the officer to pull his squad up to the entrance of Mr. Rosas-Vivar's apartment and order him to come and talk. Rather, the officer could have called him on the phone to relay the information. The seizure of Mr. Rosas-Vivar was unreasonable under the function of community caretaker.

D. The officer lacked reasonable suspicion to stop Mr. Rosas-Vivar.

Although the circuit court found that there was no stop within the meaning of the Fourth Amendment, it nonetheless determined that it if there was a stop, it was justified. (34: 48; App. 148).

"'The police must have reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts that an individual is [or was] violating the law.'" ***Washington***, 284 Wis. 2d 456 ¶ 16. (*quoting* ***State v. Gammons***, 2001 WI App 36, ¶, 241 Wis. 2d 296, 625 N.W.2d 763). The facts known to the officer at time officer at the time of the stop are considered under the totality of the circumstances. ***Washington***, 284 Wis. 2d 456 ¶ 16.

Here, the court found three indicators to justify the officer stopping Mr. Rosas-Vivar. The first was the time of night, the second was the "somewhat unusual behavior" of talking to his ex-wife at that time of night about a vehicle, and the third was the ex-wife's statements that she could smell alcohol. (34:47-48; App. 147-148).

Although the court found that the officer was not really investigating, and that rather he was "doing what officers do" by responding to the ex-wife's complaint about Mr. Rosas-Vivar having stopped at her home, it nonetheless found that those three factors gave "rise to the level of reasonable suspicion to stop Mr. Rosas to inquire – further inquire about alcohol consumption and possible drunk driving." (34:48; App. 148).

However, under the totality of the circumstances test, all the factors known to the officer at the time of the stop and their reasonable inferences do not give rise to reasonable suspicion to justify the stop. The circuit court accounted for the time of day being a factor to justify the stop twice. The first justification was the time of night, 11:30 by itself. The second context of time the court used as a factor to justify the stop was that Mr. Rosas-Vivar went to his ex-wife's home at 11:30 at night.

As a factor by itself, the time of day did not give rise to reasonable suspicion that Mr. Rosas-Vivar was driving while intoxicated. Driving at night is not indicative of intoxicated driving and in isolation does not justify a stop. *See*. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (where the cumulative effect of legal, but unusual driving of at 12:30 at night and dumping out a cup of liquid and ice after parking was enough to justify a stop, however, any of facts in isolation may well have been insufficient to justify the stop.) Otherwise, all vehicles driving after a certain hour would be subject to being stopped by the police regardless of other factors known to the police at the time.

Next, the circuit court considered the time of day in relation to the fact that Mr. Rosas-Vivar had gone to see his ex-wife at a late hour. Knocking on a door at 11:20 p.m. does not create an inference that a person is intoxicated or that a person is violating the law. There was no suggestion that this was an unusual time for him to stop by, or that his behavior was bizarre in any way. Moreover, Mr. Rosas-Vivar left without incident when asked. Being inconsiderate or having poor timing does not give rise to reasonable suspicion of a violation of the law.

Third, the court considered that Mr. Rosas-Vivar's ex-wife smelled alcohol as being a factor giving rise to reasonable suspicion. The smell of alcohol does not give rise to conclude that a person is driving while impaired. *See* ***State v. Meye***, 2010 WI App 120, ¶6, 329 Wis. 2d 272, 789 N.W.2d 755 (unpublished). (The court of appeals agreed that the "odor of intoxicants alone is insufficient to raise reasonable suspicion to make an investigatory stop.") (App. 162-163). However, the court received an affidavit stating that the ex-wife did not smell alcohol. (12:2).

In addition to the factors the court cited, the officer had gathered information from personal observation. For example, he saw Mr. Rosas-Vivar driving away from the trailer park and noted nothing unusual, erratic or dangerous

about how he was driving. (34:17; App. 117). The officer was also able to see well enough into the car to determine that Mr. Rosas-Vivar was alone, thereby dispelling any concern that the fourteen-year old son was in the car. (34:8; App. 108) Finally, there were no allegations of a domestic violence or disorderly conduct situation.

Based on the totality of the information the officer had, there was no reasonable inference that Mr. Rosas-Vivar was driving while intoxicated or violating any other law. Had Mr. Rosas-Vivar been in his car, the officer would not have had enough information to justify pulling him over for suspected drunk driving. Likewise, the officer lacked reasonable suspicion that any other crime had been committed and lacked reasonable suspicion to stop Mr. Rosas-Vivar outside of his home. Therefore, under the totality of the circumstances, the officer lacked reasonable suspicion to justify the stop.

The circuit court did not make a factual finding regarding the conflicting statements because it did not effect its primary ruling that there was no stop to being with. (35:9; App. 159). If Ms. Peralta did not tell the officer that she smelled alcohol, then the two remaining factors would not be sufficient by themselves to support reasonable suspicion.

CONCLUSION

For the reasons stated in this brief, Mr. Rosas-Vivar respectfully requests that the court reverse the circuit court's decision denying his motion to suppress the evidence resulting from an illegal stop of his person. He asks that this court find that there was a stop within the meaning of the Fourth Amendment and that it was not supported by reasonable suspicion. If this court determines that there was a stop and that it was supported by reasonable suspicion, then he respectfully requests that this court remand to the circuit court with instructions for a factual finding regarding the smell of alcohol.

Dated this 8th day of December, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,993 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 8th day of December, 2014.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 8th day of December, 2014.

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