RECEIVED
09-08-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

COURT OF APPEALS
District IV
Appeal No.: 2015AP1211 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMMY K. MILLER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

On Appeal From a Decision Entered
on November 30, 2012, in the Columbia County Circuit
Court, the Honorable Allan J. White, Presiding,
Case No. 2012 CT 259

Respectfully Submitted,

BUTING, WILLIAMS & STILLING S .C.
Dudley A. Williams
State Bar No.: 1005730

Address:
6165 N. Green Bay Avenue
Glendale, Wisconsin 53209
Phone: (414) 247-8600 Fax: (414) 247-8655

TABLE OF CONTENTS

C. Written Order Denying Motion to Suppress Statements and Evidence Due To Unlawful Seizure, Detention And Arrest dated March 18, 2012

TABLE OF AUTHORITIES

WISCONSIN CASES:

OTHER CASES:

OTHER AUTHORITIES:

STATEMENT OF THE ISSUE PRESENTED

Whether the detention of the occupants of a legally parked vehicle pursuant to the Community Caretaker Doctrine is lawful when it is founded upon an alleged concern that a passenger is sick and in need of assistance but the record establishes that no medical emergency existed?

Trial Court Answer: Yes

.

Whether the detention of the driver of a vehicle pursuant to the Community Caretaker Doctrine continued to be lawful once the original justification for the seizure proved to be baseless and nothing further occurred to establish a reasonable suspicion to support a *Terry* stop.

Trial Court Answer: Yes

Whether a law enforcement officer has the probable cause necessary to administer a PBT pursuant to Wis. Stats. §343.303 based on an odor of alcohol and an admission of drinking when the subject demonstrates he is not under the influence when performing properly administered standard field sobriety tests?

Trial Court Answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant does not request oral argument because the briefs of the parties will adequately address the issues raised on appeal. Publication is not warranted because the issues presented are case specific and not likely to recur with the kind of frequency that would warrant publication.

STANDARD OF REVIEW

Whether a stop is constitutional is a question of law that an appellate court reviews *de novo*. *State v. King,* 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993). A trial court=s findings of fact will be affirmed upon appeal unless they are against the great weight and clear preponderance of the evidence. *State v. Richardson,* 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990).

STATEMENT OF THE CASE

On July 28, 2012, Tommy K. Miller was arrested by Deputy Gregory R. Kaschinske of the Columbia County Sheriff's Department and issued citations charging Operating While Intoxicated and Operating with a Prohibited Alcohol Content as second offenses and a Notice of Intent to Revoke Operating Privileges charging a refusal to submit to chemical testing. Mr. Miller entered pleas of not guilty to both

citations at his initial appearance and filed a timely request for a refusal hearing. On October 15, 2012, Mr. Miller filed a Motion to Suppress Statements and Evidence Due to Unlawful Seizure, Detention and Arrest. (R:6)[1]. An evidentiary hearing on that motion was conducted on November 30, 2012. Judge Allan J. White entered an order denying the motion by way of an oral decision on November 30, 2012, (R:25:47-51)(App:2), and issued a written order denying the motion on March 18, 2015. (R:15)(App.3).

On March 18, 2015, the defendant entered a plea pursuant to negotiations to the OWI violation. Mr. Miller was sentenced by the court on that date. The defendant subsequently filed this appeal of Judge White's decision on the Motion to Suppress Evidence Due to Unlawful Seizure, Detention and Arrest.

STATEMENT OF FACTS

On July 28, 2012, at approximately 2:08 am, Deputy Gregory Kaschinske of the Columbia County Sheriff's Department was on routine patrol in a marked squad traveling through the City of Lodi on Milliston Ave. and approached the stop sign at Fair St. A squad video captured the entirety of events from the deputy's first observation of the vehicle to the arrest. (R:23). Deputy Kaschinske testified that while parked

[1] Throughout this brief, references to the record will take the following form: (R:__:__), with R __ denoting the Circuit Court document number followed by the page number if applicable. When the referenced material is also contained in the Appendix, it will be further identified as (App:___: ___).

at the stop sign he could observe the defendant's vehicle legally parked (R:24:9,21)(App:A:9,21) approximately 40 yards down the road on Fair St. (R:24:6)(App:A:6). Deputy Kaschinske testified that was nothing about the manner in which the vehicle was parked relative to the curb or roadway that was suspicious. (R:24:23)(App:A:23). The deputy did not see the vehicle being operated and had observed no traffic or law violations (R:24:22-23)(App:A:22-23). Deputy Kaschinske surmised that the vehicle had just parked there moments before he observed it. In the first seconds of the video, Mr. Miller's vehicle can be seen parked down the street on Fair St., with its parking lights activated and no one has yet opened a door or exited the vehicle.

While at the stop sign, Deputy Kaschinske testified that he observed the passenger door was open but the female subject seated in the passenger seat did not immediately exit the vehicle. Deputy Kaschinske testified that he "eventually" observed her exit the vehicle without noting any balance issues. He then observed her looking down at the ground and "thought maybe she was going to puke or something was wrong". (R:24:6)(App:A:6). Deputy Kaschinske testified that he then made a right turn onto to Fair Street and pulled up behind the vehicle and activated his red and blue bar lights to check on the status of the occupants. (R:24:8)(App:A:8).

The video established that Deputy Kaschinske remained at the stop sign a total of fifteen seconds. Ten seconds later he was behind Mr. Miller's vehicle with his red

and blue squad lights activated detaining Mr. Miller. Contrary to Deputy Kaschinske's testimony, the video showed that the passenger was standing outside the passenger door bending over and reaching into the vehicle when he pulled away from the stop sign.

Deputy Kaschinske testified that he observed Mr. Miller standing at the driver's door as he pulled in behind the vehicle, though the video actually shows Mr. Miller approaching the rear of the vehicle when the deputy pulled up behind him. Deputy Kaschinske exited his squad and made verbal contact with Mr. Miller as he approached. Deputy Kaschinske testified that he asked Mr. Miller if "everything was Okay" and Mr. Miller responded that "everything was fine". (R:24:10-11)(App:A:10-11). Deputy Kaschinske testified that he was just a couple feet from Mr. Miller at this time and he noted that Mr. Miller's speech was "slightly slurred", his eyes were bloodshot and glassy, and that there was an odor of intoxicant's coming from his person (R:24:11)(App:A:11). Deputy Kaschinske testified that he also observed that the passenger was "fine" and that there was nothing about her that indicated she was sick or in need of assistance. (R:24:11,19-20,23)(App:A:11,19-20,23).

Contrary to Deputy Kaschinske's testimony, the video clearly establishes that he was several yards away from Mr. Miller when he was advised by Mr. Miller that there was no problem. Deputy Kaschinske was not close enough to Mr. Miller to be in a position to have smelled an odor of alcohol

or observed any bloodshot eyes when Mr. Miller first spoke to him. Also contrary to Deputy Kaschinske's testimony, the video clearly captures every word stated by Mr. Miller during the event and his speech was clear and not slurred to any degree – not even slightly.

After Deputy Kaschinske had learned that there was no medical emergency and no one was in need of assistance, he continued to approach Mr. Miller, coming up to within a few feet of him, and asked Mr. Miller if he had anything to drink that night. The passenger answered that they did. Deputy Kaschinske asked Mr. Miller where he had come from and he replied that he had come from KD's Bar and Grill, which the deputy knew to be located a half mile up the road. (R:24:12)(App:A:12). Deputy Kaschinske asked Mr. Miller if he had driven to the location and he said that he had. (R:24:13)(App:A:13).

Deputy Kaschinske then had Mr. Miller perform the "three standard field sobriety tests": the Horizontal Gaze Nystagmus test (HGN), the Walk-and-Turn test, and the One Leg Stand test. (R:24:13)(App:A:13). Deputy Kaschinske testified he had been trained in the administration of the tests and taught how to administer them in accordance with the standard procedures used throughout the state. (R:24:25)(App:A:24). Deputy Kaschinske testified that the reason the tests are considered standard is because the tests are administered in the same way with the same clues being looked at no matter who is conducting the tests. Deputy

Kaschinske testified that the accuracy of the results would be dependent on the tests being administered properly. (R:24:25)(App:A:25).

Deputy Kaschinske could not remember any specifics of his training. Deputy Kaschinske could not remember the directions he was given in how to administer the HGN test. (R:24:26-28)(App:A:26-28). He testified he observed the maximum of six clues when he administered that test to Mr. Miller, however the video clearly established that the test was administered improperly and in a way that he could not have observed most of the clues he testified he observed.

The video evidence clearly establishes that Deputy Kaschinske makes a total of six lightening quick passes with his finger, three for the left eye and three for the right. He did not recall that the standard training he had received 8 years earlier for that test required two passes for each eye for each of the three tests, for a total of 12 passes. (R:24:26)(App:A:26). He did not recall that the pass for the first part of the test, to determine smooth pursuit in each eye, should be administered slow enough – taking two seconds - that the eyes can be observed following the stimulus. (R:24:26)(App:A:26). The video reveals that the first two passes looking for smooth pursuit were done so fast that it would be impossible to observe the subtleties of nystagmus.

Deputy Kaschinske testified that he could not remember the procedures he was trained on in administering the second part of the HGN test, looking for distinct

nystagmus at maximum deviation. Deputy Kaschinske could not remember that he was trained to hold the stimulus at maximum deviation for four seconds to observe distinct nystagmus. The video shows that Deputy Kaschinske did not hold the stimulus at maximum deviation for even a split second and contrary to his testimony could not have observed distinct nystagmus at maximum deviation - what the test is designed to be looking for.

Deputy Kaschinske testified again that he could not remember the procedures for the administration of the last portion of the HGN test where he was supposed to determine whether the onset of nystagmus occurs prior to 45 degrees. Deputy Kaschinske did testify that he was trained that during this portion of the test he is supposed to move the stimulus at a slow rate until he observes the angle at which nystagmus first occurs. (R:24:29)(App:A:29). Again, the video showed that Deputy Kaschinske made two lighting fast passes with the stimulus and could not have observed the angle that nystagmus first occurred.

The evidence established that while conducting the Heel to Toe test, Mr. Miller remained in the instructional stance as he was told to do while being advised as to how to conduct the test, took the correct number of steps, all steps were heel to toe, he looked at his feet and never stepped off the straight line he was walking. Deputy Kaschinske did testify that Mr. Miller failed that test because he swayed while remaining in the instructional stance, he did not turn

using short choppy steps as he was instructed and because he raised his arms more than six inches from his side while he was walking to "maintain his balance". (R:24:16)(App:A:16). The video shows Mr. Miller showed no balance issues at all during his performance on the test and, contrary to Deputy Kaschinske's testimony, the video also establishes that Mr. Miller did not sway while in the instructional stance and that he did not raise his arms more than six inches from his side during the test to maintain his balance. The video evidence establishes that Mr. Miller passed the Heel to Toe test.

Lastly, Deputy Kaschinske administered the One Leg Stand test to Mr. Miller and testified that he failed that test because Mr. Miller swayed during the test and put his foot down at the count of 26 instead of 30. (R:24:17)(App:A:17). The video clearly shows that Mr. Miller showed no signs of alcohol impairment during the administration of that test and, contrary to Deputy Kaschinske's testimony, he did not sway during the test.

After completing the three standard field sobriety tests, Mr. Miller, after some discussion and prodding by Deputy Kaschinske, agreed to take a PBT test and was thereafter placed under arrest.

ARGUMENT

I. INTRODUCTION

Many of the essential facts are not in dispute. Deputy Kaschinske saw the defendant's vehicle legally parked on the side of a roadway. He observed no operation of the vehicle and no law violations of any kind. The deputy went a short distance down the road and activated his lights as he parked behind the vehicle. Deputy Kaschinske effectuated a seizure purportedly out of concern that the passenger may need assistance. Immediately upon exiting his vehicle, before he was in a position to detect any odor of alcohol or bloodshot eyes on Mr. Miller, Deputy Kaschinske learned the passenger was not in need of assistance and that Mr. Miller and his passenger were fine.

The court decided the case against Mr. Miller finding that the initial detention was reasonable pursuant to the Community Caretaker Doctrine. The court found that the fact that the "first question out of the deputy's mouth was "Is everything all right?" indicates that the community caretaker function was "legitimate" and formed a reasonable basis for the detention. (R:24:48)(App:A:48).

The State failed to meet its burden of establishing that Deputy Kaschinske had legitimate grounds to seize Mr. Miller acting as a community caretaker based on the evidence at the hearing. There was no basis for Deputy Kaschinske to believe that either the passenger or Mr. Miller was in need of assistance. The video demonstrated that during the fifteen

seconds he had to observe the vehicle and passenger prior to the seizure, Deputy Kaschinske could not have reasonably believed that anyone was in need of assistance and clearly stopped and detained Mr. Miller acting as a law enforcement officer looking for crimes – not as a community caretaker concerned for the well being of someone. The video evidence contradicts Deputy Kaschinske's testimony regarding seeing the passenger moving in a manner suggesting she was sick – she simply could not have done what the deputy testified she did in the seconds she is off camera.

Deputy Kaschinske's seizure of Mr. Miller and continuing the seizure to confront the defendant was not a bonafide community caretaker activity. The public's need and interest in the police action in this case was outweighed by the nature and extent of the intrusion upon the defendant. Deputy Kaschinske's conduct in seizing the defendant was not justified by the Community Caretaker Doctrine.

Even if Deputy Kaschinske was somehow initially justified in deciding as a community caretaker to investigate what he reasonably believed to have been a person in need of assistance when he seized the defendant, once it was clear that the basis for his concern for the well being of the passenger was unfounded, he no longer had any basis to act as a community caretaker and the seizure became a *Terry* stop.

The seizure cannot be upheld as a valid T*erry* stop because Mr. Miller had done nothing to create a reasonable

suspicion that criminal activity was afoot. Deputy Kaschinske had no reasonable basis to believe that Mr. Miller had violated any law at the time he learned the passenger was not sick or in need of assistance. The initial justification and scope of the detention was exceeded when Deputy Kaschinske continued the seizure by keeping his lights activated, approaching Mr. Miller and interrogating him about his activities prior to legally parking his vehicle.

Even if Mr. Miller was legally detained pursuant to a valid *Terry* stop, Deputy Kaschinske did not have probable cause to administer the PBT to Mr. Miller. The record clearly establishes that the HGN test administered to the defendant was not conducted in a manner which could have supported Deputy Kaschinske's findings on that test. The manner in which Mr. Miller performed the Heel to Toe Test and the One Leg Stand test clearly established he was not impaired. The PBT test was not legally administered and the arrest of Mr. Miller was therefore illegal.

II. THE DETENTION IN THIS CASE CANNOT BE UPHELD BASED UPON THE COMMUNITY CARETAKER DOCTRINE

The right of individuals to be free from unreasonable detentions, seizures and arrests is protected by the Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution. "The Fourth Amendment's purpose is to prevent arbitrary and oppressive

interference by law enforcement officials with the privacy and personal security of individuals." *State v. Reichl*, 114, Wis. 2d 511, 339 N.W.2d 127 (Ct. App. 1983). When a defendant challenges the constitutionality of a warrantless seizure or detention under the Fourth Amendment, the prosecution bears the burden of proving the officer's conduct was reasonable and lawful. *McDonald v. United States*, 335 U.S. 451,456 (1984).

The police may seize a citizen without a warrant and without reasonable suspicion when the police are performing a community caretaker function. In *State v. Anderson*, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987) (reversed on other grounds, 155 Wis. 2d 77, 454 N.W.2d 763 (1990) the court developed a three prong test to evaluate whether a seizure conducted as part of community caretaker activity is reasonable under the Fourth Amendment. First, the court must determine whether a seizure under the Fourth Amendment occurred. Second, the court must decide whether the police conduct was a bonafide community caretaker activity. Lastly, the court must find that the public need and interest in the police activity outweighed the intrusion upon the privacy of the individual. *Id.,* at 169.

A. Mr. Miller Was Seized By Deputy Kaschinske.

A seizure has occurred under the Fourth Amendment when an officer by means of physical force or show of

authority has in some way restrained the liberty of a citizen. *Terry v. Ohio,* 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Harris,* 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). In order to effect a seizure, an officer must make a show of authority and the citizen must actually yield to that show of authority. *In re Kelsey C. R.,* 243 Wis.2d 422, 444, 626 N.W.2d 777, 789 (2001). A seizure occurs when a reasonable person would not feel free to ignore the police presence and go about their business. *Kaup v. Texas*, 538 U.S. 626, 630 (2003). The detention of a motorist by a law enforcement officer resulting from a traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment. *Berkemer v. McCarty*, 486 U.S. 420, 436-437 (1984).

Deputy Kaschinske seized Mr. Miller at the moment he activated his squad lights, parked behind Mr. Miller's vehicle and Mr. Miller acquiesced to those lights and remained on the scene.

B. Deputy Kaschinske's Seizure of Mr. Miller Was Not a Bonafide Community Caretaker Function.

The second prong of the *Anderson* test requires that the police action in seizing a suspect be a "bonafide community caretaker function". *State v. Anderson*, 142 Wis2d. at 169. The community caretaker function describes those actions by police in conducting investigations that are **A**totally divorced

from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.@ *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed. 706 (1973); *State v. Erdman,* 266 Wis. 2d 1062, 668 N.W.2d 563 (Ct. App. 2003). *State v. Richter,* 224 Wis. 2d 814, 823, 592 N.W.2d 310, 315 (Ct. App. 1999). Under this test, the evidence would have to establish that Deputy Kaschinske was motivated "totally" by a perceived need to render aid or assistance to the defendant or his passenger and therefore was not motivated by an intent to investigate potential criminal conduct. Requiring that the officer's motivation be based "totally" on an intent to render aid or assistance makes sense in the context of Fourth Amendment analysis. To require anything less would justify seizures conducted by police acting under the guise of being a caretaker when they were actually motivated by inadequate hunches that the suspect may have been engaging in unlawful activity.

While the Wisconsin Supreme Court in *State vs. Krame*r, 315 Wis.2d 414, 432, 759 N.W.2d 598, 608 (2009), did conclude that when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that finding is not negated by the officer's subjective law enforcement concerns. Deputy Kaschinske's testimony established that he had no law enforcement concerns which motivated his detention of Mr. Miller. Deputy Kaschinske testified that the defendant's vehicle was legally parked, he had committed no law

violations and that he stopped the defendant's vehicle only to see if the passenger was in need of assistance.

Mr. Miller takes issue with the truthfulness and reasonableness of Deputy Kaschinske's testimony regarding his intent being to check only the welfare of the passenger and believes that his only real motivation for the detention would have been a desire to investigate mere hunches related to potential criminal activity. The evidence established that there was no medical issue with the passenger and Deputy Kaschinske must have known she was not in need of any kind of assistance.

Deputy Kaschinske testified that he first observed the passenger door to be open but that the female passenger did not exit immediately. He testified "eventually she got out" and looked at the ground "like she was going to be sick". (R:24:6)(App:A:6). Deputy Kaschinske's testimony was not credible and not supported by the uncontroverted evidence of the video. Again, the video established that Deputy Kaschinske was at the stop sign a total of fifteen seconds and 10 seconds later was behind Mr. Miller's vehicle with his red and blue squad lights activated.

Contrary to Deputy Kaschinske's testimony, the video showed that the passenger had not yet opened the door as he approached the stop sign. Fifteen seconds later he pulls away from the stop sign and the passenger can be seen standing outside the vehicle bending over into the passenger compartment. There was simply not enough time during the

few seconds she is off camera for the passenger to open the door, not immediately exit the vehicle, "eventually" get out of the vehicle, stare at the ground facing away from the vehicle looking like she was going to get sick and then turn and lean into the vehicle as she is seen doing as Deputy Kaschinske pulls away from the stop sign and gets behind Mr. Miller's vehicle. (R:24:6)(App:A:6). Deputy Kaschinske's testimony regarding seeing the passenger behave like she was "going to puke" was wholly inconsistent with the video evidence and not credible.

This court must apply a test of reasonableness to the testimony of Deputy Kaschinske, just as it would in the context of other types of seizures utilizing Fourth Amendment analysis. The subjective intentions and beliefs of a law enforcement officer are generally irrelevant to a determination of the constitutionality of a seizure under the Fourth Amendment. *Wren v. U.S.*, 517 U.S. 806, 811-13 (1996). Deputy Kaschinske's testimony that he was only motivated by a desire to assist the passenger is not supported by the evidence, not credible and unreasonable. Based on the credible and reliable evidence which undermined Deputy Kaschinske's testimony regarding his reasons for seizing Mr. Miller, this court should find that Deputy Kaschinske's conduct was not "totally divorced" from the investigation of unlawful activity and was not lawful as a bonafide community caretaker function.

C. Deputy Kaschinske's Seizure of Mr. Miller Was Not Reasonable

To determine whether a seizure conducted under the Community Caretaker function was reasonable, the Court must 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. The third prong of the *Anderson* test requires that the public need and interest in the community caretaker activity outweigh the intrusion of the privacy of the individual. The court must consider four factors established by the court in *Anderson* to determine if the public interest and need outweigh the intrusion on the defendant's privacy:

> (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.

S*tate v. Anderson,* 142 Wis. 2d at 169-70, 417 N.W.2d at 414.

As to the first factor, the degree of the public interest in the police conduct in this case would be extremely low and no real exigency existed – even if the passenger might have

been about to "puke" – sufficient in severity to override the protections of the Fourth Amendment. The defendant's vehicle was not involved in an accident, not interrupting the flow of traffic, not disabled or damaged, not violating parking ordinances or in any way jeopardizing the public safety or the efficient movement of vehicular traffic. The seizure of the defendant in this case occurred as he was legally parked on the side of the roadway. There was no evidence that the position of the defendant's vehicle on the roadway presented any danger or risk to other motorists. If parking at that location was dangerous or posed any risk to others, presumably it would have been prohibited by statute or ordinance. The degree of public interest in this factual circumstance was minimal at best.

There was absolutely no credible and reasonable evidence of the kind of medical emergency or other problem which would have created an exigency to the situation. Any slight hunch of any such emergency needing to be tended to was eliminated when the passenger demonstrated that she was not suffering from even an upset stomach or any other insignificant or slight illness. There was absolutely no exigency to the situation.

Deputy Kaschinske testified that he had observed nothing that indicated any criminal activity was about to or had occurred. Investigating non-criminal behavior **A**necessarily falls at the low end of the **>**public interest**=** and

exigency scale.@ *State v. Anderson,* 149 Wis. 2d 663, 681, 439 N.W.2d 840 (Ct. App. 1989).

The public does have an interest in police officers checking on the welfare of drivers when an officer reasonably believes that one may be looking for or in need of assistance. The public has absolutely no interest in law enforcement officers confronting citizens who are legally parked, who have done nothing wrong and who demonstrate they are not in need of assistance and don't want assistance. The public interest in the seizure in this case does not outweigh the intrusion upon the defendant's right to be left alone.

As to the second factor, the circumstances surrounding the seizure in this case make it unreasonable. While there were no guns drawn, the fact remains that the defendant and the passenger were in the process of going about their lawful business when Deputy Kaschinske activated his lights and conducted the stop in this case. There was no need to detain the defendant and the circumstances of the seizure in this case were unreasonable.

Regarding the third factor, Mr. Miller acknowledges that an automobile was involved at least peripherally, and the Fourth Amendment affords less of an expectation of privacy to individuals in an automobile and on the street than in a home. That does not mean the defendant is afforded no expectation of privacy while outside on a public street enjoying an evening with a friend having been observed to have done nothing wrong.

Wisconsin courts have recognized that an individual has a privacy interest in a vehicle. For example, our courts have recognized that a citizen in the State of Wisconsin should be able to reasonably expect to leave a vehicle legally parked without the vehicle being towed and the contents being subject to a search. See. *State v. Clark*, 265 Wis.2d.557, 666 N.W.2d 112 (Ct. App.2003). The circumstances of this case make Deputy Kaschinske's seizure of the defendant unreasonable.

As to the fourth and final factor, Deputy Kaschinske had obvious alternatives to activating his emergency lights that would have signaled to the defendant that he was free to leave and that he need not remain. Deputy Kaschinske could have simply pulled up next to Mr. Miller's vehicle and asked without activating lights or even exiting whether he and his passenger were OK. He did not need to activate lights and approach as he would in any traffic stop based on suspicion of criminal activity.

The circumstances of this case did not require that Deputy Kaschinske seize the defendant. Deputy Kaschinske did not have a reasonable basis to believe the passenger was in need of assistance. The seizure of Mr. Miller in this case was not reasonable as the public interest in the police activity here did not outweigh the intrusion on his privacy. The seizure of Miller by Deputy Kaschinske cannot be justified under the Community Caretaker Doctrine and, therefore, was a violation of the Fourth Amendment.

II. DEPUTY KASCHINSKE'S DETENTION OF MR. MILLER WAS CONDUCTED WITHOUT A REASONABLE SUSPICION

Deputy Kaschinske was not authorized by the Community Caretaker Doctrine to detain Mr. Miller once it was clear that the passenger was not in need of assistance and did not want assistance. Therefore, the only way the stop can comport with the Fourth Amendment prohibition against unreasonable searches seizures is for it to be determined to have been a valid T*erry* stop based upon a reasonable suspicion that Mr. Miller was engaging in activity that violated the law.

A. Deputy Kaschinske's Seizure of Mr. Miller Exceeded the Scope of the Original Justification for the Stop

The deputy's conduct in activating his lights and keeping them activated to signal to Mr. Miller that he was not free to leave the scene exceeded the scope and justification for the stop, even if at its inception it was a valid community caretaker activity. Under the Fourth Amendment, lawful police conduct can become unlawful when the scope and justification for the original stop is exceeded. Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

An officer performing a T*erry* stop must objectively have an "articulable suspicion that the person has committed or is about to commit [an offense]." See: *State v. Goyer*, 157 Wis.2d 532, 536, 460 N.W.2d 424, 425-26 (Ct. App. 1990). The key to Fourth_Amendment analysis is the "reasonable relationship" between the detention and the reasons for which the stop was made. If a police officer has a reasonable suspicion that criminal activity is afoot, he can detain a suspect as long as "[t]he stop and inquiry [are] reasonably related in scope to the justification for their initiation." Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). United States v. Brignoni-Ponce, 422 U.S. 873, 881, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Similarly, a seizure conducted pursuant to the Community Caretaker Doctrine remains lawful only as long as the officer has a reasonable belief that a subject is in need of assistance. As the Court stated in *Anderson,* "overriding this entire process is the fundamental consideration that any warrantless intrusion must be as limited as is reasonably possible, consistent with the purpose justifying it in the first instance." *State v. Anderson*, 142 Wis. 2d. at 169.

Deputy Kaschinske testified that when he exited his vehicle that Mr. Miller was approximately 20 yards from him in the area of the driver's side of the vehicle. (R:24:10)(App:A:10). Deputy Kaschinske testified that when he asked the first question "if everything was OK?" and Mr. Miller replied "everything is fine", he was just a couple feet

away from him and was close enough to afford him the opportunity to observe an odor of alcohol about Mr. Miller. (R:24:10, 11)(App:A:10,11).

Contrary to Deputy Kaschinske's testimony, it is clear from the video that Deputy Kaschinske was not in a position to observe an odor of alcohol about Mr. Miller at the time he asked him "if everything was OK?". The video clearly establishes that Deputy Kaschinske was several yards away from Mr. Miller when he responded that there was no problem. Deputy Kaschinske was not in a position to have smelled an odor of alcohol or observed any bloodshot eyes when he was advised there was no need for assistance by Mr. Miller and could observe that the passenger was not sick. Contrary to Deputy Kaschinske's testimony, the video clearly captures every word stated by Mr. Miller during the event and his speech was clear and not slurred to any degree – not even slightly.

Deputy Kaschinske no longer had a basis to approach Mr. Miller and to detain him pursuant to the community caretaker doctrine after Mr. Miller made it known to the deputy that he was not in need of assistance and it had been made clear that the passenger was not sick. The Fourth Amendment would necessarily prohibit extending a community caretaker detention under these circumstances once Deputy Kaschinske's original justification had been eliminated without additional information surfacing

simultaneously which by itself created a reasonable suspicion that would warrant a detention under the Fourth Amendment.

B. The State Failed to Meet its Burden to Establish That the Detention Was Supported by a Reasonable Suspicion

To execute a lawful investigatory stop that conforms with the Fourth Amendment prohibition against unreasonable seizures, a law enforcement officer must reasonably conclude, in light of his experience, that criminal activity has either taken place or is taking place, or that the person's conduct constitutes a civil forfeiture. *Wis. Stat.* §968.24. *Terry v. Ohio,* 392 U.S. 1, 22 (1968); *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990); *State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W. 2d 63 (Ct. App. 1991). *State v. Jackson,* 147 Wis. 2d 824, 833-34, 434 N.W.2d 386, 390 (1989).

A court reviewing the constitutionality of a traffic stop must consider the totality of the circumstances known to the officer at the time the stop occurred. The officer must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that at the time of the stop criminal activity is afoot. *Terry*, 392 U.S. at 22-24, *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987), *State v. Dunn,* 158, Wis. 2d 138, 146, 462 N.W. 2d 538 (Ct.

App. 1990). More than a mere hunch that the suspect is about to or has engaged in criminal activity is necessary to establish reasonable suspicion. *State v. Waldner,* 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Investigatory detentions are valid only when reasonable suspicion objectively exists. *Wren v. U.S.*, 517 U.S. 806, 811-13 (1996). The subjective intentions and beliefs of a law enforcement officer are irrelevant to a determination of the constitutionality of a seizure under the Fourth Amendment. *Id*.

The record here is uncontroverted as to the fact that the defendant had committed no violations of the law by parking as he did at that location. The record also establishes that the defendant was not observed operating the vehicle or violating any other law or ordinance that gave rise to a reasonable suspicion that criminal activity was afoot. Deputy Kaschinske clearly did not have the kind of reasonable suspicion required to justify Mr. Miller's detention in this case as a *Terry* stop.

IV. DEPUTY KASCHINSKE DID NOT HAVE THE PROBABLE CAUSE NECESSARY TO ADMINISTER THE PBT AND MR. MILLER'S ARREST WAS THEREFORE UNLAWFUL.

To request a preliminary breath test (PBT), a law enforcement officer must have "probable cause to believe" a suspect was operating a motor vehicle while intoxicated. See. Wis. Stats. §343.303. In *County of Jefferson vs. Renz*, 231 Wis.2d 293, 316, 603 N.W.2d 541 (1999), the Wisconsin

Supreme Court held that "probable cause to believe" in Wis. Stats. §343.303 is a "quantum of proof greater than a reasonable suspicion necessary to justify an investigative stop … but less than the level of proof required to establish probable cause to arrest." *Renz,* 23 Wis.2d at 317, 603 N.W.2d 541. see also *State v. Colstad*, 2003 WI App. 25, 260 Wis.2d 406, 659 N.W.2d 394, and *State v. Begicevic,* 2004 WI App. 57, 270 Wis.2d 675, 678 N.W.2d 293. Deputy Kaschinske did not have the probable cause necessary to request that Mr. Miller submit to a PBT. Mr. Miller's arrest was, therefore, illegal.

A. Deputy Kaschinske Had No Reason to Suspect Mr. Miller of Any Wrongdoing at the Time of the Stop.

Deputy Kaschinske did not have probable cause to administer the PBT in part because he had absolutely no evidence that Mr. Miller had or was involved in any unlawful behavior at the time of the original seizure. Deputy Kaschinske had observed no driving. He had no information that Mr. Miller had any problems operating his vehicle to the location where it was parked. The vehicle was not parked in a manner indicating any inability to operate – i.e. against the curb, too far from the curb or skewed relative to the curb. He had no information that Mr. Miller had violated any State laws or local ordinances. (R:24:23)(App:A:23).

In virtually every published decision dealing with the issue of probable cause to administer a PBT in an OWI case, the subject was alleged to have committed some violation or engaged in some suspicious behavior that caught the attention of the investigating officer. In *Renz* the defendant was stopped operating a vehicle for an equipment violation. In C*olstad*, the officer knew the defendant had struck and killed a child on a road that was straight with no obstructions. In *Begicevic*, the officer observed the defendant stop over the yellow line. The record here is uncontroverted that Mr. Miller had done absolutely nothing wrong or suspicious to warrant the initial intrusion.

Contrary to Deputy Kaschinske's testimony that Mr. Miller's speech was "slightly slurred", the video clearly establishes that Mr. Miller was speaking clearly with no slurring what so ever. (R:24:12)(App:A:12). The video also establishes that he was walking and standing without any balance issues or other indications of impairment. He was responsive to questioning, respectful of the officer and cooperative. While Deputy Kaschinske's testimony that Mr. Miller had an odor of alcohol and Mr. Miller's admission that he had consumed some unknown quantity of alcohol at a bar down the road may contribute to a finding of reasonable suspicion, the balance of the evidence fails to establish the probable cause required to administer a PBT.

B. Deputy Kaschinske Did Not Have Probable Cause to Administer the PBT After Conducting the Field Sobriety Tests.

Deputy Kaschinske had Mr. Miller perform the "three standard field sobriety tests": the horizontal gaze nystagmus test, the walk-and-turn test, and the one leg stand test. (R:24:13)(App:A:13). Deputy Kaschinske testified he had been trained 8 years earlier in the administration of the tests and taught how to administer them in accordance with the standard procedures used throughout the state. (R:24:25)(App:A:25).

The first test Deputy Kaschinske had Mr. Miller perform was the HGN test and Deputy Kaschinske testified that he had forgotten every vital procedure in administering that test – how many passes to make, the speed of each pass and the procedure for some parts of the test. (R:24:26-28)(App:A:26-28). Deputy Kaschinske testified he observed the maximum of six clues when he administered the HGN test to Mr. Miller. This court does not need expert testimony to find that Deputy Kaschinske's findings as to the HGN test that he botched when administered to Mr. Miller were useless and contributed nothing to a finding of probable cause to administer the PBT.

The video evidence clearly establishes that Deputy Kaschinske makes a total of six lightening quick passes with his finger, three for the left eye and three for the right, rather than the 12 he was trained to make. (R:24:26)(App:A:26).

The video reveals that the first two passes looking for smooth pursuit were done so fast, rather than taking 2 seconds as he was trained, that it would have been impossible to observe the subtleties of nystagmus. (R:24:26)(App:A:26). The video shows that Deputy Kaschinske did not hold the stimulus at maximum deviation for even a split second while looking for nystagmus at maximum deviation, contrary to his training that it be held there for 4 seconds, and therefore could not have observed what the test is designed to be looking for. Similarly, the video showed that Deputy Kaschinske made another two lighting fast passes with the stimulus when looking for the angle of onset of the nystagmus, contrary to his training to move the stimulus "slowly" so he could observe the exact angle that nystagmus first occurred. (R:24:28-29)(App:A:28-29).

Deputy Kaschinske testified that the accuracy of the results of the HGN test would be dependent on the tests being administered properly. (R:24:25)(App:A:25). It was painfully clear from the video evidence that Deputy Kaschinske had no clue how to perform the HGN test. The deputy's testimony that Mr. Miller failed that test was unreliable and based on a botched administration of the test. This court should find that the evidence provided regarding the HGN test should not contribute in any way to a finding of probable cause.

The evidence established that while performing the Heel to Toe test, Mr. Miller remained in the instructional stance as he was told to do while being advised as to how to

conduct the test, took the correct number of steps, all steps were heel to toe, he looked at his feet and never stepped off the straight line he was walking. The video evidence contradicted Deputy Kaschinske's testimony that Mr. Miller failed that test because he swayed while remaining in the instructional stance and because he raised his arms more than six inches from his side while he was walking to "maintain his balance". (R:24:16)(App:A:16). The video shows Mr. Miller showed no balance issues at all during his performance on the test, that Mr. Miller did not sway while in the instructional stance and that he did not raise his arms more than six inches from his side during the test to maintain his balance. The record establishes that Mr. Miller passed the Heel to Toe test.

Lastly, Deputy Kaschinske administered the One Leg Stand test to Mr. Miller and testified that he failed that test because Mr. Miller swayed during the test and put his foot down at the count of 26 instead of 30. (R:24:17)(App:A:17). The video clearly shows that Mr. Miller showed no signs of alcohol impairment during the administration of that test and, contrary to Deputy Kaschinske's testimony, he did not sway during the test.

Once again, in comparing Mr. Miller's case to *Renz, Begicevic* and *Colstad,* there were significantly more facts to support a finding of probable cause. In addition to the driving violations in each of the cases, there were significantly more indicators of intoxication than the record established existed

here. In *Renz*, the officer observed that the Renz exhibited a *strong* odor of intoxicant, admitted drinking three beers, put his foot down on the one leg stand test, stepped off line on the walk and turn test, missed heel to toe and missed his nose on the finger to nose test. *Renz*, ¶49, 316-17. In *Colstad*, in addition to having struck a child while operating the vehicle, the record established that the defendant exhibited an odor of intoxicant, admitted drinking two beers, counted wrong on the one leg stand test, failed to walk in a straight line on the walk and turn test and slurred letters on the alphabet test. *Colstad*, at ¶25. In *Begicevic*, in addition to the impaired driving observed, the defendant exhibited a *strong* odor of intoxicant, bloodshot and glassy eyes, seemed confused, couldn't perform the HGN or finger to nose test and failed to follow instructions on the walk and turn test. *Begicevic*, ¶9, 683-84. In all three cases, the number of indicators of impairment was far greater than those in the record here.

Mr. Miller had done absolutely nothing wrong or illegal and Deputy Kaschinske had no information from any source that Mr. Miller had operated a motor vehicle under the influence prior to confronting him. The credible and corroborated evidence established that Mr. Miller had no slurred speech, no balance issues and demonstrated that he was not impaired to any degree while performing each of the field sobriety tests administered to him. Deputy Kaschinske did not have the probable cause required by Wis. Stats.

§343.303 to administer the PBT to Mr. Miller. The arrest of Mr. Miller was, therefore illegal.

CONCLUSION

The seizure of Mr. Miller by Deputy Kaschinske cannot be justified by the Community Caretaker Doctrine. The circumstances of this case clearly established that Deputy Kaschinske had no reason to be concerned about anyone's welfare and the seizure was not, therefore, a reasonable and lawful community caretaker activity. The stop cannot be justified as a valid *Terry* stop either, as Deputy Kaschinske did not have a reasonable suspicion that the defendant had or was violating any law. Continuation of the investigation after it had become obvious that the initial justification for the stop was unfounded was unlawful. The record establishes that Deputy Kaschinske did not have enough reliable evidence to establish the probable cause necessary to administer a PBT to Mr. Miller. The stop of the vehicle, the seizure and arrest of the defendant were all illegal and all evidence obtained as a result of that illegality should have been be suppressed.

Dated this ____ day of September, 2015.

Respectfully submitted,

BUTING, WILLIAMS & STILLING, S.C.

By:_____
Dudley A. Williams
State Bar No. 100573
Attorney for Defendant-Appellant

Address:
6165 N. Green Bay Avenue
Glendale, Wisconsin 53209
Phone: (414) 247-8600
Fax: (414) 247-8655

CERTIFICATION

I hereby certify that this document conforms to the rules contained in '809.19(8), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this document is 8,144 words.

Dated this _____ day of September, 2015.

_____
Dudley A. Williams
State Bar No.: 1005730

COURT OF APPEALS
District IV
Appeal No.: 2015AP1211 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMMY K. MILLER,

Defendant-Appellant.

CERTIFICATION OF MAILING

Pursuant to Wis. Stat. ' 809.80(3)(b), I hereby certify that on the 8th day of September, 2015, I mailed in a properly enclosed postage-paid box the original and nine copies of the Defendant-Appellant's Brief and Appendix addressed to the following named person(s) at the proper post office address, to-wit:

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

Dated this ____ day of September, 2015

Dudley A. Williams
State Bar No.: 1005730

Certification Prepared By:
BUTING, WILLIAMS & STILLING, S.C.
6165 N. Green Bay Avenue
Glendale, Wisconsin 53209
Phone: (414) 247-8600
Fax: (414) 247-8655

COURT OF APPEALS
District IV
Appeal No.: 2015AP1211 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMMY K. MILLER,

Defendant-Appellant.

APPENDIX CERTIFICATION

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; and (3) 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 _____ day of September, 2015.

Respectfully submitted,

BUTING, WILLIAMS & STILLING, S.C.

By:_____

Dudley A. Williams
State Bar No. 1005730
Attorney for Defendant-Appellant

Address:
6165 N. Green Bay Avenue
Glendale, Wisconsin 53209

Phone: (414) 247-8600
Fax: (414) 247-8655

APPENDIX TABLE OF CONTENTS: