RECEIVED
03-26-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Appeal No. 2014 AP 2955 CR
(Oconto County Cir. Ct. Case No. 14 TR 701)

In the Matter of the Refusal of Joseph R. Arndt:

COUNTY OF OCONTO,

Plaintiff-Respondent,

v.

JOSEPH R. ARNDT,

Defendant-Appellant.

ON APPEAL FROM AN ORDER FINDING THE APPELLANT'S REFUSAL UNREASONABLE ENTERED IN OCONTO COUNTY CIRCUIT COURT, THE HONORABLE JAY N. CONLEY PRESIDING

Brief of the Plaintiff-Respondent County of Oconto

Robert J. Mraz
Asst. District Attorney
Oconto County
State Bar No. 1012099
301 Washington St.
Oconto, WI 54153
Phone: (920)834-6860
E-mail:robert.mraz@da.wi.gov
Attorney for Plaintiff-Respondent County of Oconto

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WISCONSIN STATUTES CITED

COURT CASES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Appeal No. 2014 AP 2955 CR
(Oconto County Cir. Ct. Case No. 14 TR 701)

In the Matter of the Refusal of Joseph R. Arndt:

COUNTY OF OCONTO,

Plaintiff-Respondent,

v.

JOSEPH R. ARNDT,

Defendant-Appellant.

ON APPEAL FROM AN ORDER FINDING THE APPELLANT'S REFUSAL UNREASONABLE ENTERED IN OCONTO COUNTY CIRCUIT COURT, THE HONORABLE JAY N. CONLEY PRESIDING

Brief of the Plaintiff-Respondent County of Oconto

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The County of Oconto is not requesting either oral argument or publication.

ARGUMENT

1. THE ISSUES THAT CAN BE CONSIDERED AT A REFUSAL HEARING ARE LIMITED BY SEC. 343.305(9), WIS. STATS.

This appeal involves the appellant's refusal to submit to a chemical test of his blood, breath, or urine. Sec. 343.309, Wis. Stats., deals with refusals and refusal hearings. It is clear from the structure of Sec. 343.309, Wis. Stats., that issues regarding refusals should be addressed in a timely and effective matter. In order to timely and effectively address issues regarding refusals, the issues that can be considered at refusal hearings are very limited. There are only three (3) issues that can be considered at a refusal hearing. These issues are set forth at Sec. 343.305(9)(a)(5), Wis. Stats., and again at Sec. 343.305(9)(c), Wis. Stats. These issues, as pertains to this case, are (1) Whether the officer had probable cause to believe the appellant operated a vehicle on a public highway and whether a person was lawfully placed under arrest for a violation or Sec. 346.63(1), Wis. Stats.; (2) Whether the officer read the informing the accused form to the appellant; and (3) Whether the appellant refused to submit to the test. In this case, the appellant agreed that all three (3) of the issues related to a refusal hearing, except for the issue of whether the

appellant was lawfully placed under arrest for a violation of Sec. 346.63(1)(a), Wis. Stats., can be proven by the respondent. (R14 at 14-17).

2. IT WAS LAWFUL FOR THE APPELLANT TO BE ARRESTED BECAUSE OFFICER GOERLINGER DID NOT ENTER THE CURTILAGE OF THE APPELLANT'S PROPERTY.

The respondent acknowledges that Officer Goerlinger did not have a search warrant when he entered the appellant's driveway.

As the Trial Court indicated, however, there is no unreasonable search when the police restrict their movements to driveways. (R20:23); *State v. Bauer,* 127 Wis. 2d 401, 406, 379 N.W. 2d 895 (1985). The appellant here would have no expectation of privacy in areas generally made accessible to visitors, such as his driveway. *State v. Bauer*, at p. 406.

Following Officer Goerlinger's entry of the appellant's driveway, he exited his patrol vehicle, walked around toward the appellant's vehicle, which was running, and observed the appellant laying or slumped up against the seat of his vehicle. (R14:9-10). The Court found that the appellant's vehicle was located slightly off the driveway in what appears to be a parking area. (R20:24) The Trial Court then found that the appellant was not in the

curtilage of his home, and, as a result, the defendant's arrest was proper. (R20:27).

The case of *United States v. Dunn,* 480 U.S. 294, 301 (1987) sets forth the criteria to determine whether the appellant was located in the curtilage home. The appellant in his brief and the Court have accurately set forth the factors under *Dunn* that need to be considered. (Appellant's Brief at page 8; R20:25-27). First, the appellant was a substantial distance from his home. Officer Goerlinger testified that the appellant was located 40 to 50 yards from his home and County's Exhibit 5 confirms his testimony. (R14:24; R12:Exhibit 5). Second, the area where the appellant was located was not enclosed. Officer Goerlinger testified he didn't see any fences and County's Exhibits 2, 3, 4, and 5 confirm the lack of enclosures. (R14:23; R12: Exhibits 2, 3, 4, and 5). Third, the Trial Court found that the area where the defendant was located was used for parking motor vehicles. (R20:27). This conclusion is supported by Officer Goerlinger's testimony in the Exhibits previously described. (R14:20). Finally, the area where the appellant was found was not protected from the public view. Exhibits 2, 3, 4, and 5 all indicate that the property is completed open to the public. (R12:Exhibits 2, 3, 4, and 5).

The Trial Court properly applied the factors set forth in *Dunn* and the Trial Court's decision that the appellant was not located in the curtilage should be affirmed.

3. A SEARCH WARRANT WAS NOT REQUIRED IN THIS CASE FOR THE REASON THAT OFFICER GOERLINGER WAS ACTING AS A COMMUNITY CARETAKER.

Even if the Court finds that the appellant was in the curtilage, here are several well-known exceptions to the search warrant requirement of the 4th Amendment of the United States Constitution and Article I, Sec. 11 of the Wisconsin Constitution.

In this case the warrantless search was permitted because the community caretaker exception is applicable. In *State v. Garcia,* 2013 WI 15, ¶15, 345 Wis. 2d 488, 826 N.W. 2d 87 and *State v. Kramer,* 2009 WI 14, ¶21, 759 N.W. 2d 598 (2009), the Court adopted a three-step test for evaluating claims of police community caretaker function. The appellant has accurately set forth the 3 step analysis in his brief and the Trial Court accurately set forth the 3 step test in its decision. (Appellant's Brief at page 13; R20:28).

As concerns the first step, there is no question that a seizure within the meaning of the fourth amendment has occurred.

Officer Goerlinger was also conducting a bona fide community caretaker activity. Officer Goerlinger was responding to a citizen complaint of a black truck all over the road that had possible hit a sign. (R14:5-6). The citizen complainant had followed the vehicle and saw the vehicle pull into an address and saw the driver exit and fall out of the vehicle. (R14:5-6). When Officer Goerlinger arrived at this residence, the complainant was outside of the appellant's driveway and motioned to where the appellant's vehicle was. (R14:8). Officer Goerlinger further indicated that he wasn't entirely sure what was occurring. (R14:10-11). He suspected an OWI, but it could have been a medical reason or some other reasons, but he felt it was necessary for him to inquire further as to what was going on without a warrant. (R14:10-11). He was concerned that the person could need help because of a medical issue. (R14-11). In this regard, an officer need not rule out any possibility of the violation of any law before the community caretaker function is bona fide. *State v. Kramer, 2009 WI 14*, ¶35-36. As the Court in *Kramer* concluded, "… a court may consider an officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker; however, if the court concludes that the officer has articulated an

objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions. As the Trial Court found here, Officer Goerlinger needed to enter the appellant's property to see if he needed help. (R20:31). The Trial Court went so far as to state that Officer Goerlinger would have been derelict in his duty if he didn't enter the appellant's property to check on him. (R20:31). Looking at the totality of the circumstances, Officer Goerlinger was acting as a bona fide community caretaker.

Finally, the public need and interest outweighed the intrusion upon the privacy of the appellant. The intrusion here was minimal. Officer Goerlinger, for example, did not enter the appellant's dwelling or any other buildings. He simple entered the appellant's property by a driveway and observed the appellant in an area slightly off the driveway in a muddy area. Next the public interest in making sure the appellant is safe, making sure the appellant doesn't hurt himself or someone else, outweighs the minimal intrusion here. (R20:31).

CONCLUSION

For all the reasons set forth herein, Oconto County, respectfully request the Court to affirm the Trial Court's decision denying the appellant's motion to dismiss refusal and suppress evidence.

Dated this _____ day of March, 2015.

Respectfully submitted,

_____
Robert J. Mraz
Oconto County Asst. District Attorney
301 Washington St.
Oconto, WI 54153
Phone: (920)834-6860
E-mail: robert.mraz@da.wi.gov
State Bar No. 1012099

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c), Wis. Stats., for a brief produced with monospaced font. The length of this brief is 9 pages.

Dated this _____ day of March, 2015.

_____
Robert J. Mraz
Asst. District Attorney
Oconto County

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 Rule 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 _____ day of March, 2015.

_____
Robert J. Mraz
Asst. District Attorney
Oconto County