STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016-AP-000127 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

GREGORY J MCMILLAN,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 5, THE HONORABLE NICHOLAS MCNAMARA, PRESIDING

Matthew D. Moeser
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1034198

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

OTHER AUTHORITIES CITED

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

STATEMENT OF ISSUES

I. Did the police officer have reasonable suspicion to conduct a *Terry* stop of McMillan?

The trial court answered yes.

II. Was the policer officer acting as a community caretaker when he contacted McMillan?

The trial court answered yes.

STATE OF THE CASE AND FACTS

On March 21, 2015 at approximately 12:30 a.m., McFarland Police Officer Jason Onken was operating his fully marked squad car on Terminal Drive. (R35:4). As Officer Onken traveled northbound, he observed a black Dodge Charger in front of him. (R35:5). The Charger was driving in a direct away from many local taverns. (R35:5).

The Charger made a quick right turn onto McFarland Court, an area that is an industrial park and contains only businesses. (R35:5-6, 9-10). There were no open businesses in the area at the time. (R35:8). Officer Onken was familiar with several burglaries occurring in this area with the last two or three years. (R35:6). Based on citizens typically not being in this area at this time of night, Officer Onken suspected criminal activity might be occurring. (R35:8-9). Officer Onken believed the driver of the Charger was trying to avoid him. (R35:9, 12).

After the Charger turned onto McFarland Court, Officer Onken continued north on Terminal Driver before circling back to the area using parking lots. (R35:9). When Officer Onken returned to McFarland Court, he observed the Charger stopped in a parking lot. (R35:9). Defendant, Gregory McMillan, was standing outside the vehicle talking on his

phone. (R35:9, 16). There were not normally cars parked throughout the industrial park. (R35: 12). Cars that are in the industrial park are usually unoccupied and belong to the business. (R35:20).

Officer Onken believed it out of the ordinary and suspicious that the vehicle made a quick turn into a closed industrial park and was stopped in a parking lot at 12:30 a.m. (R35:9-10). Based on this suspicion, Officer Onken activated his emergency lights and made contact with McMillan. (R35:9). Officer Onken activated his emergency lights as both a show of authority and so his partners would know where he was located. (R35:21). McMillan only challenged the justification for the initial contact and not the arrest that followed. (R35:22).

On June 16, 2015, McMillan filed a Motion to Suppress Evidence Based Upon an Unconstitutional Automobile Stop alleging that Officer Onken did not have a reasonable articulable suspicion to stop McMillan's vehicle. (R19). A hearing on the motion was held on July 16, 2015 before the Honorable Nicholas McNamara where Officer Onken testified to the above facts. (R:35).

Judge McNamara denied McMillan's Motion to Suppress. Judge McNamara held that Officer Onken's contact with

McMillan was a seizure. (R35:36). Judge McNamara also held that Officer Onken's seizure was a lawful as either a *Terry* stop, *see Terry v. Ohio*, 392 U.S. 1 (1968), or acting under a community caretaker function. (R35:39). Judge McNamara found that a *Terry* stop was lawful based on the time of night, that it was bar time and bars in the area, past burglaries in the area, and McMillan's suspicious turn into an area where he obviously had no reason to go. (R35:42). Judge McNamara also found that it would have been unreasonable, under the community caretaker function of policing, for the officer to just drive away from a person outside of their vehicle at 12:30 a.m. in a parking lot of a business that was closed. (R35:39-40).

ARGUMENT

I. STANDARD OF REVIEW.

When reviewing the circuit court's denial of a motion to suppress evidence, this Court will uphold the circuit court's factual findings unless clearly erroneous, but reviews its application of the facts to constitutional principles de novo. *See State v. Stout*, 2002 WI App 41, ¶9, 250 Wis. 2d 768, 641 N.W.2d 474.

II. THE TOTALITY OF THE CIRCUMSTANCES SUPPORTS THE TRIAL COURT'S FINDING THAT REASONABLE SUSPICION EXISTED TO CONDUCT A *TERRY* STOP OF MCMILLAN.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *See State v. Young*, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. An investigatory stop typically involves temporary questioning of an individual. *See id.*, ¶20. Such a stop is constitutional if the officer has reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *See id*. Accordingly, an investigatory stop permits police to briefly detain a person in order to ascertain the presence of possible criminal behavior, even though there is no probable cause supporting an arrest. *See id*.

Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Id.*, ¶21. "[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the

individual for the purpose of inquiry." *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996); *see also* Wis. Stat. § 968.24. "Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *State v. Waldner*, 206 Wis. 2d at 60. It is sufficient that "a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn." *Id.*

The reasonable suspicion test is not limited to criminal matters. An officer may perform an investigatory stop of a vehicle based upon a reasonable suspicion of a non-criminal traffic violation or civil traffic ordinance. *See State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 415, 659 N.W.2d 394, 398.

The record in this matter clearly supports Judge McNamara's findings that Officer Onken had reasonable suspicion to temporarily seize McMillan based upon the officer's knowledge of the area and crimes committed in that area, the time of night, and the officer's observations of McMillan's behavior, including attempting to evade the officer.

III. **IN THE ALTERNATIVE, THE OFFICER'S STOP OF MCMILLAN WAS LAWFUL AS HE WAS ACTING IN AS A COMMUNITY CARETAKER.**

When an "officer discovers a member of the public who is in need of assistance," that officer is serving in a community caretaker function, rather than a law enforcement function. *See State v. Kramer*, 2009 WI 14, ¶ 32. The reasonableness of the traffic stop is assessed within the framework of a community caretaker analysis, which was first articulated by the United States Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433 (1973). The community caretaker exception to the prohibition against seizures was first discussed by the Wisconsin Supreme Court in *State v. Bies*, 76 Wis. 2d 457, 251 N.W.2d 461 (1977). In *Bies*, the Court concluded that an officer's conduct fell under the community caretaker exception when the officer discovered evidence of a crime while investigating a noise complaint. *See id.* at 463. Even though the officer did not have a warrant, the Court found that looking into an open garage was conduct that fell under the community caretaking role in investigating the noise complaint. See id. at 471-72.

The next step in Wisconsin's jurisprudence involving the community caretaker doctrine is *State v. Anderson*, 142 Wis.

2d 162, 417 N.W.2d 411 (Ct. App. 1987). In this case, this Court set out a three-part test for evaluating community caretaker claims. The *Anderson* analysis requires that the trial court must first determine if there was a seizure within the meaning of the Fourth Amendment. *See id.* at 169. If the court finds that a seizure occurred, then the court must decide if the police conduct was "*bona fide* community caretaker activity." *See id.* Finally, the public need and interest must outweigh the intrusion on the individual's privacy. *See id*. This test was later adopted by the Supreme Court of Wisconsin in *State v. Kelsey C.R.*, 2001 WI 54, 243 Wis. 2d 422.

The leading Wisconsin case on the community caretaker doctrine involving a traffic stop is *State v. Kramer*. In *Kramer*, a deputy sheriff passed by a car parked on the side of the road with hazard lights on. *See id.*, ¶ 4. The officer turned around, activated the emergency lights on the squad car, and pulled in behind Kramer's vehicle. *See id.*, ¶ 5. Next, the officer exited his squad, went up to the driver's side window, and asked Kramer if he needed help. *See id.*, ¶¶ 6-7. The officer testified that he arrested Kramer for OWI based on Kramer's answers and the

smell of intoxicants coming from inside the vehicle. *See id.,* ¶ 7.

Kramer moved to suppress the evidence of his intoxication at trial, but the court denied the motion because the officer's conduct served a community caretaker function. *See id.*, ¶¶ 8-9. Kramer was convicted of OWI and appealed the circuit court's denial of his suppression motion. *See id.,* ¶ 9. This Court affirmed the circuit court's decision, and encouraged the Supreme Court of Wisconsin to explain the community caretaker analysis with respect to whether an officer's subjective belief that a crime might be taking place would preclude the officer's conduct from coming within the community caretaker doctrine. *See id.*, ¶¶ 11-12.

For analysis purposes, the Supreme Court of Wisconsin assumed that a seizure occurred when the officer pulled in behind Kramer's car and had the squad's emergency lights flashing, satisfying the first step of the three-part test. *See id.,* ¶ 22. Next, the court discussed whether the officer's conduct was a "*bona fide*" community caretaker function. *See id.,* ¶ 23. Under this step, a court considers whether the officer's conduct is "totally divorced from the detection, investigation, or acquisition

of evidence relating to the violation of a criminal statute." *Id.* The "totally divorced" language does not mean that the officer cannot have any subjective concerns about potential criminal activity. *See id.*, ¶ 30. Rather, the court concluded that "in a community caretaker context, when under the totality 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." *Id.* Therefore, the officer was acting in his community caretaker function when he stopped to check on the vehicle, despite any subjective concerns the officer may have had. *See id.*, ¶ 24. Furthermore, given the multifaceted nature of police work, interpreting the "totally divorced" language from *Cady* to mean that if an officer had any thoughts that crime might be afoot within the community caretaker context, the officer would be precluded from performing any caretaking duties. *See id.*, ¶¶ 33-34.

The court concluded that if an officer has articulated a reasonable basis under the totality of the circumstances for the community caretaker function, then the officer has met the standard of a *bona fide* community caretaker. *See id.*, ¶ 36. The State would still bear the burden of

proving that the officer's conduct fell within the community caretaker function. *See id.*, ¶ 17.

The *Kramer* Court decided that the officer had an objectively reasonable basis for deciding that Kramer may have needed helped - the vehicle was parked on the side of a highway after dark with the hazard lights flashing. See id., ¶ 37. When the officer first made contact with Kramer he offered assistance, asking if Kramer needed help and checking if there were any vehicle problems. *See id.* The Court recognized that a police officer's function may shift from community caretaker to law enforcement within the same incident, such as during the officer's brief interaction with Kramer when the officer detected signs of intoxication. *See id.,* ¶¶ 38-39. The Court found that the officer's contact with Kramer was a *bona fide* community caretaker function and was totally divorced from the officer's law enforcement function. *See id.*, ¶ 39.

Assuming a Fourth Amendment seizure occurs and that the officer was acting in a *bona fide* community caretaker function, the third step of the analysis is to determine whether the officer's exercise of the community caretaker function was reasonable. *See id.,* ¶ 40. This is determined by balancing the public interest or need that is

furthered by the caretaker conduct against the liberty interest of the citizen. *See id.* Conduct is more likely to be found reasonable the greater the public need and the more minimal the intrusion is on the citizen. *See id.*, ¶ 41. The following factors are considered:

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
4. The availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

After considering the factors above, the Court found that the officer reasonably performed his community caretaker function. *See id.,* ¶ 45.

Under this analysis, this Court should affirm Judge McNamara's ruling on Officer Onken's actions as a community caretaker. It was objectively reasonable for Officer Onken to investigate McMillan's reason for being parked by his a closed business under the circumstances present in this

case. It was reasonable for Officer Onken to briefly intrude on McMillan's liberty in an effort to determine if there was any issue on which McMillan required assistance.

CONCLUSION

For the reasons stated above, and upon the record in this matter, the State respectfully requests that this Court affirm Judge McNamara's decisions.

Matthew D. Moeser
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1034198

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is __12__ pages.

Dated: _____.

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29 day of September, 2016.

_____

Matthew D. Moeser
Deputy District Attorney
Dane County, Wisconsin