STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP002199-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

BRIEF OF PLAINTIFF-RESPONDENT

By: MONICA J. HALL
Assistant District Attorney
State Bar #1049039

Attorney for Plaintiff-Respondent

District Attorney's Office
Jefferson County, Wisconsin
320 South Main Street
Room 225
Jefferson, Wisconsin 53549
(920)-674-7220

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Wisconsin Cases

STATEMENT ON PUBLICATION

Plaintiff-Respondent (hereinafter "State") agrees that this appeal, as a one-judge appeal, does not qualify for publication.

STATEMENT ON ORAL ARGUMENT

The State stands ready to provide oral argument should the Court deem oral argument to be necessary.

STATEMENT OF THE CASE AND FACTS

On October 23, 2013, the State charged Juan Francisco Rosas Vivar, the Defendant herein, with Operating a Motor Vehicle While Intoxicated as a second offense in violation of Wis. Stat. § 346.63(1)(a) and § 346.65(2)(am)2 and Operating with Prohibited Alcohol Concentration as a second offense in violation of Wis. Stat. § 346.63(1)(b) and § 346.65(2)(am)2. The State filed an Amended Complaint on October 31, 2013, which added a count of Operating While Revoked. On November 21, 2013, the defendant filed a Motion to Suppress arguing illegal arrest and detention of the Defendant. The Motion Hearing was held on December 6, 2013.

Officer Rupprecht's Testimony

At the Motion Hearing, Officer Joseph Rupprecht of the Waterloo Police Department and the Defendant both gave testimony. Officer Rupprecht testified that he had been a law enforcement officer for 11 months and was trained at the law enforcement academy at Blackhawk Technical College in Janesville, Wisconsin. (Transcript of Motion Hearing Dated December 6, 2013, 4:13-23, 5:6-7.) Officer Rupprecht stated that he completed standardized field sobriety training in August of 2013. (Trans 5:8-17.) Officer Rupprecht stated that he works the night shift full time. (Trans 6:12-14.)

Officer Rupprecht further testified that at approximately 11:20 p.m. on October 11, 2013, he was dispatched to 215 Frances Lane in the City of Waterloo, Jefferson County, Wisconsin, after a woman called to report that her ex-husband

had been knocking at her door. (Trans 6:16-25; 7:1-3.) It did not take Officer Rupprecht long to respond to the call. (Trans 7:22-25, 8:1-2.) As he turned onto Frances Lane, Officer Rupprecht observed a man drive out of the trailer park. (Trans 8:5-8.) The man was driving a red Pontiac with a black hood. (Trans 8:5-8.) Upon arrival at the residence, Officer Rupprecht spoke with the complainant, Elida Peralta. (Trans 8:20-23.) Ms. Peralta told Officer Rupprecht that her ex-husband, Juan, knocked on her door and wanted to talk to her about a vehicle in her driveway. (Trans 9:1-5, 18:11-20.) Ms. Peralta told Officer Rupprecht that she thought the conversation should occur the next day as it was late at night, and she had been asleep. (Trans 9:1-10.) Ms. Peralta told Officer Rupprecht she could smell alcohol on Juan's breath. (Trans 9:20-21.) Peralta also expressed concern regarding Juan driving because she was not sure if her son was in the vehicle, and she believed Juan had been drinking. (Trans 10:1-8.) It appeared to Officer Rupprecht that Ms. Peralta believed that Juan was too drunk to drive. (Trans 22:18-20.) Ms. Peralta told Officer Rupprecht that Juan was driving the red Pontiac with the black hood that left when Officer Rupprecht arrived. (Trans 10:19-21.) Officer Rupprecht asked Ms. Peralta where her ex-husband lived, and she told him that Juan lived in one of the rented rooms above Coach's Alley. (Trans 11:18-21.) After talking to Ms. Peralta for approximately 5 minutes, Officer Rupprecht responded to Juan's residence, which was approximately 2 minutes away. (Trans 11:14-16; 11:22-24; 12:1-4.)

Officer Rupprecht testified that when he left Ms. Peralta's home to find Juan, Officer Rupprecht intended to convey Ms. Peralta's wishes to Juan. (Trans. 29:12-25; 30:1-7.) Officer Rupprecht stated that this is something that he does in the course of his normal law enforcement duties. (Trans 29:20-25; 30:1-7.) Officer Rupprecht testified that he was also going to check on the welfare of Ms. Peralta's son, given her concerns that Juan may have been driving while intoxicated with the child in the vehicle. (Trans 30:19-25; 31:1-2.) Officer Rupprecht stated that he did not intend to investigate a possible driving while intoxicated violation. (Trans. 30:8-18.)

Officer Rupprecht stated that he was in full uniform in a marked squad when he arrived at the parking lot of the Defendant's home and saw the red Pontiac in the parking lot. (Trans 12:15-25; 13:1-5.) Officer Rupprecht also saw a man walking away from the Pontiac, who was wearing the same dark colored clothing that Officer Rupprecht saw the driver of the Pontiac wearing when it pulled out of the trailer park earlier. (Trans 12:18-21.) Officer Rupprecht did not turn on his lights or his siren but stopped his squad by the entrance to the apartments above Coach's Alley bar. (Trans 12:24-25; 13:1, 20:7-9.) Officer Rupprecht then called to the man, saying, "Juan, can you come talk to me?" in an authoritative tone of voice. (Trans 19:23-25; 20:1-12; 26:8-21.) The man, who was later identified as Juan Francisco Rosas Vivar, the Defendant herein, came up to the passenger side window of Officer Rupprecht's squad car. (Trans 13:12-25; 14:1-10.)

As the Defendant leaned into the squad's open passenger side window to talk to Officer Rupprecht, Officer Rupprecht smelled the odor of intoxicants coming from the Defendant. (Trans 14:13-20.) Officer Rupprecht then shined his flashlight in the direction of the Defendant and saw that the Defendant's eyes were bloodshot. (Trans 14:21-22.) From that point, Officer Rupprecht performed an Operating While Under the Influence of an Intoxicant investigation. (Trans 14:23-25.)

The Defendant's Testimony

The Defendant testified that, although he primarily speaks Spanish, he speaks some English. (Trans 40:3-6.) The Defendant stated that he understood what Officer Rupprecht was asking him to do when Officer Rupprecht asked the Defendant to talk to him. (Trans 40:7-13.) The Defendant stated that he felt that he was obligated to talk to Officer Rupprecht in that parking lot. (Trans 38:19-24.) Further testimony from the Defendant established that Officer Rupprecht was the only Officer on scene, Officer Rupprecht did not draw a gun or handcuff the Defendant, and Officer Rupprecht only asked the Defendant to talk to him one time. (Trans 40:14-22.)

Circuit Court Ruling

After the court heard evidence at the Motion Hearing, the Circuit Court denied the Defendant's Motion to Suppress. (Trans 44:14-15.) Judge Weston found that Officer Rupprecht's testimony was credible. (Trans 43:22-24.) The Court held: There was no stop, any action the Defendant took was voluntary, and

there was nothing except tone of voice to suggest that the Defendant was not free to walk away. (Trans 44:13-20.) Additionally, Judge Weston held that Officer Rupprecht's "intention wasn't to conduct an investigation. 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." (Trans 43:1-7.) The Court also held that Officer Rupprecht had reasonable suspicion to stop the Defendant and conduct an investigation for Operating While Intoxicated. (Trans 48:3-11.)

The Defense filed a Motion for Reconsideration on December 9, 2013. The Motion had an Affidavit attached that was signed by an investigator, who stated that she spoke to Elida Peralta. The investigator swore that Ms. Peralta told her that the Defendant called her on the phone, came to her house, and then knocked on the door. The investigator stated that Ms. Peralta denied telling the officer that she opened the door or smelled "the odor of intoxicants" on the Defendant. At the plea and sentencing hearing, Judge Weston made a record in which she acknowledged the Affidavit. However, Judge Weston denied the Motion.

STATEMENT OF THE ISSUES

A. Was the interaction between Officer Rupprecht and the Defendant a "consensual encounter" such that Officer Rupprecht did not need to have reasonable suspicion to request that the Defendant speak with him?

B. If the interaction between Officer Rupprecht and the Defendant was a seizure, was Officer Rupprecht acting as a community caretaker?

C. If the interaction between Officer Rupprecht and the Defendant was a seizure, did Officer Rupprecht have reasonable suspicion to request that Defendant speak with him?

ARGUMENT

I. OFFICER RUPPRECHT DID NOT SEIZE THE DEFENDANT WITHIN THE MEANING OF THE FOURTH AMENDMENT

A. Standard of Review

The Court of Appeals reviews the Circuit Court's questions of fact from a motion to suppress under the clearly erroneous standard and reviews questions of law from a motion to suppress *de novo*. *County of Grant v. Vogt*, 2014 WI 76, ¶ 17, 356 Wis. 2d 343, 850 N.W.2d 253 (*citing State v. Williams*, 2002 WI 94, ¶ 17, 255 Wis. 2d 1, 646 N.W.2d 834 and *State v. Hess*, 2010 WI 82, ¶ 19, 327 Wis. 2d 524, 785 N.W.2d 579).

B. The Interaction between Officer Rupprecht and the Defendant was a Consensual Encounter.

This case is easily distinguished from *State v. Washington*. 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305, which the defendant cites in his brief. In *Washington*, two officers were investigating an anonymous complaint that drug sales and loitering were occurring outside of a vacant house in a high crime area; one of the officers gave testimony at the motion hearing. *Id*. at ¶¶ 2, 7. The officer was unable to provide much information regarding the anonymous complaint. *See id.* at ¶ 7. He could not identify who made the complaint, when the complaint was made, the veracity of the complaint, or why the complainant had reason to believe that drug trafficking was occurring at the house. *Id*. The officer testified that when he arrived at the residence, he recognized the defendant from prior contacts and knew that the defendant had a prior drug arrest. *Id.* at ¶ 7. The officer further

testified that when he saw the defendant in front of the house talking to two other people, he intended to cite the defendant for loitering. *Id*. at ¶¶ 3, 7.

When the squad car passed the residence, the defendant and the people he was speaking with started to walk in different directions. *Id.* at ¶ 7. The officers found the defendant as he was walking, stopped their squad, and the officer who testified at the suppression hearing got out. *Id.* The officer was within two to three feet of the defendant when he told the defendant to stop. *Id*. at ¶ 3. The officer testified that the defendant stopped, but that the defendant, '"had the motion that he wanted to run. I told him not to run; stand there. He continued to look nervous. He wanted to run. At that point, I'm familiar that he – what he may do. I drew my weapon."' *Id*. The officer moved closer to the defendant, and the defendant put his hands up. *Id*. When this occurred, the defendant threw a washcloth, and the officer pushed the defendant to the ground. *Id.* at ¶¶ 3, 7. The officers discovered cocaine in the washcloth. *Id*. ¶ 2. The court held that the defendant was seized, "when he initially stopped after the police commanded him to do so." *Id*. at ¶¶14-15.

In contrast, the initial complaint in this case came from a known citizen, who made the complaint, in person, to Officer Rupprecht minutes before Officer Rupprecht had contact with the Defendant. (Trans 8:20-23; 11:14-16; 11:22-24; 12:1-4.) When Officer Rupprecht saw the Defendant, he remained in the squad car. (Trans 13:12-25; 14:1.) Rather than ordering the Defendant to "Stop!," Officer Rupprecht requested, "Juan, can you come talk to me?" (or something similar) in an authoritative tone. (Trans 19:23-25; 20:1-12; 26:8-21.). Officer Rupprecht did

not approach the Defendant; instead, the Defendant approached the open passenger's side window of the squad car, where he spoke to Officer Rupprecht (Trans 13:12-25; 14:1.). Unlike the circumstances in *Washington*, there was no indication the Defendant intended to flee, as the Defendant did not put his hands up, and Officer Rupprecht never pulled his gun. (Trans 40:14-22.)

The Defendant's argument that he was seized for Fourth Amendment purposes the moment he submitted to Officer Rupprecht's request to speak with him is not supported by *In re Kelsey C.R.*, because that case does not address whether the command given in that case led to a seizure. 2001 WI 54, 243 Wis. 2d 422, 626 N.W.2d 777. In *Kelsey C.R.*, two uniformed officers in an unmarked car saw a young female sitting alone in a huddled position mid-block at 7:40 p.m. in a high-crime commercial area in Milwaukee. *Id.* at ¶ 4. The officers stopped their squad on the opposite side of the street from the young woman and asked her a few questions including how old she was, where she lived, and what she was doing. *Id*. at ¶ 5. The officers then told her to "stay put" before making a U-turn to be on the same side of the street as the girl. *Id*. The girl fled. *Id*. Officers gave chase, and after they caught the girl, continued to investigate whether she was a runaway. *Id*. ¶ 6. Eventually, after a pat down search, the officers found a handgun in the girl's jeans. *Id*. at ¶ 7.

The Supreme Court analyzed various points in the encounter to establish whether the police interaction with the girl was allowed under the Fourth Amendment. See *Kelsey C.R.*, 2001 WI 54, ¶¶ 29-51. The court began its analysis

from the moment the officers told the girl to "stay put" and did not even examine the officers' initial encounter with the girl, presumably because that part of the encounter was consensual. *See id*. at ¶ 29. The court chose to apply the *Hodari D*.[1] standard for when a seizure occurs and determined that because the girl did not submit to the officer's show of authority, no seizure occurred until the officers used physical force to catch her after the chase. *Id*. at ¶ 33. Therefore, the court did not determine if a seizure would have occurred if Kelsey had submitted to the words, "Stay put," which would have made that case applicable to this case.[2] Furthermore, the Wisconsin Supreme Court has stated that when a person submits to police authority, the proper test for whether a seizure occurred is the test under *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870 (1980).[3] *Vogt*, 2014 WI 76, ¶ 30. Therefore, *In re Kelcey C.R.* is not instructive for this issue.

More parallels to the Case before the court are found in *County of Grant v. Vogt*. *Vogt*, 2014 WI 76. In *Vogt*, an officer in a small town observed a vehicle pull into an empty parking lot for a closed park on December 25, 2011 at 1:00 a.m. 2014 WI 76, ¶ 4. The officer did not observe any traffic or law violations; the activity simply struck the officer as suspicious. *Id*. The officer pulled his marked

[1] In *California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547, 1550-51 (1991), the Supreme Court held that when physical force is absent in an encounter between law enforcement and citizen, a seizure within the meaning of the Fourth Amendment is affected when an individual submits to an officer's show of authority to restrain the individual's liberty.

[2] *See Kelcey C.R.*, ¶34, which states, "Even if we considered this initial exchange between the police and Kelcey to be a seizure, it would be reasonable under the community caretaker function." The court's language supports the State's position that no determination was made as to whether the officers ordering the girl to "stay put" constituted a seizure.

[3] The standard for whether a seizure occurred under *Mendenhall* is whether a reasonable person, considering all the circumstances surrounding the incident, would have felt free to leave. *Mendenhall*, 446 U.S. at 554.

squad behind the defendant's vehicle and parked without turning on his emergency lights. *Id*. at ¶ 6. The uniformed officer approached the driver's side window (where the defendant was seated), rapped on the window and motioned for the defendant to roll the window down. *Id*. at ¶ 7. The defendant rolled down his window, and the officer asked the defendant what he was doing. *Id*. at ¶ 8. As the defendant answered, the officer observed signs of intoxication. *Id*. The officer then took the defendant's driver's license, turned on his squad lights, and conducted an operating while under the influence investigation. *Id*. The Supreme Court held the initial contact was not a seizure, but a consensual encounter. *Id*. at ¶ 39.

As the Court in *Vogt* reasoned, a consensual encounter between a law enforcement officer and a citizen does not implicate the Fourth Amendment. *Vogt* 2014 WI 76, ¶ 19, *citing State v. Young*, 2006 WI 98, ¶ 23, 294 Wis. 2d 1, 717 N.W.2d 729 and *Mendenhall*, 446 U.S. at 544. An encounter between a law enforcement officer and a citizen only becomes a seizure, "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen," so that, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Vogt*, 2014 WI 76, ¶ 20, *citing Mendenhall*, 466 U.S. at 552 (quoting *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868 (1968)). Factors considered by the court in determining whether a reasonable person would have felt free to leave include, "'the threatening presence of several officers, the display of a weapon by an

officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *Id.* at ¶ 23*(quoting Mendenhall*, 446 U.S. at 554). The Court, quoting *INS v. Delgado*, 446 U.S. 210, 104 S.Ct. 1758 (1984), made clear that "'police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.'" *Id*. at ¶ 24 (*quoting Delgado*, 466 U.S. at 216).

Like the officer in *Vogt*, Officer Rupprecht saw a car parked in a public parking lot. (Trans 12:15-21). However, unlike *Vogt*, the Defendant was not still in his vehicle, and Officer Rupprecht did not pull his squad behind the Defendant's vehicle. (Trans 12:15-25; 13:1-10.) Instead, the Defendant was walking towards the building near the parking lot, and Officer Rupprecht parked near the door to that building, but did not block it. (Trans 12:18-21; 13:1-10; 20:4-9.) Furthermore, the Defendant's movements were not as restrained as those of the defendant in *Vogt.* The Defendant did not have a vehicle to contend with; he only had to walk into his home. In both cases, the Officers kept their squad lights off. (Trans 12:24-25; 13:1, 8-10; 20:7-9.) Further, when Officer Rupprecht called out to the Defendant by first name and asked to speak with him, it was no more of a command than when the officer in *Vogt* rapped on the defendant's car window and motioned for him to roll it down. Both officers were simply trying to make contact. *See Vogt*, 2014 WI 76, at ¶ 43 and (Trans. 19:23-25; 20:1-12; 26:8-21,

29:12-19). Finally, the Defendant's own behavior of leaning in through the passenger side window of the squad to talk to Officer Rupprecht demonstrates the Defendant's willingness to answer Officer Rupprecht's questions, even more so than the act of rolling down the car window exhibited by the defendant in *Vogt*. (Trans 13:12-25; 14:1.) Then, like the facts of *Vogt*, as Officer Rupprecht spoke with the Defendant, he observed additional signs of intoxication, which justified Officer Rupprecht's subsequent seizure of the Defendant for the purpose of conducting an investigation for operating while intoxicated. (Trans 14:19-22.)

II. EVEN IF THIS COURT FINDS THAT A SEIZURE OCCURRED, THE SEIZURE WAS REASONABLE BECAUSE OFFICER RUPPRECHT WAS FUNCTIONING AS A COMMUNITY CARETAKER WHEN HE MADE CONTACT WITH THE DEFENDANT.

A. Community Caretaker Standard of Review and Law

The Court of Appeals reviews the Circuit Court's questions of fact from a motion to suppress under the clearly erroneous standard and independently reviews "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." *State v. Kramer,* 2009 WI 14, ¶ 16, 315 Wis. 2d 414, 759 N.W.2d 598 (*citations omitted*).

In *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411, 414 (1987), the Wisconsin Court of Appeals created a three-step test to determine whether a seizure conducted under the community caretaker function is reasonable. The court stated:

> We conclude that when a community caretaker function is asserted as justification for the seizure of a person, 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*.

B. Officer Rupprecht was not Investigating, Detecting, or Trying to Acquire Evidence of a Crime when He Made Contact with the Defendant, Therefore, Officer Rupprecht was Acting as a Community Caretaker at the Time the Defense Claims a Seizure Occurred.

Regarding the first and second steps of the *Anderson* test, the State would note that it expressly does not concede that a seizure occurred when Officer Rupprecht said, "Juan, can you come talk to me?" The State maintains that the Defendant was not seized until after Officer Rupprecht smelled the odor of intoxicants and saw that the Defendant had bloodshot eyes after the Defendant approached the squad and was talking to Officer Rupprecht. If this Court agrees that there was no seizure, there is no need to go any further into the analysis of the community caretaker function. However, in the event that this Court holds that a seizure occurred when Officer Rupprecht called out to the Defendant, the seizure was reasonable because Officer Rupprecht was functioning as a community caretaker when he made contact with the defendant.

The second prong of the *Anderson* test is "whether the police conduct was bona fide community caretaker activity." 142 Wis. 2d at 169, 417 N.W.2d at 414. In determining whether an officer was engaged in a bona fide community caretaker activity, the inquiry is whether the officer's actions were "totally

divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *In re Kelcey C.R.*, 2001 WI 54, ¶ 34, *citing Anderson*, 142 Wis. 2d at 166, 417 N.W.2d 411 (*quoting Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523 (1973). The subjective motivation for the officer's actions is not dispositive of whether the officer was engaged in a community caretaker activity. *Kramer*, 2009 WI 14, ¶ 30. The Court is to evaluate the totality of the circumstances and determine if "an objectively reasonable basis for the community caretaker function is shown." *Id*.

Officer Rupprecht testified that his intention was to convey to the Defendant that Elida Peralta did not want the Defendant at the home and to check if Ms. Peralta's son was in the car with the intoxicated Defendant. (Trans 29:12-25; 30:1-7; 30:19-25.) Officer Rupprecht testified that this is a sort of activity that falls within his normal law-enforcement duties. (Trans 29:20-25; 30:1-7.) The Circuit Court found that Officer Rupprecht was credible when he testified he was "doing what officers do," and she found that, in fact, Officer Rupprecht was "doing what officers do." (Trans 43:1-7.) While Officer Rupprecht might have recognized that an Operating While Intoxicated investigation might be a result of his contact with the Defendant, under a totality of the circumstances analysis, the purpose of Officer Rupprecht's contact with the Defendant had nothing to do with the detection and investigation of criminal activity. Rather, his purpose was to ensure the peace and safety of members the community.

C. Any Privacy Intrusion was Justified because Officer Rupprecht used the Least Intrusive Means Available to Carry Out His Duties as a Community Caretaker

The third step of the *Anderson* test is "whether the public need and interest outweigh the intrusion upon the privacy of the individual." 142 Wis. 2d at 169, 417 N.W.2d at 414. In *Kelcey C.R.*, the court noted four relevant factors in determining whether the public interest outweighs the private intrusion. 2001 WI 54, ¶ 36. These factors include:

> (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.
> *Id*. (*citing Anderson*, 142 Wis. 2d at 169-70, 417 N.W.2d 411).

Regarding the first factor, the public interest in Officer Rupprecht speaking to the Defendant was to avoid potential future conflict that evening and to protect a child. (Trans 29:12-25, 30:1-18.) A uniformed law enforcement officer telling the Defendant not to return to Elida Peralta's residence would likely have more of a deterrent effect on the Defendant than Elida's simple request that the Defendant leave her alone. Additionally, for the safety of Elida Peralta's child, Officer Rupprecht needed to determine that the child was not in a vehicle with an intoxicated driver.

Considering the circumstances surrounding the seizure, it was the middle of the night when Officer Rupprecht pulled into the public parking lot in his full uniform and marked squad. (Trans 6:16-20; 11:14-16; 11:22-24; 12:1-4; 12:15-25; 13:1-5.) Officer Rupprecht was the only officer in the only squad car on the scene.

(Trans 40:14-22.) Officer Rupprecht did not turn on his squad's emergency lights, get out of his squad, or draw his gun. (Trans 12:24-25; 13:8-10; 20:7-9, 40:14-22.) Officer Rupprecht said, in an authoritative tone, "Juan, can you come talk to me?" (Trans 19:23-25; 26:8-21.) This is a minimal show of force. Additionally, this interaction occurred in the public parking lot of the Defendant's apartment, which is a non-intimidating location. The circumstances surrounding this seizure indicate that a low level of force and authority was used to make contact with the Defendant and was done with a minimal amount of intrusion into the Defendant's individual privacy. Therefore, the level of authority imposed upon the Defendant was commiserate with the level of public interest in Officer Rupprecht having contact with the Defendant.

Courts also consider whether an automobile was involved in determining whether the private intrusion was justified by the public interest. *In re Kelcey* C.R., 2001 WI 54, ¶ 36 (*citation omitted*). This case did not involve a traffic stop in the traditional sense. Therefore, the automobile exception does not apply.

The final factor to evaluate is the availability of alternatives to the intrusion. *Id*. If there was an intrusion, it would be Officer Rupprecht requesting, in an authoritative tone, "Juan, can you come talk to me." In response, the Defendant approached Officer Rupprecht's squad. (Trans 13:12-25; 14:1; 19:23-25; 20:1-12; 26:8-21.) The Defendant being asked to walk to a nearby squad car to speak to a police officer is a minimal intrusion, with few, less intrusive

alternatives to ensure that Elida Peralta's son was safe and that the Defendant would no longer bother Elida Peralta.

Thus, if a seizure occurred, the seizure was justified because Officer Rupprecht was engaged the "bona fide" community caretaker activity of ensuring that Ms. Peralta would no longer be bothered that night, and that her son was safe. If Officer Rupprecht intruded on the Defendant's privacy at all, it was when he requested that the Defendant speak with him. (Trans. 19:23-25; 20:1-12; 26:8-21.) Officer Rupprecht's intrusion on the Defendant's privacy was minimal enough that the public interest justified the intrusion, and the Defendant's privacy interests did not outweigh the Officer's right to request to speak with him.

III. IF OFFICER RUPPRECHT SEIZED THE DEFENDANT, HE HAD REASONABLE SUSPICION TO DO SO.

A. Standard of Review

The Court of Appeals reviews the Circuit Court's questions of fact from a motion to suppress under the clearly erroneous standard and reviews questions of law from a motion to suppress *de novo*. *State v. Powers*, 2004 WI App 143, ¶ 6, 275 Wis. 2d 456, 685 N.W.2d 869 (*citing State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106).

B. Officer Rupprecht had Reasonable Suspicion to Stop of the Defendant for the Crime of Operating While Intoxicated, Based on the Observations of a Reliable Citizen Informant.

In *State v. Powers*, a store clerk called police, gave her name, and reported that "'an intoxicated man had come in to make purchases at the store buying beer,

a little outfit, and something else.'" 2004 WI App 143, ¶ 2. The clerk further reported that the man's credit card was declined, and he left saying he would come back with money. *Id*. The clerk gave a description of the man's truck and its license plate number. *Id*. An officer responded to the store's location and began to watch the vehicle described by the clerk. *Id*. at ¶ 3. Shortly thereafter, the defendant came out of the store walking unsteadily carrying a case of beer and a small item. *Id*. The officer activated his emergency lights after the defendant pulled onto the street. *Id*. The defendant did not pull over immediately. *Id*. The officer had to turn his siren on twice before the defendant eventually stopped in front of a restaurant. *Id*. The defendant challenged the stop arguing that the officer did not have reasonable suspicion to conduct an investigative stop because the stop was based on the tip of an unreliable witness who had little or no knowledge of whether he was intoxicated. *Id*. at ¶ 5.

The court found that, based on the information provided by the clerk combined with the officer's corroboration of that information, the officer had reasonable suspicion to conduct the investigatory stop. *Id*. at ¶ 15. In reaching its conclusion, the court determined that the officer could rely on the tip provided by the store clerk, who would be considered a citizen informant. *Id*. at ¶ 9 (*citing State v. Sisk*, 2001 WI App 82, ¶ 8, 247 Wis. 2d 443, 634 N.W.2d 877 and *Williams*, 2001 WI 21, ¶ 35). In assessing the clerk's reliability, the court noted that the clerk put her anonymity at risk by giving her name and other identifying information. *Powers*, 2004 WI App 143, ¶ 9 (*citing Williams*, 2001 WI 21, ¶ 35

and *Florida v. J.L.*, 529 U.S. 266, 276, 120 S.Ct. 1375 (2000)). Quoting *Williams* directly, the Court reasoned, "'we view citizens who purport to have witnessed a crime as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established.'" *Powers*, 2004 WI App 143, ¶ 9 (*quoting Williams*, 2001 WI 21, ¶ 36). Furthermore, because the officer was able to independently verify some of the information provided by the clerk before he stopped the defendant, the court found that the officer had reasonable suspicion to conduct the stop. *Id*. at ¶ 14.

The *Powers* Court found that the stop was supported by reasonable suspicion despite the fact that the store clerk did not observe the defendant driving. 2004 WI App 143, ¶ 11. The Court observed that the clerk made first-hand observations of the defendant in which the defendant exhibited one or more indicia of intoxication including "odor of alcohol, slurred speech, glassy eyes, etc. . . " *Id*. The court also observed that the clerk had an unobstructed view of the parking lot and was able to observe the defendant enter and exit his vehicle. *Id*. Finally, the court noted that an officer can rely upon a lay person's opinion that another person is intoxicated. 2004 WI App 143, ¶ 13 (*citing State v. Bailey*, 54 Wis.2d 679, 685, 196 N.W.2d 664 (1972)).

Like the officer in *Powers*, Officer Rupprecht had reasonable suspicion to interact with the Defendant based on information provided by a known citizen informant. Elida Peralta was a known citizen informant. (Trans 8:20-23.) She reported to Officer Rupprecht that she was close enough to the Defendant to smell

his breath. (Trans 9:1-5; 9:20-21.) Like the clerk in *Powers*, Elida Peralta was able to make first hand observations of the Defendant in which she observed one or more indicia of intoxication. (Trans 9:20-25; 10:1-8; 22:18-20.) Ms. Peralta said she could smell alcohol on the Defendant's breath, and she expressed concern that her son may be in the vehicle with the Defendant. (Trans 10:1-8.) Officer Rupprecht inferred that Ms. Peralta was concerned the Defendant was too drunk to safely drive. (Trans 9:20-25; 10:1-8; 22:18-20.)

Ms. Peralta also told Officer Rupprecht that the Defendant left in his vehicle when Officer Rupprecht arrived at her home. (Trans 10:17-21.) Therefore the vehicle was not still parked at her home, as the vehicle was still in the parking lot in *Powers*. Also, Ms. Peralta did not provide a license plate number, the way the clerk did in *Powers*. However, Ms. Peralta did provide a vehicle description and told Officer Rupprecht where the Defendant lived. (Trans 10:19-21; 11:18-21.)

Like the officer in *Powers*, Officer Rupprecht was also able to corroborate some of the information provided by the citizen informant before making contact with the Defendant. Officer Rupprecht saw the vehicle Ms. Peralta described leaving the area of her home as he arrived. (Trans 8:5-8; 10:19-21; 12:15-21.) Officer Rupprecht also saw the vehicle in the parking lot of the Defendant's home. (Trans 12:15-21.) Not only did Officer Rupprecht recognize this vehicle to be the same vehicle that he saw leaving Ms. Peralta's residence, Officer Rupprecht also noted that the man walking away from the vehicle wore dark clothing like the

driver of the vehicle he saw leaving Peralta's residence. (Trans 12:18-21.) Furthermore, it was 11:30 at night, and the Defendant was pounding on his ex-wife's door to discuss a vehicle in her driveway. (Trans 6:13-23; 9:1-5.)

Officer Rupprecht was provided information from a reliable citizen informant who observed signs that the Defendant had been consuming alcohol and observed the Defendant driving. Officer Rupprecht corroborated some of the information from that informant. Therefore, the stop was supported by reasonable suspicion.

CONCLUSION

Considering the totality of the circumstances surrounding the encounter between Officer Rupprecht and the Defendant, there was no physical force or show of authority by Officer Rupprecht restraining the Defendant's liberty that would make a reasonable person feel he or she was not free to leave. Therefore, the State maintains that no seizure under the Fourth Amendment occurred, and the encounter was a consensual encounter.

Should this Court find that a seizure occurred, then the seizure was reasonable because Officer Rupprecht was functioning as a community caretaker, and if there was an intrusion, the intrusion was minimal and was justified by the public interest of ensuring the safety of members of the community.

Finally, any seizure of the Defendant was supported by reasonable suspicion that the Defendant had committed the crime of Operating While Intoxicated. Ms. Peralta, a reliable citizen informant, informed Officer Rupprecht

that observed the Defendant may have consumed alcohol. Ms. Peralta also informed Officer Rupprecht that she observed the Defendant driving away from her residence in a Red Pontiac with a black hood. This observation was corroborated by Officer Rupprecht, who saw a Red Pontiac with a black hood leaving Ms. Peralta's residence just as he was arriving. Officer Rupprecht observed this same vehicle parked in a parking lot outside the Defendant's residence, and the man who was walking away from the vehicle was wearing dark clothing similar to that of the man in the vehicle that he saw leave Ms. Peralta's neighborhood. Based on the observations of both Ms. Peralta and Officer Rupprecht, Officer Rupprecht had reasonable suspicion to conduct an investigative stop of the Defendant for Operating While Intoxicated.

For the reasons stated herein, the State respectfully requests that this court affirm the circuit court's decision and deny the Defendant's request for reversal and remand.

Dated this 28 day of January, 2015.

Respectfully submitted,

_____

MONICA J. HALL
Assistant District Attorney,
Jefferson County
State Bar No. 1049039

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,528 words (excluding the appendix).

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12) and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 28 day of January, 2015.

Respectfully submitted,

MONICA J. HALL
Assistant District Attorney,
Jefferson County
State Bar No. 1049039