WISCONSIN COURT OF APPEALS
District II

VILLAGE OF CHENEQUA,

Plaintiff-Appellant,

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

CHAD C. SCHMALZ,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

ON APPEAL FROM A JUDGMENT OF DISMISSAL ENTERED BY THE
CIRCUIT COURT FOR WAUKESHA COUNTY,
THE HONORABLE MICHAEL O. BOHREN PRESIDING

Kim & LaVoy, S.C.
2505 North 124th Street, Suite 220
Brookfield, Wisconsin 53005

By: Paul S. Crawford
State Bar Number: 1083115
Attorney for Defendant-Respondent,
Chad C. Schmalz

WISCONSIN COURT OF APPEALS
District II

VILLAGE OF CHENEQUA,

Plaintiff-Appellant,

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

CHAD C. SCHMALZ,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT CHAD C. SCHMALZ

STATEMENT OF THE ISSUES

1. Did the trial court erroneously exercise its discretion by granting the defendant's motion to suppress evidence on the grounds that there was no reasonable suspicion to stop the Defendant's vehicle?

2. Did the Village of Chenequa waive its right to raise the Community Caretaker doctrine on appeal by failing to raise the issue in the circuit court?

POSITION ON PUBLICATION

In this decision, publication is not warranted because the factual circumstances of this case, while somewhat unique, are not significantly different from that in other published opinions or established case law.

STATEMENT OF THE CASE

The testimony of Village of Chenequa Police Officer Johns sets forth the following relevant facts as they relate to the Court's decision in this matter. These facts supplement the factual record provided by the Appellant.

On November 18, 2012 at approximately 3:08 a.m. Officer Richard Johns was traveling Northbound on County Highway C in the Village of Chenequa. (R p. 5:17-18, R-Ap. p. 5:17-18). He observed a vehicle traveling southbound in the same area. (R p. 6:6-11, R-Ap. p. 6:6-11).

The road was dark and unlit. (R p. 40-41:23-1, R-Ap. p. 40-41:23-1). At that time of year, there is a heavy deer population on and near the roadway. (R p. 14:4-15, R-Ap. p. 14:4-15). The vehicle came out of a curve with a 25 mile per hour speed limit, where the speed limit became 35 miles per hour. (R p. 16:1-24, R-Ap. p. 16:1-24). Officer Johns observed the vehicle traveling 26 miles per hour and traveling in the proper lane of travel near, but not on or over, the fog line. Officer Johns then decided to turn around to follow the vehicle. (R 7:15-23, R-Ap. p. 7:15-23). As he followed the vehicle, he observed no erratic driving. The vehicle traveled properly in its lane of travel, with no deviations on or over the fog line, and the

vehicle did not swerve within its own lane. (R pp. 17:11-14, 20-21:15-7, R-Ap. pp. 17:11-14, 20-21:15-7).

The driver of the vehicle he was following applied the brakes, but could not avoid a collision with a deer. (R pp. 11:7-8, 22:10, R-Ap. pp. 11:7-8, 22:10). Officer Johns could not observe any damage to the vehicle or signs of distress from the driver. (R pp. 23-24:15-7, R-Ap. pp. 23-24:15-7). He testified that the reason for his decision to stop the vehicle was to check and see if the driver was okay or if there was damage to the vehicle. (R p. 24:19-23, R-Ap. p. 24:19-23).

At argument, after the evidence was closed, the Village stated that "the motion is just a stop motion" and raised no arguments about the Community Caretaker doctrine during the entirety of the hearing. (R p. 27:20-22, R-Ap. p. 27:20-22).

ARGUMENT

I. THE TRIAL COURT DID NOT CLEARLY ERR IN FINDING THAT OFFICER JOHNS DID NOT HAVE REASONABLE SUSPICION TO INITIATE A TRAFFIC STOP ON THE DEFENDANT.

A. Introduction.

The trial court did not err in granting the defendant's motion to suppress evidence based on the unlawful stop of the defendant's vehicle in this case. The trial court properly evaluated the testimony and exhibits

when it issued its oral decision, noting that the circumstances as they existed in this case, under the totality of the circumstances, did not warrant a traffic stop.

B. Standard of Review.

When the Appellate Court reviews a trial court's decision to grant a motion to suppress evidence, the Court accepts the circuit court's findings of fact unless they are clearly erroneous, and determines the application of constitutional principles to those facts independently of the circuit court, but benefitting from their analysis. State v. Popenhagen, 2008 WI 55, ¶ 31, 309 Wis. 2d 601, 749 N.W.2d 611, *citing* State v. Drew, 2007 WI App 213, ¶ 11, 305 Wis. 2d 641, 740 N.W.2d 404.

C. The Trial Court Did Not Err in Granting the Defendant's Motion to Suppress Evidence.

The stop of a vehicle must be based on more than an officer's "inchoate and unparticularized suspicion or hunch," but instead must be grounded upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop. State v. Post, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. An investigatory stop may be made when an officer observes wholly lawful conduct, so

long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." State v. Waldner, 206 Wis. 2d 51, 57, 556 N.W. 2d 681 (1996).

The following facts were observed in Officer Johns' allegation of suspicious driving: the time of day was 3:08 a.m.; the time of year meant increased deer populations on and near roadways; the roadway was dark and unlit; the driver was traveling 26 miles per hour in a 35 mile per hour zone; the driver was traveling in the proper lane of travel and did not deviate from, or swerve within, the lane of travel[1]; a deer wandered into the road; the driver applied his brakes; the driver collided with a deer and continued driving; Officer Johns did not observe any damage to the vehicle or signs of distress from the driver. Officer Johns testified that the reason for his stop was "to determine if the operator was hurt or if damage was caused to the vehicle," he was not investigating an Operating While Intoxicated related offense at that time.

The Court noted that there were five specific items, when considered cumulatively, do not constitute reasonable suspicion for operating a motor vehicle while under the influence. (R 40:16-23, R-Ap. p. 40:16-23). Instead, the

[1] Although Officer Johns' testimony goes into great detail about the ditch on the opposite side of the fog line, there is no indication that the driver was in danger of going into the ditch at any time.

court concluded that in evaluation of the evidence "there was not a basis for the stop," but instead "it was conjecture. It was perhaps a good guess based upon what he saw, but is it - a guess enough? And I don't think a guess is enough. There has to be more than a guess." (R 41:12-18, R-Ap. p. 41:12-18).

The court stated that had the vehicle not struck the deer that "there would not be clearly a basis to stop the vehicle." (R 41:22-24; R-Ap. p. 41:22-24). Then the Court found that the additional fact of striking a deer does not create "a further reasonable basis for the officer to conclude that a traffic violation occurred or a traffic law was violated." (R 42:2-5, R-Ap. p. 42:2-5).

As a result of the trial court's reasonable analysis of the facts on the record before it, the court did not err in granting the Defendant's motion to suppress evidence. The court's conclusion was that there was no reasonable inference that any criminal activity, or drunk driving, occurring based solely on the record before it. It was not clear error to apply the law to these facts and deem there was no reasonable suspicion to stop the Defendant's vehicle.

II. THE VILLAGE'S FAILURE TO RAISE THE ISSUE OF THE COMMUNITY CARETAKER FUNCTION AT THE TRIAL COURT WAIVES ITS RIGHT TO ARGUE THAT ISSUE ON APPEAL.

A. Introduction.

At the trial level, the Village of Chenequa did not raise the issue of the Community Caretaker doctrine, and as a result, the issue has been waived by the Village for purposes of the appeal.

B. Standard of Review.

It is well established that arguments which are not raised at the trial level are deemed waived upon appeal. State v. Caban, 210 Wis. 2d 597, 608, 563 N.W.2d 501 (1997); State v. Keith, 216 Wis. 2d 61, 80, 573 N.W.2d 888 (Ct. App. 1997). The issue must be raised and argued in the trial court in some meaningful way in order for the circuit court to make a ruling. State v. Ledger, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

C. The Village waived its right to raise the issue of Community Caretaker when it did not raise that issue at the trial level.

At the motion hearing, the Village stated that "the motion is just a stop motion." (R p. 27:20-22, R-Ap. p. 27:20-22). The entirety of the transcript is devoid of any arguments regarding the Community Caretaker doctrine. The Defendant raised the issue in the motion he filed with the circuit court, anticipating the argument to be raised by

the Village's counsel as it was in the municipal court. However, at the motion hearing in circuit court, the Village did not make any reference to, or argument regarding, the application of the Community Caretaker doctrine. The Village's sole focus was on reasonable suspicion for the traffic stop. The Village abandoned the argument of the Community Caretaker doctrine that it had initially raised in the municipal court. The hearing before the circuit court is de novo; any arguments not raised before the circuit court court are not decided. As a result, the Village's failure to raise the issue in the circuit court meant that the circuit court judge did not address the issue. The issue cannot now be raised for the first time on appeal, and the argument should be deemed waived by the Village.

CONCLUSION

Therefore, based on the arguments above, case precedent, and the record before this Court, Mr. Schmalz respectfully requests that this Court affirm the findings of the Circuit Court and find that the trial court did not erroneously exercise its discretion in granting the defendant's motion to suppress evidence. Further, Mr. Schmalz respectfully requests that this Court decline to address the issue of the Community Caretaker doctrine,

given that the argument was waived by trial counsel at the time of the motion hearing. As a result, we are asking that this Court affirm the decision of the Circuit Court to grant the Defendant's motion to suppress and the trial court's dismissal of the citations.

Dated in Brookfield, Wisconsin this 13th day of March, 2015.

KIM & LAVOY, S.C.

By: 

Paul S. Crawford
Attorney for Defendant
State Bar Number 1083115

Kim & LaVoy, S.C.
2505 North 124th Street, Suite 220
Brookfield, Wisconsin 53005
Phone (262) 796-1400
Fax: (262) 796-1470
pcrawford@kimandlavoy.com

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 monospace font. The length of this brief is ten (10) pages.

Dated in Brookfield, Wisconsin this 13th day of March, 2015.

Paul S. Crawford
Attorney at Law
State Bar No. 1083115

Kim & LaVoy, S.C.
2505 North 124th Street, Suite 220
Brookfield, Wisconsin 53005
Phone (262) 796-1400
Fax: (262) 796-1470
pcrawford@kimandlavoy.com

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 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 in Brookfield, Wisconsin this 13th day of March, 2015.

KIM & LAVOY, S.C.

By: 

Paul S. Crawford
Attorney for Defendant
State Bar Number 1083115

Kim & LaVoy, S.C.
2505 North 124th Street, Suite 220
Brookfield, Wisconsin 53005
Phone (262) 796-1400
Fax: (262) 796-1470
pcrawford@kimandlavoy.com

WISCONSIN COURT OF APPEALS
District II

VILLAGE OF CHENEQUA,

Plaintiff-Appellant,

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

CHAD C. SCHMALZ,

Defendant-Respondent.

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
) SS
WAUKESHA COUNTY)

Amanda Dowler of Kim & LaVoy, S.C. located at 2505 North 124th Street, Suite 220, Brookfield, Wisconsin, 53005, being first duly sworn on oath, states that on the ___ of March, 2015 she mailed properly enclosed in a postage paid envelope, an original and five (5) copies of Defendant-Respondent Chad C. Schmalz's Brief and all accompanying certifications in the above captioned matter to:

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

Amanda Dowler

Subscribed and sworn before me
This 13th day of March, 2015.

Paul S. Crawford
Notary Public, State of Wisconsin
My commission is permanent.

WISCONSIN COURT OF APPEALS
District II

VILLAGE OF CHENEQUA,

Plaintiff-Appellant,

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

CHAD C. SCHMALZ,

Defendant-Respondent.

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
) SS
WAUKESHA COUNTY)

Amanda Dowler of Kim & LaVoy, S.C. located at 2505 North 124th Street, Suite 220, Brookfield, Wisconsin, 53005, being first duly sworn on oath, states that on the ___ of March, 2015 she mailed properly enclosed in a postage paid envelope, a copy of Defendant-Respondent Chad C. Schmalz's Brief and all accompanying certifications in the above captioned matter to:

Attorney Kimberly Kershek
Kershek Law Offices
10777 West Beloit Road
Greenfield, Wisconsin 53228

Amanda Dowler

Subscribed and sworn before me
This 13th day of March, 2015.

Paul S. Crawford
Notary Public, State of Wisconsin
My commission is permanent.

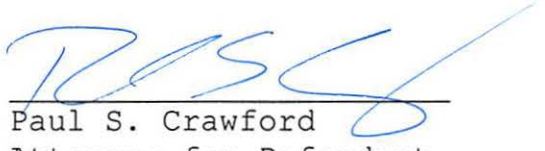
CERTIFICATE OF MAILING

I hereby certify that this brief 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 March 13, 2015.

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

Dated in Brookfield, Wisconsin this 13th day of March, 2015.

KIM & LAVOY, S.C.

By: 

Paul S. Crawford
Attorney for Defendant
State Bar Number 1083115

Kim & LaVoy, S.C.
2505 North 124th Street, Suite 220
Brookfield, Wisconsin 53005
Phone (262) 796-1400
Fax: (262) 796-1470
pcrawford@kimandlavoy.com