STATE OF WISCONSIN

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Appeal No. 2015AP1211-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TOMMY K. MILLER,

Defendant-Appellant,

BRIEF OF PLAINTIFF-- RESPONDENT

ON APPEAL FROM A CONVICTION IN THE CIRCUIT COURT FOR COLUMBIA COUNTY, THE HON. ALLAN J. WHITE, PRESIDING, WHO ISSUED THE DECISION IN THIS THAT IS BEING APPEALED

Respectfully submitted,

The State of Wisconsin,
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STATEMENT OF THE ISSUES

The Appellant has framed three issues that he wants appealed in this case. (See Appellant's Brief page 7). The Respondent does not agree with the characterization that the Appellant has put on these issues.

The Respondent would suggest that a proper characterization of the first issue presented would be more appropriately put as: was the defendant seized by the actions of the officer at the time of this event, and if a seizure took place in this case, was the officer justified in effectuating a seizure because he was exercising a bona fide community caretaking function.

The Respondent suggests that the proper characterization of the second issue presented by the Appellant is: if the officer had justification to make the contact that occurred in this case, should the contact have ended prior to the officer becoming aware of information that led him to believe that the defendant may have been operating a motor vehicle while under the influence of an intoxicant.

The Respondent suggests that the proper characterization of the final issue presented by the Appellant is: whether probable cause existed in this case for the officer to request that the defendant submit to a preliminary breath test.

TRIAL COURT'S ANSWER

It is the Respondent's position that the Trial Court ruled that the officer exercised a bona fide community caretaking function when he made contact with the defendant in this case. (R. 24, pages 47-48). It is also the Respondent's position that the Trial Court held that the officer became aware of more information when he was in contact with the defendant, while he was performing the community caretaking duties, such that the officer was justified in continuing the investigation into the possible drunk driving offense. (R. 24, pages 49-50). Finally, it is the Respondent's position that the Trial Court held that the officer had the requisite probable cause to request that the defendant perform the preliminary breath test. (R. 24, pages 52-53).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent would request the opportunity to present oral argument in this case, if the Court would feel that it would be appropriate, to help further define the issues and to clear up any questions that the Court may have.

The Respondent does not request that this case be published because the Respondent believes that this

case will be limited to its own facts and have little or no precedential value to future cases.

I. FACTS

The Facts in the case are contained in the transcript of the motion hearing conducted on November 30, 2012 (R. 24). Because the facts are all contained in the transcript of the above hearing, there is no dispute in the facts, just a dispute in the interpretation of them and a dispute in the law.

II. QUESTIONS PRESENTED

The questions presented in this appeal are whether there was a seizure that occurred in this case; if there was a seizure, was it lawful; if there was a lawful contact between the officer and the defendant, should it have ended prior to the officer becoming aware of more information that justified his further investigation of the alleged drunk driving; and did the officer possess probable cause to request that the defendant submit to a preliminary breath test.

III. TRIAL COURT'S FINDINGS THAT THE OFFICER WAS ACTING IN A BONA FIDE COMMUNITY CARTAKING FUNCTION IS NOT ERRONEOUS

The Respondent agrees with the Appellant that the Standard of Review for this Court on the issues

presented are constitutional questions of law that this Court will review *de novo*.[1] The Trial Court held first, that the officer had reason to pull up behind the vehicle that the Appellant had been driving. (R. 24, page 47, lines 13-17). The Trial Court watched the video of the evidence and heard the testimony of the officer. The Trial Court commented on the quality of the video (R. 24, page 47, lines 24-25). Based upon this, the Trial Court made its decision regarding what happened in this case.

The Trial Court stated, "With two parties out of the vehicle, the first question out of the deputy's mouth was, 'Is everything all right?'" (R. 24, page 48, lines 12-14). The Trial Court, who is in a better position to judge the credibility of the officer who testified in the case, determined that based upon the circumstances and the first question from the officer, that the officer was acting in a community caretaker function when he stopped to see if the women, who was with the Appellant in this case, looked like she was going to be sick. (R. 24, page 48, line 25 and page 49 lines 1-2).

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[1] Whether police conduct constitutes a violation of the Fourth Amendment or Article I, Section 11 of the federal and state Constitutions is a question of constitutional fact that we review independently. *State v. Arias,* 2008 WI 84, ¶ 11, 311 Wis.2d 358, 752 N.W.2d 748 (citing *State v. Griffith,* 2000 WI 72, ¶ 23, 236 Wis.2d 48, 613 N.W.2d 72). Accordingly, we independently review 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. *Kelsey C.R.,* 243 Wis.2d 422, ¶ 34, 626 N.W.2d 777.*State v. Kramer*, 2009 WI 14, ¶ 16, 315 Wis. 2d 414, 423, 759 N.W.2d 598, 603.

IV. THE TRIAL COURT'S RULING THAT THE OFFICER WAS JUSTIFIED IN CONTINUING HIS CONTACT WAS NOT ERRONEOUS

The Trial Court found that the officer was exercising a bona fide community caretaker function, so it then moved onto the second issue, whether the contact was justifiably extended. The Trial Court found that:

> And he's definitely -- the tape, the film, shows that he's close enough to the defendant where they – they weren't shouting to each other. They weren't – there wasn't any great deal of distance. And the deputy testified within a couple of feet, I believe is what he said, that he was noticing the odor of alcohol. (R. 24, page 49, lines 11-17).

The Trial Court added that the Appellant did not admit that he had been drinking, after he was asked twice about it, which also gave the officer reason to continue the contact. (R. 24, page 49, line 25 and page 50, lines 1-7). This was on top of the odor that the officer had smelled upon first contact. The Trial Court went on to state:

> I'm not going to second-guess Officer Kaschinske here on this odor of alcohol because there's no way, as Mr. Cross has indicated, that you can tell that from a tape. There's no way that you can see bloodshot eyes from a tape. (R. 24, page 50, lines 8-12).

V. THE TRIAL COURT'S RULING THAT THE OFFICER HAD PROBABLE CAUSE TO REQUEST A PBT WAS NOT ERRONEOUS

The Trial Court then went on to hold that the officer did have probable cause to request that the Appellant perform a preliminary breath test.

> There's no expert that's been presented to me that said that was an improper way of determining nystagmus and whether there's a – or more precisely, if there's a deviation, somewhat of a deviation, that it's going to throw off anything that the officer sees. It's true that when the officer was moving his arm, his arm was – I presume he was using his finger, watching the defendant's eyes following, and it did not stop in the middle.
>
> But on the basis of that, in – in the middle of his line of vision, I can't rule on the basis of that, that that HGN test is totally ineffective in giving certain clues. I just can't. I'm not an expert in that.
>
> And what I saw and what the – the deputy has testified to, he said that the clues were present. Again, I can't see how his eyes are following that – that – his finger. There's no way I can make a determination of that through this.
>
> So, you know, again, these tapes give defense counsel sometimes reason to say, oh, this proves that this didn't happen or this proves that that happened. Well, very late at night, at 2 o'clock in the morning, and given the – given the quality of these pictures, it's – it's difficult to say that they prove anything other than the fact that the people were out of the vehicle and that eventually there were some tests that were given.
>
> So the Court finds that there was a reason to stop the vehicle; that the officer then had a reason to give the field sobriety tests based on this odor of alcohol, and finally, the admission by the passenger that the defendant was – and I'm not sure where that – exactly where that came in the scheme of things. And he gave the HGN test which he indicated were six clues; the walk-and-turn test, again, the swaying – and I think that – I think that – I was looking very hard for substantial swaying, which I did not see, it's true, on the video of the walk-and-turn.
>
> The turn was made improperly. The officer had testified that the arms were – and I – and I would defy anyone to be able to tell me where six inches begins on any video where a person is walking. I did not see the arms being used to

> keep his balance, however, on the walk-and-turn test. On the one-leg-stand test, there was an appearance of swaying, and there was a dropping of the front foot that I was able to see, that I felt that I saw.
>
> And I guess that then on the basis of the total tests that were given to him, I'm going to hold that he was and did have reason. (R. 24, page 50, lines 16-25, page 51, and page 52 lines 1-17).

The Trial Court's ruling that there was probable cause under these circumstances, is in line with the case of *County of Jefferson v. Renz*.[2]

VI. ARGUMENT

A. Community Caretaker Argument

The fact that the first words out of the officer's mouth in this case were, "Is everything all right?" (R. 24, page 48, lines 13-14), makes this case similar to the case of *State v. Kramer* in which the officer, upon making contact with a person in a vehicle that was parked along the side of the road, after dark, in a rural area first stated, "'Hi, Can I help you with something?' and 'Just making sure no vehicle problems.'"[3]

It is the Respondent's position that this case is more similar to *Kramer* than it is not. This case took place at 2:08 in the morning so it is more likely that there would be less help available to the woman and to the Appellant. (R. 24, page 5, line 7). This case did take place in the City of Lodi (R. 24, page, 5, lines 23-24) as

[2] 231 Wis. 2d 293; 603 N.W.2d 541 (1999).

opposed to the *Kramer* case which took place just outside of the City of Lodi at about 8:45 p.m. in late August.[4]

The Wisconsin Supreme Court commented that there was a three-step test for evaluating claims of police community caretaker functions, which had been set out previously by the Wisconsin Court of Appeals in the *Anderson* case.[5] By using this test, this Court can clearly see that Deputy Kaschinske was acting in a bona fide community caretaker function under the facts of this case.

The Respondent does not concede that the Appellant was "seized" when Deputy Kaschinske pulled up behind him to make contact to see if the woman was okay, but for purposes of the appeal, whether he was

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[3] *State v. Kramer*, 315 Wis.2d 414, 437; 759 N.W.2d 598, 610 (2009).

[4] At a hearing on the motion, the arresting officer testified that he was on patrol on a county highway when he observed a truck parked on the shoulder of the roadway with its hazard lights on. It was late August, approximately 8:45 p.m., and dark outside. The officer did not know how long the **943 truck had been there, and did not see inside the truck as he passed it. *State v. Kramer*, 2008 WI App 62, ¶ 2, 311 Wis. 2d 468, 471, 750 N.W.2d 941, 942-43 *aff'd,* 2009 WI 14, ¶ 2, 315 Wis. 2d 414, 759 N.W.2d 598.

[5] We conclude that when a community caretaker function is asserted as justification for the seizure of a person, the trial court must determine: (1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual. *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411, 414 (Ct. App. 1987).

"seized" is not relevant because the Respondent asks that this Court assume, for purposes of appeal, that he was, just like was the case in *Kramer*.[6] Therefore, since the first part of the test will have been met, the next step is to decide whether a police officer stopping to check to see if a person, who appears may be sick, is something that a police officer is doing that is "totally divorced" from his investigating or the acquisition of evidence. The *Kramer* Court made the analysis as to what "totally divorced" means:

> ¶ 30 When evaluating whether a community caretaker function is bona fide, we examine the totality of the circumstances as they existed at the time of the police conduct. *Cady,* 413 U.S. at 440, 93 S.Ct. 2523; *Kelsey C.R.,* 243 Wis.2d 422, ¶ 37, 626 N.W.2d 777. In so doing, we conclude that the "totally divorced" language from *Cady* does not mean that if the police officer has any subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function. Rather, we conclude that in a community caretaker context, when under the totality *433 of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns.
> ¶ 31 In some respects, our analysis is similar to the analysis described in *Whren.* It is similar because in both a determination of probable cause to arrest, such as *Whren,* and in a community caretaker context, as we have in the

[6] ¶ 22 Here, the parties do not dispute that the only conduct that might have constituted a seizure was Wagner's activation of his police cruiser's emergency overhead lights while pulling up behind Kramer's legally-parked vehicle. While it is entirely possible that upon analysis this conduct may *not* constitute a seizure, see *State v. Young,* 2006 WI 98, ¶¶ 65–67, 294 Wis.2d 1, 717 N.W.2d 729, we do not decide this issue. Instead, for *429 purposes of our analysis, we will assume, without deciding, that a seizure took place for which there was neither probable cause nor reasonable suspicion. Accordingly, the first step of the three-step test is satisfied. *State v. Kramer*, 2009 WI 14, ¶ 22, 315 Wis. 2d 414, 428-29, 759 N.W.2d 598, 606.

case before us, when an objectively reasonable basis for probable cause or the community caretaker function exists, an officer's subjective motivations do not negate either the probable cause determination or the determination that the community caretaker function was bona fide. However, our analysis of the community caretaker function is also distinct from an analysis of whether there exists probable cause to arrest. In a probable cause analysis, the subjective intent of the officer plays no role in the totality of the circumstances that a court considers in determining whether there is probable cause to arrest. *Whren,* 517 U.S. at 813, 116 S.Ct. 1769. In our community caretaker analysis, it constitutes a factor that may be considered in the totality of the circumstances.

¶ 32 In regard to our community caretaker analysis, the nature of a police officer's work is multifaceted. An officer is charged with enforcing the law, but he or she also serves as a necessary community caretaker when the officer discovers a member of the public who is in need of assistance. As an officer goes about his or her duties, an officer cannot always ascertain which hat the officer will wear—his law enforcement hat or her community caretaker hat. For example, an officer may come upon what appears to be a stalled vehicle and decide to investigate to determine if assistance is needed; however, the investigation may show *434 that a crime is being committed within the vehicle. Therefore, from the point of view of the officer, he or she must be prepared for either eventuality as the vehicle is approached. Accordingly, the officer may have law enforcement concerns, even when the officer has an objectively reasonable basis for performing a community caretaker function.

¶ 33 To conclude otherwise would ignore the multifaceted nature of police work and force police officers to let down their guard and unnecessarily expose themselves to dangerous conditions. *See, e.g., Maryland v. Wilson,* 519 U.S. 408, 412–13, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) (“Regrettably, traffic stops may be dangerous encounters. In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic **609 pursuits and stops.”); *Pennsylvania v. Mimms,* 434 U.S. 106, 110, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (“[W]e have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. ‘According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.’ ”) (quoting *Adams v. Williams,* 407 U.S. 143, 148 n. 3, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)); *State v. Ellenbecker,* 159 Wis.2d 91, 97, 464 N.W.2d 427 (Ct.App.1990) (“[E]ven seemingly innocent activity, such

> as refueling a disabled car, could later turn out to be theft of a car that was left on the shoulder of the highway."); Charles Remsberg, *The Tactical Edge: Surviving High–Risk Patrol* 271–72 (Calibre Press 1988) (noting that officers approaching vehicles typically know nothing about the threat level passengers may pose, because they know nothing about the passengers themselves, and the officers thus expose themselves to considerable danger).
> ¶ 34 Furthermore, to interpret the "totally divorced" language in *Cady* to mean that an officer could *435 not engage in a community caretaker function if he or she had any law enforcement concerns would, for practical purposes, preclude police officers from engaging in any community caretaker functions at all. This result is neither sensible nor desirable.
> ¶ 35 Accordingly, we do not read the "totally divorced" language from *Cady* as broadly as Kramer suggests. Instead, we conclude that *Cady* was merely *observing* that community caretaker functions are "totally divorced" from an officer's law enforcement function because a different facet of police work is paramount in a community caretaker function than is paramount in a law enforcement function. In our view, the concurrence in an Illinois Court of Appeals decision, *People v. Cordero,* 358 Ill.App.3d 121, 294 Ill.Dec. 418, 830 N.E.2d 830 (2005), correctly interpreted the "totally divorced" language from *Cady* as the Supreme Court's "noting that many police-citizen encounters have nothing to do with crime, not [as] requiring that they must have nothing to do with crime." *Id.* at 841 (O'Malley, P.J., concurring).
> 7 ¶ 36 Therefore, we conclude that 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. *State v. Kramer*, 2009 WI 14, ¶¶ 29-36, 315 Wis. 2d 414, 432-35, 759 N.W.2d 598, 608-09.

Under the totality of the circumstances in this case, there is no other reasonable explanation for the officer stopping and checking on the situation other than he believed that the woman was going to be sick and he was stopping to offer assistance. The Appellant's

attorney never even asked the officer if he believed that there may have been something criminal going on. The only explanation that is in the record, is that the officer was stopping to assist the woman that he had seen. The Appellant seems to be arguing that the officer stopping to see if the woman was going to be sick, is not reasonable, which the Respondent disagrees with.

The *Kramer* Court, after determining that a seizure had occurred and that the officer was acting in a bona fide community caretaker function, went on to the balancing test, which is the third step in the three-part test.[7] The only thing that the officer did in this case that could be argued to have created a "seizure" was that he pulled in behind the vehicle (R. 24, page 8, lines 1-2) and he activated his emergency lights (R. 24, page 8, lines 19-21). The officer explained that he activated his emergency lights so that it would activate his camera and for the safety of oncoming motorists to let them know that he was there. (R. 24, page 8, lines 23-25 and

[7] ¶ 41 The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable. In balancing these interests, we consider the following factors:
(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. *Kelsey C.R.,* 243 Wis.2d 422, ¶ 36, 626 N.W.2d 777 (quoting *Anderson I,* 142 Wis.2d at 169–70, 417 N.W.2d 411). *State v. Kramer*, 2009 WI 14, ¶ 41, 315 Wis. 2d 414, 438, 759 N.W.2d 598, 611

page 9, lines 1-3). This is very similar to the conduct of the officer in the *Kramer* case.[8]

The *Kramer* Court considered what other alternatives that the officer could have used to accomplish his community caretaking function[9], but rejected those alternatives as not being reasonable under the circumstances. The same holds true in this

[8] In considering the second reasonableness factor, whether the time, location, and degree of authority and force displayed were appropriate under the circumstances, we note that it is hard to imagine Wagner displaying less overt authority, or acting less coercively, than he did in this case. The contact with Kramer to determine his need of assistance was brief. And, although Wagner's activation of his police cruiser's emergency lights may be interpreted as a show of authority, the activation of the lights was also a safety precaution because Kramer had stopped in an unlighted area after dark on a two-lane county highway near the crest of a hill. Wagner wanted to let other drivers know that there were vehicles parked on the *440 shoulder of the highway. *State v. Kramer*, 2009 WI 14, ¶ 43, 315 Wis. 2d 414, 439-40, 759 N.W.2d 598, 611

[9] Finally, we consider the feasibility and availability of alternatives. Kramer argues that Wagner should have driven past his car, left him alone for a few minutes and then returned later. Only then, Kramer argues, would Wagner have been justified in further determining what was taking place in Kramer's vehicle. We reject Kramer's argument, and conclude that the manner in which Wagner performed his community caretaker function was more reasonable than any suggested *441 by Kramer. For example, if Wagner had left the location in which Kramer was parked and Kramer had stopped due to a health problem, it may have been too late for effective assistance at some later time. If Kramer had been experiencing vehicle problems, Kramer may have exited the vehicle and started to walk along the dark highway. That could have increased his risk of injury. Therefore, we conclude that the fourth factor also favors concluding that Wagner reasonably performed his community caretaker function. All four factors under the third step of the three-step test favor concluding that Wagner reasonably performed his community caretaker function. The third step has been satisfied. *State v. Kramer*, 2009 WI 14, ¶ 45, 315 Wis. 2d 414, 440-41, 759 N.W.2d 598, 612

case. Deputy Kaschinske could have driven past the vehicle, came back later to see if they were still there, but that may have been too late, if the woman was really sick.

The Appellant may try to distinguish the facts of this case with those in *Kramer* because in *Kramer* there was no one else with the driver who could help him, which the officer did not know until he made contact. However, Deputy Kaschinske did not know that there was anybody else with the woman, until he pulled up behind the vehicle. Deputy Kaschinske testified, "I did not originally see the male subject until I pulled in behind the vehicle." (R. 24 page 8, lines 10-11). At the time that Deputy Kaschinske pulled in behind the vehicle and activated his emergency lights, he knew that there was a woman outside of a vehicle who appeared to be sick, late at night, in a city, but it was a rural city, and he did not see anyone with her, so he chose to pull in to see if she needed assistance. When he did this, his intrusion was very minimal. He activated his emergency lights to warn anyone that there were people outside of vehicles so that they could proceed cautiously (R. 24 page 9, lines 1-3), and so that his camera would be activated. The Appellant could argue that this was in order to obtain evidence, but what was there going to be evidence of at that point. The Respondent would suggest that it was more to preserve what occurred so that there would be no question that if this woman was

really sick and the officer tried to help her, his and her actions would have been recorded. Even if this would be to gather information for a possible criminal case, it took a back seat to the safety of the officer and the woman by signaling to possible passing motorists that there was something going on at this location.

It is the Respondent's position that Deputy Kaschinske was exercising a bona fide community caretaking function when he pulled in and made contact with this vehicle at that time and would ask that this Court deny the Appellant's request and uphold the Trial Court's ruling on this issue.

B. Continued Contact Argument

The Appellant next argues that if the Court finds that the officer was exercising a valid community caretaking function when he pulled in behind the vehicle and activated his emergency lights, he should have discontinued his contact once he learned that everything was okay. The Respondent asks that this Court deny the request and uphold the Trial Court's ruling that by the time that Deputy Kaschinske had learned that everything was okay, Deputy Kaschinke already had more information, the odor of intoxicants, and then the Appellant's denial of consuming alcohol two times, which justified Deputy Kaschinske's continued investigation in this matter. (R. 24, pages 49-50).

It is clear that by the time that Deputy Kaschinske learned that the woman was not going to be sick, he had already gotten close enough to the Appellant that he was able to smell the odor of intoxicants. Deputy Kaschinske asked about the odor and the Appellant denied having consumed anything. The Trial Court held that this was enough to continue the contact. This was the correct decision. The Wisconsin Supreme Court has stated, in a different *Anderson* case that officers are not required to rule out the possibility of innocent behavior before making a stop.[10] The Respondent would then argue that Deputy Kaschinske had more than innocent behavior once he smelled the odor of intoxicants coming from the Appellant and the Appellant denied having consumed any on two occasions, Deputy Kaschinske had reasonable suspicion to continue with the investigation.

[10] We also stressed that police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. In this regard, we pointed out that the suspects in *Terry* " 'might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store.' " *Jackson,* 147 Wis.2d at 835, 434 N.W.2d 386 (quoting 3 W. LaFave, *Search and Seizure,* sec. 9.2(c), at 357–58). We noted that suspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry. *Jackson,* 147 Wis.2d at 835, 434 N.W.2d 386. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763, 766 (1990).

C. Probable Cause to Request PBT Argument

Lastly, the Appellant asks that this Court find that Deputy Kaschinske did not have probable cause to request that the Appellant perform a PBT. The test for what constitutes probable cause in this situation was stated by the Wisconsin Supreme Court in the case of *County of Jefferson v. Renz*.[11] In this case, the probable cause standard to request that the Appellant perform a PBT was easily met.

The first information that the officer possessed was the time of night, around 2:00 a.m. (R. 24, page 5, line 7). The officer noticed that the Appellant had glassy, bloodshot eyes and there was the odor of intoxicants coming from him. (R. 24, page 11, lines 18-20). The officer noticed that the Appellant had slurred speech. (R. 24, page 11, line 22). The officer knew that the Appellant did not answer the question about whether he had been drinking, but that the passenger did answer the question that the driver had in fact been drinking. (R. 24, page 12, lines 3-9). The officer knew that the

[11] In summary, we conclude that the legislature intended "probable cause to believe" in the first sentence of Wis. Stat. § 343.303 to refer to a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the "reason to believe" necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest. Accordingly, we reverse the decision of the court of appeals and remand the cause to the circuit court for reinstatement of the judgment of conviction. *Cnty. of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541, 552 (1999).

Appellant had been coming from KD's Bar, a short distance from their location. (R. 24, page 12, lines 16-19). The officer knew that the Appellant had driven to this location because the Appellant admitted that he had. (R. 24, page 12, lines 24-25).

The officer then asked the Appellant to perform some field sobriety tests. The first test was the HGN test and the officer observed that the Appellant displayed all six clues which to the officer meant that there was a high probability that the Appellant was above a 0.10. (R. 24, pages 14 and 15). The next test was the walk and turn test in which there are a possible eight clues, of which the Appellant displayed two clues, which meant that there was a high probability that he was above 0.10, according to the officer. (R. 24, pages 15-16). Finally, the Appellant performed the one leg stand test, during which he displayed two of the possible four clues which meant to the officer that there was a high probability that he was above 0.10. (R. 24, page 17).

It is the Respondent's position that with the information that the officer possessed at this time, there was probable cause to arrest the Appellant, which is a higher standard than that for asking for a PBT.[12]

[12] Chief Justice Abrahamson issued a concurring opinion in this case which discussed the 9 degrees of probable cause, which included her chart on this. A warrantless arrest was number four on the chart, which the Respondent believes was met by the information that Deputy Kaschinske had at the time of the request for the PBT.

The Appellant, in a number of spots in his brief, argues that because the officer did not perform the field sobriety tests correctly, that they should be discounted and therefore, there was not probable cause in this case. However, the record does not establish any of these claims. As the Trial Court pointed out:

"4. *Warrantless Arrest*. A law enforcement officer may arrest a person when "there are reasonable grounds to believe the person is committing or has committed a crime" or violated a traffic regulation. Wis. Stat. § 968.07 (1997–98) (crimes); § 345.22 (1997–98) (traffic violations).
*325 Within 48 hours after being arrested, the person is brought before a magistrate to determine whether there is probable cause to believe an offense was committed by the suspect. See *State v. Koch,* 175 Wis.2d 684, 698, 499 N.W.2d 152, cert. denied 510 U.S. 880, 114 S.Ct. 221, 126 L.Ed.2d 177 (1993).
In comparative terms, when a suspect is arrested without a warrant, the same quantum of proof is applicable as is applicable to a suspect arrested with a warrant; see note # 3 above. *Loveday v. State,* 74 Wis.2d 503, 523, 247 N.W.2d 116 (1976).
"The State's burden of persuasion at a suppression hearing [challenging a warrantless arrest] is significantly greater than its burden of persuasion at a refusal [license revocation] hearing" under note # 6 below. *State v. Wille,* 185 Wis.2d 673, 682, 518 N.W.2d 325 (Ct.App.1994). *Cnty. of Jefferson v. Renz*, 231 Wis. 2d 293, 324-25, 603 N.W.2d 541, 555 (1999)."

The probable cause necessary for an officer to lawfully request that a non-commercial driver submit to a PBT is number seven on this chart:

"7. *Preliminary Breath Screening Test (PBT) Request: Driver of a Non–Commercial Motor Vehicle*. Probable cause to believe under Wis. Stat. § 343.303 (1993–94)(requesting a PBT of a driver of a non-commercial motor vehicle) refers to "a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop [note # 9 below] and greater than the 'reason to believe' necessary to request a PBT from a driver of a commercial motor vehicle [note # 8 below] but less than that required to establish probable cause for arrest [note # 3 above]." Maj. op. at 552. *Cnty. of Jefferson v. Renz*, 231 Wis. 2d 293, 326, 603 N.W.2d 541, 556 (1999)."

> There's no expert that's been presented to me that said that was an improper way of determining nystagmus and whether there's a – or more precisely, if there's a deviation, somewhat of a deviation, that it's going to throw off anything that the officer sees. It's true that when the officer was moving his arm, his arm was – I presume he was using his finger, watching the defendant's eyes following, and it did not stop in the middle.
>
> But on the basis of that, in – in the middle of his line of vision, I can't rule on the basis of that, that that HGN test is totally ineffective in giving certain clues. I just can't. I'm not an expert in that.
>
> And what I saw and what the – the deputy has testified to, he said that the clues were present. Again, I can't see how his eyes are following that – that – his finger. There's no way I can make a determination of that through this. (R. 24, pages 50, lines 16-25 and page 51, lines 1-9).

The record simply does not support any of these claims or arguments that the Appellant has made. It is apparent that the Appellant does not agree with the Trial Court's findings of fact and would like this Court to overrule the Trial Court on those. In a case such as this, this Court should uphold the Trial Court's findings of fact, unless they are clearly erroneous.[13] Since the Trial Court's findings of fact are not clearly erroneous in this case, this Court cannot overturn them.

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[13] Our standard of review has not changed. "Whether evidence should be suppressed is a question of constitutional fact. In reviewing questions of constitutional fact, we uphold a circuit court's factual findings unless clearly erroneous, but we independently determine *96 whether those facts meet the constitutional standard." *State v. Samuel,* 2002 WI 34, ¶ 15, 252 Wis.2d 26, 643 N.W.2d 423 (citations omitted). *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 95-96, 700 N.W.2d 899, 904.

VII. CONCLUSION

Given the facts of this case, the Trial Court was absolutely correct in its ruling that the officer had a bona fide community caretaker function that he was exercising when he first made contact with the Appellant. The Trial Court was correct when it held that the officer had obtained more information which lead him to investigate a possible drunk driving complaint, before he was able to complete his community caretaker function. And, the Trial Court was correct when it held that the officer had "probable cause" to request that the Appellant submit a PBT sample. Because the Trial Court was correct in all of these rulings, the Respondent asks that this Court uphold the Trial Court's decisions and deny the Appellant's appeal.

Dated at Portage, Wisconsin, October 2nd, 2015

Respectfully submitted,

_____

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CERTIFICATION
I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a Proportional Serif Font. The length of this brief is 6,694 words.

Dated this 2nd day of October, 2015.

Signed,

_____
Troy D. Cross
Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)

ELECTRONIC E-FILING

I hereby certify that:

I have submitted an electronic copy of the brief in case 2015AP1211-CR, 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 2nd day of October, 2015.

Signed:

_____

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