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WISCONSIN COURT OF APPEALS
DISTRICT 2

VILLAGE OF CHENEQUA

Plaintiff-Appellant,

vs. Circuit Court Case No.: 2014-CV-001389
Appeal No. 2015-AP-000094 FT

CHAD C. SCHMALZ

Defendant-Respondent.

PLAINTIFF-APPELLANT VILLAGE OF CHENEQUA'S BRIEF

Appeal from Circuit Court of Waukesha County
Honorable Michael O. Bohren

Kershek Law Offices
Greenfield Professional Center
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Greenfield, WI 53228

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STATEMENT OF THE ISSUES

1. Did the Circuit Court err in finding that the Village of Chenequa police officer did not have reasonable suspicion to conduct a traffic stop of Respondent?

2. Did the Circuit Court err in finding that the Village of Chenequa police officer's traffic stop of Respondent was not valid under the community caretaker doctrine?

STATEMENT REGARDING PUBLICATION

A decision in this appeal will meet the criteria for publication in Wis. Stat. § 809.23(1) because it will apply the established rules of law regarding reasonable suspicion and the community caretaker doctrine to a factual situation significantly different from that in published opinions,

particularly those traffic stops involving drivers who fail to stop after striking a deer on a public roadway.

STATEMENT OF THE CASE

I. Nature of the Case

Schmalz is charged with a violation of Town of Lisbon Ordinance Number 7.03, adopting Wis. Stat. § 346.63(1)(a), entitled "Operating under the influence of an intoxicant" and a violation of Town of Lisbon Ordinance Number 7.03, adopting Wis. Stat. § 346.63(1)(b), entitled "Operating with a prohibited alcohol concentration."

II. Procedural Status and Disposition at Motion Hearing

Schmalz was charged with the above-listed violations on November 18, 2012. Schmalz filed a Motion to Suppress in Municipal Court on May 13, 2013 on the grounds that the Village of Chenequa police officer lacked a reasonable suspicion to stop Schmalz and that the officer's stop was not justified by the community caretaker doctrine. The Municipal Court held a hearing on Schmalz's Motion to Suppress on May 2, 2014 and denied the Motion and the defendant was ultimately found guilty on both charges. Schmalz appealed the Municipal Court decision to Circuit Court on May 9, 2014. Schmalz filed an identical Motion to Suppress in the Circuit Court on August 13, 2014 (R 9; R-Ap. p. 1-11). This matter proceeded to a motion hearing on

Schmalz's Motion to Suppress on October 13, 2014 before Waukesha County Circuit Judge Michael O. Bohren. (R 15; R-Ap. p. 1-43). Judge Bohren granted Schmalz's Motion to Suppress and dismissed both charges against Schmalz. (R 15 42:6-20; R-Ap. p. 42:6-20). The Village of Chenequa filed its Notice of Appeal on January 12, 2015. (R 13).

III. Statement of Facts

While on duty on Sunday, November 18, 2012 at approximately 3:08 a.m. and traveling northbound on Highway C in the Village of Chenequa, Village of Chenequa Police Officer Johns observed Schmalz operating a motor vehicle southbound on Highway C in the same location. (R 15 5:10-6:8; R-Ap. p. 5:10-6:8). There were no unusual weather or road conditions; it was clear and dry. (R 15 7:3-7; R-Ap. p. 7:3-7). The area of the roadway where Officer Johns observed Schmalz was straight and relatively flat. (R 15 7:24-8:3; R-Ap. p. 7:24-8:3).

Officer Johns's attention was drawn to Schmalz's vehicle because it was traveling at 26 miles per hour in a 35 mile per hour zone with no apparent justification. (R 15 6:8-7:7 R-Ap. p. 6:8-7:7). Based on years of running radar in this area of Highway C, Officer Johns knew that most vehicles travel between 38 and 43 miles per hour in this particular area. (R 15 19:1-4; R-Ap. p. 19:1-4).

Therefore, Officer Johns's attention was drawn to the slow speed of Schmalz's vehicle and found it unreasonable. (R 15 9:6-13; R-Ap. p. 9:6-13).

Officer Johns's attention was also alerted by the fact that Schmalz's vehicle was traveling very close to the fog line in an area with little to no shoulder on the road. (R 15 7:15-21, 8:13-16, 25:8-10; R-Ap. p. 7:15-21, 8:13-16, 25:8-10). Officer Johns was concerned that Schmalz was traveling within two (2) to three (3) inches of the fog line in an area where "you're in the ditch after crossing over the fog line." (R 15 8:7-16; R-Ap. p. 8:7-16). Officer Johns saw that Schmalz was within six (6) to seven (7) inches of leaving the roadway. (R 15 8:21-22; R-Ap. p. 8:21-22). Based upon these observations, Officer Johns conducted a u-turn to further observe Schmalz's operation of his vehicle. (R 15 7:21-23; R-Ap. p. 7:21-23).

After conducting a u-turn and getting within three (3) to four (4) car lengths of Schmalz' vehicle, covering about a half mile, Officer Johns observed a deer coming from the right side of his field of vision toward the roadway. (R 15 9:3-7, R-Ap. p. 9:3-7). Officer Johns had no trouble seeing the deer as it approached the roadway or reacting to its presence and approach. (R 15 9:15-17, 10:16-18; R-Ap. p. 9:15-17, 10:16-18).

Officer Johns observed the deer travel in front of Schmalz's vehicle which then struck the deer, causing the deer to "spin helicopter into the roadway into the northbound lane." (R 15 9:7-10, 11:2-4; R-Ap. p. 9:7-10, 11:2-4). When Schmalz struck the deer, the deer had almost crossed the path of the car. (R 15 26:15-19; R-Ap. p. 26:15-19). Officer Johns saw that Schmalz did not stop upon striking the deer but only tapped the brake lightly just before impact. (R 15 9:10, 11:5-10; R-Ap. p. 9:10, 11:5-10). Officer Johns did not think it was "normal driving behavior to strike an animal that's as large as a deer and not at least stop and check on your vehicle to make sure your vehicle is safe to continue on." (R 15 11:23-12:2; R-Ap. p. 11:23-12:2). In Officer Johns's experience, people report deer-car collisions approximately 90% of the time. (R 15 19:19-20:6). In this instance, the impact was such that the deer was deceased in the northbound lane where it created a traffic hazard. (R 15 26:24-27:3, R-Ap. p. 26:24-27:3).

Having observed Schmalz fail to stop after striking the deer, Officer Johns was unsure if something was wrong with Schmalz. (R 15 24:5-14; R-Ap. p. 24:5-14). Officer Johns didn't know if Schmalz was impaired or having a medical condition like diabetic shock that may have

contributed to his lack of reaction to the deer. *Id.* Officer Johns wondered if Schmalz even knew he struck a deer. (R 15 24:12-14; R-Ap. p. 24:12-14). Officer Johns knew that he would not be able confirm if Schmalz was having some kind of problem without making contact with him. *Id.* Officer Johns was also unable to ascertain whether Schmalz's vehicle had sustained any damage as a result of striking the deer. (R 15 23:1-19, 25:2-4; R-Ap. p. 23:1-19, 25:2-4).

Officer Johns found that based on the day of the week, the time of the day, the slow speed of Schmalz's vehicle, his observation of the Schmalz vehicle traveling within inches of the fog line in an area with little or no shoulder, and the fact that Schmalz did not react or stop upon striking the deer, he had formed a reasonable suspicion that Schmalz was operating while impaired. (R 15 11:18-23; R-Ap. p. 11:18-23). As a result of the forgoing, Officer Johns conducted a traffic stop of Schmalz to determine if the operator was impaired or hurt and if the vehicle was damaged. (R 15 12:10-14, 24:19-23, R-Ap. p. 12:10-14, 24:19-23).

ARGUMENT

I. Standard of Review

When reviewing a circuit court's determination of whether there was reasonable suspicion to support a stop of a vehicle, the Appellate Court reviews the Circuit Court's findings of fact under the clearly erroneous standard and reviews de novo the application of those facts to constitutional principles. State v. Brown, 2014 WI 69, ¶17, 355 Wis.2d 668, 677, 850 N.W.2d 66, 71.

The standard of review for searches and seizures based on the "community caretaker function" is whether police conduct constitutes a violation of the Fourth Amendment or Article I, Section 11 of the federal and state Constitutions, which is a question of constitutional fact reviewed de novo. State v. Kramer, 2009 WI 14, ¶ 16, 315 Wis.2d 414, 423, 759 N.W.2d 598, 603. Accordingly, the Court of Appeals reviews de novo 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. Id.

II. Officer Johns had reasonable suspicion to stop Schmalz

In Terry v. Ohio, 392 U.S. 1, 30 (1967), the United States Supreme Court authorized police officers to stop and detain individuals when officers possess reasonable suspicion to believe a crime has occurred. The reasonable suspicion standard applies to motor vehicle stops. Arizona

v. Johnson, 555 U.S. 323, 333 (2009). The Wisconsin Supreme Court has embraced this rule, see State v. Chambers, 55 Wis. 2d 289, 294, 198 N.W.2d 377, 378-79 (1972), and it is codified in Wis. Stat. § 968.24.

A law enforcement officer may lawfully conduct an investigatory stop if, based upon the officer's experience, he or she reasonably suspects "that criminal activity may be afoot." Williams, 2001 WI 21 at ¶21, 241 Wis. 2d at 644, 623 N.W.2d at 112 (quoting Terry, 392 U.S. at 30). Reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was committing a crime. State v. Waldner, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681, 684 (1996).

An investigative traffic stop may be supported by reasonable suspicion even when the officer did not observe the driver violate any law. See Post, 301 Wis.2d 1, ¶24 ("[I]t is clear that driving need not be illegal in order to give rise to reasonable suspicion" because such a standard "would allow investigatory stops only when there was probable cause to make an arrest."); State v. Waldner, 206 Wis.2d 51, 57, 556 N.W.2d 681, 684 (1996) ("The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable

inferences drawn from the lawful conduct are that criminal activity is afoot.").

In evaluating whether an investigatory traffic stop is supported by reasonable suspicion, the officer must have more than an "inchoate and unparticularized suspicion or hunch." Post, 301 Wis.2d 1, ¶10. Rather, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the traffic stop. Id. This determination is based on "whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." Id. at ¶13.

The determination of whether a stop was objectively reasonable turns on the facts of each individual case. Despite the fact that any single fact, standing alone, may be insufficient to provide reasonable suspicion or that each could have an innocent explanation, a Court must look at the totality of the facts taken together. Waldner, 206 Wis. 2d at 58, 556 N.W.2d at 685. "The building blocks of fact accumulate. As they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a

point is reached where the sum of the whole is greater than the sum of its individual parts. Id.

Here, Officer Johns possessed the requisite reasonable suspicion to stop Schmalz. First, Officer Johns first observed Schmalz operating a motor vehicle in the Village of Chenequa on a Sunday at 3:08 a.m. Second, Officer Johns observed Schmalz operating a motor vehicle at a speed of 26 miles per hour in a 35 mile an hour zone. Officer Johns found this unusual given that the average vehicle travels this stretch of road at between 38 and 43 miles per hour.

Third, Officer Johns observed Schmalz's vehicle traveling within two (2) to three (3) inches of the fog line in an area where the roadway has little to no shoulder. As Officer Johns put it, "you're in the ditch after crossing over the fog line." (R 15 8:7-16; R-Ap. p. 8:7-16). Officer Johns saw that Schmalz was within six (6) to seven (7) inches of actually leaving the roadway.

Fourth, Schmalz failed to avoid colliding with a deer, struck the deer and failed to stop upon striking the deer. Schmalz's only reaction to the oncoming deer was a momentary tap of the brakes just before impact. As Officer Johns pointed out, based on his experience, this is not normal driving behavior. The average person, upon striking an animal as large as a deer would at least stop to examine

the condition of his or her vehicle. The helicopter-effect the impact had on the deer and the fact that the deer was ultimately deceased indicate that this was not a collision where the deer or the impact would escape the driver's notice. Schmalz, however, exhibited little if any reaction to the deer or the collision. Furthermore, as Officer Johns pointed out, approximately 90% of deer-car collisions are reported as accidents. Schmalz gave no indication he intended to report the incident.

While none of these factors alone may constitute a violation of the law or justify a stop of Schmalz's vehicle, taken together, these facts are the building blocks of the reasonable suspicion necessary to justify the stop. In this case, Officer Johns had more than just an inchoate hunch that Schmalz was committing a violation of the law. Officer Johns was able to point to the heretofore listed specific, articulable facts that led him to the reasonable belief, based on the totality of the circumstances that a violation of the law was afoot. Therefore, the Circuit Court's finding that Officer Johns did not possess the reasonable suspicion necessary to stop Schmalz was clearly erroneous.

III. Officer Johns's stop of Schmalz was justified by his community caretaker function.

An officer exercises a community caretaker function "when the officer discovers a member of the public who is in need of assistance." State v. Pinkard, 2010 WI 81, ¶12, 237 Wis.2d 346, 785 N.W.2d 592.

> When a community caretaker function is asserted as justification for the seizure of a person, the 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.

State v. Kramer, 2009 WI App 14, ¶21, 315 Wis.2d 414, 427 759 N.W.2d 598, 605, citing State v. Anderson, 142 Wis.2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987). Analysis of the third factor involves balancing "the public interest or need that is furthered by the officer's conduct against the degree and nature of the intrusion on the citizen's constitutional interest." Pinkard, 2010 WI at ¶41. Four factors are considered when weighing these interests:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the search, 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. at ¶42.

In Kramer, which is instructive here, the officer stopped behind the defendant's legally parked vehicle that

had its hazard flashers on. Id. at ¶37. The court pointed to the officer's testimony that "when a vehicle is parked on the side of the road with its hazard flashers operating, typically there is a vehicle problem." Id. Another instructive case is State v. Truax, 2009 WI App 60, 318 Wis. 2d 113, 767 N.W.2d 369, wherein a motorist passed a law enforcement vehicle and abruptly pulled over to the side of the road. Because this behavior was unusual, the officer monitored the vehicle for ten to fifteen seconds and saw no one exiting the vehicle. The officer became "concerned for the well-being of the driver inside at that time," such as a possible medical condition or mechanical problem with the vehicle. Id., ¶4.

What these two cases demonstrate is that the possibility of assistance being needed, based on unusual vehicle conduct, is what forms the basis of a bona fide community caretaker function. Here, there was vehicle conduct that would lead a reasonable police officer to believe that assistance may have been needed. Schmalz was traveling nine (9) miles an hour under the posted speed limit. Schmalz was traveling within inches of the fog line and therefore within inches of leaving the roadway. Most striking is that Schmalz exhibited little, if any, reaction the approach of and collision with a deer that was so

severe that the animal was ultimately deceased. Based upon the unusual conduct of the Schmalz vehicle and the fact that Officer Johns was concerned that driver may in fact be in need of assistance, Officer Johns was acting under a bona fide community caretaker function.

Lastly, the public need and interest outweigh the intrusion upon the privacy of Schmalz. Here, the public had a high degree of interest because the unusual driving in question left a hazard blocking the only northbound lane of travel. The public also has an interest in the removal of drivers who are impaired for whatever reason from the roadway, for the driver's safety and the public's safety. The situation here was also exigent in that it demanded prompt attention. A driver in need of assistance allowed to continue traveling unassisted on a public roadway poses a danger to himself and others.

In addition, the circumstances surrounding the seizure in this case demonstrate a minimal intrusion. The seizure was in the nature of an investigatory traffic stop that took place on a public roadway soon after bar time. The only display of authority was the activation of the officer's lights and sirens utilized in conducting the traffic stop. Officer Johns exhibited no other force. What is more, the traffic stop was the first available, most

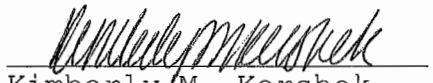
feasible, most effective and least intrusive means by which Officer Johns could determine the condition of the driver. Based upon the forgoing, Officer Johns's stop of Schmalz was justified by the community caretaker doctrine.

CONCLUSION

Because Officer Johns possessed the requisite reasonable suspicion to stop Schmalz, the Village of Chenequa respectfully requests that this Court reverse the Circuit Court's clearly erroneous decision to grant Schmalz's motion to suppress for lack of reasonable suspicion remand the case back to the Circuit Court. Alternatively, because Officer Johns's stop of Schmalz was justified by the community caretaker doctrine, the Village of Chenequa respectfully requests that this Court reverse the Circuit Court's decision to grant Schmalz's motion to suppress and remand the case back to the Circuit Court.

Respectfully submitted this 24th day of February, 2015.

KERSHEK LAW OFFICES



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and Wis. Stat. § 809.19(8)(c) as modified by the Court's Order for a brief produced with a monospaced font. The length of this brief is thirteen (13) pages.

Dated this 24th day of February, 2015.

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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 s. 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 24th day of February, 2015.

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AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

Susan J. Krause of Kershek Law Offices located at the Greenfield Professional Center, 10777 West Beloit Road, Greenfield, Wisconsin, 53228, being first duly sworn on oath, states that on the 24th day of February, 2014, she mailed properly enclosed in a postage paid envelope, an original and five (5) copies of Plaintiff-Appellant Village of Chenequa's Brief, Appendix and all accompanying certifications in the above matter to:

Wisconsin Court of Appeals
Office of the Clerk
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Susan J. Krause
Susan J. Krause

Subscribed and sworn before me
this 24th day of February, 2015.

Kimberly M. Kershek
Notary Public, State of Wisconsin
My commission is permanent

NOTARY PUBLIC KIMBERLY M. KERSHEK STATE OF WISCONSIN

WISCONSIN COURT OF APPEALS
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Attorney Paul S. Crawford
Kim & LaVoy, SC
2505 N 124th St, Ste 220
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Susan J. Krause
Susan J. Krause

Subscribed and sworn before me
this 24th day of February, 2015.

Kimberly M. Kershek
Notary Public, State of Wisconsin
My commission is permanent

NOTARY PUBLIC
KIMBERLY M.
KERSHEK
STATE OF WISCONSIN

CERTIFICATE OF MAILING

I hereby certify that this brief, appendix and all accompanying certifications were deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on February 24, 2015.

I further certify that the brief, appendix and all accompanying certifications was correctly addressed and postage was pre-paid.

Dated this 24th day of February, 2015.

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