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DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP490-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOHN D MYER,

Myer-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF AND APPENDIX

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 2, THE HONORABLE JOSANN M. REYNOLDS, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State believes that the issues addressed can be decided by applying existing law to these facts, therefore publication is not necessary. As the State believes it has adequately addressed the issues in its brief, oral argument is not necessary.

STATEMENT OF THE ISSUES

- I. Was Myer's seizure justified by the community caretaker function?

The trial court ruled that Officer Wilke articulated an objectively reasonable basis for his actions and that the community caretaker exception to the Fourth Amendment applied.

STATEMENT OF THE CASE:
FACTS AND PROCEDURAL HISTORY

On October 21, 2014, at approximately 2:37 a.m. while traveling Southbound on Fordem Avenue Maple Bluff Police Officer Keith Wilke observed a running vehicle with its headlights on. The vehicle was parked at 2037 Sherman Avenue, Madison, WI. The parking lot is associated with the Virginia Davis School of Dance, a business which was closed at that time. (32:4-5; Ap. 3-4).

Based on the above observations Officer Wilke performed a U turn and drove into the parking lot to investigate further. As he did so, he observed Myer sitting in the driver's seat with his head laying back and his jaw open.(32:5-7; Ap. 4-6). Officer Wilke in one motion knocked on the window, checked if the door was unlocked and opened it. The Officer was positioned in such a way that he could catch Myer if he were to fall. (32:7,10; Ap. 6,9).

As a result of the ensuing investigation Myer was cited and arrested for Operating a Motor Vehicle while Intoxicated as a Second Offense.(1).

On November 26, 2014 Myer had his initial appearance in Dane County Circuit Court, Case Number 14CT1205.(5). Myer was charged with Operating a Motor Vehicle While

Intoxicated Second Offense (in violation of Wisconsin Statute Sections 346.63(1)(a), 346.65(2)(am) and 343.307(1)) and with Operating with a Prohibited Alcohol Concentration Second Offense (in violation of Wisconsin Statute Sections 346.63(1)(b), 346.65(2)(am)(2) and 343.307(1)).(4). Myer filed a motion to suppress based on lack of a reason for Officer Wilke to make contact with him.(14;31:2; Ap.13). At the motion hearing on March 4, 2015, the State argued that the motion should be dismissed without a hearing based upon the factual allegations within Myer's motion. The Court agreed with the State and denied the evidentiary hearing. (31:2,12-13; Ap. 13-15). The Court also found that "the Officer made [initial] contact and opened [Myer's] door acting in his capacity as community caretaker." (31:12; Ap. 14).

On April 4, 2015 Myer requested that the Court reconsider its March 4, 2015 decision. (19). Myer's basis for reconsideration was that the record did not show an objective basis for Officer Wilke to be concerned with Myer's wellbeing and open his door. (32:2; Ap. 1). An evidentiary hearing was held and Officer Wilke testified that he has been a Police Officer for 15 to 16 years and recently retired from being a firefighter paramedic for 30

years with the City of Madison. (32:3-4; Ap. 2-3). Based on that experience, he explained the significance of seeing someone late at night sitting in the driver's seat of a running vehicle with his head back¹ and in front of a closed business. (32:4-6; Ap. 3-5). Testimony indicated that Officer Wilke approached the vehicle to do a welfare check, "if someone has overdosed on a narcotic especially, that it suppresses the body's drive to breathe to the point that they will become hypoxic or apneic or they basically stop breathing and within only a couple minutes it will cause permanent brain injury and/or death." (32:6; Ap. 5). Officer Wilke concluded that "the fact that his head was back and jaw was open so that it appeared that overdose was in my mind." (32:8; Ap. 7).

During the hearing Officer Wilke also expressed his belief that the only way to determine "whether there is an overdose of a substance or if he's just sleeping is to make actual physical contact." (32:6-7; Ap. 5-6). When asked why he did not wait for Myer to open the door, Officer Wilke testified that he did not know how long the vehicle had been parked at the location or if the door was unlocked, so

¹A position that would be consistent with lack of consciousness due to sleep, narcotics overdose, carbon monoxide poisoning or a myriad other possibilities

he just opened the door to check the status of the driver as fast as he could without using force. (32:9-10; Ap. 8-9). Officer Wilke testified that he knew the vehicle had been parked there for at least three or four minutes, the time it took him to turn his squad around and reach Myer's door, hence putting the driver at "critical" risk for brain damage or death "if they're not breathing." (32:13; AP. 10).

The trial court denied Myer's motion pointing that "[w]hile warrantless searches are presumed unconstitutional, there are many exceptions to the requirement for a warrant and in a motor vehicle there is a significantly decreased expectation of privacy." (32:17; Ap. 11). The court then informed the parties that it had reviewed "all of the cases that I can discussing this issue, those provided by defense including State vs. Miller, State vs. Kramer, State vs. Rice, and County of Grant vs. Vogt." (32:17; Ap.11)(emphasis added). The trial court concluded that "... Officer Wilke has articulated an objectiv[e]ly reasonable basis for his actions in term of the community caretaker function." (32:17; Ap. 11). The court goes on to say that the situation "... gave this officer every right and in fact the obligation to act

expediently to insure that this individual was not overdosing or having a heart attack for that matter." (32:18; Ap. 12).

On November 30, 2015, Myer entered his guilty plea to Operating a Motor Vehicle while Intoxicated as a Second Offense. He was sentenced to 10 days in jail, a fine of \$400 plus court costs, his operation privileges revoked for fourteen months, followed by fourteen months of an Ignition Interlock Device, alcohol and other drugs assessment and to attend a victim impact panel. (26). The sentence was stayed pending this appeal.(27).

ARGUMENT

I. THE COURT SHOULD UPHOLD THE TRIAL COURT'S FINDINGS THAT OFFICER WILKE ACTED AS A COMMUNITY CARETAKER WHEN HE DECIDED TO OPEN THE DOOR OF MYER'S VEHICLE, WHICH IS AN EXCEPTION TO THE WARRANT REQUIREMENT UNDER THE FOURTH AMENDMENT

A. Standard of Review

A mixed question is one that requires the court to determine (1) what happened, and (2) whether those facts fulfill a particular legal standard. State v. Gollon, 115 Wis. 2d 592, 600, 340 N.W.2d 912 (Ct. App. 1983). The standard of review of mixed questions is to apply great weight/clearly erroneous standard to the factual part, while independently reviewing the conclusions of law. Department of Revenue v. Exxon Corp., 90 Wis. 2d 94 (1979), *aff'd*, 447 U.S. 207 (1980). When the circuit court's legal conclusions is intertwined with factual findings, an appellate court may give weight to the circuit court's conclusion. See Leasefirst v. Hartford Rexall Drugs, Inc., 168 Wis. 2d 83, 89, 483 N.W.2d 585 (Ct. App. 1992).

B. The actions of Officer Wilke were justified under the community caretaker doctrine

The "federal and state constitutions do not protect against all searches and seizures, but only *unreasonable*

searches and seizures." State v. Pinkard, 327 Wis.2d 346 ¶ 13 (internal citations omitted) (emphasis added). The State agrees that opening the door of the Myer's vehicle and ordering him to shut the engine off constitutes a seizure that is protected by the Fourth Amendment.

The trial court correctly applied the law when it found that this particular seizure fell within the community caretaker exception to the warrant requirement.

Officer Wilke was acting as a community caretaker when he opened the door of the Myer's vehicle to respond to what he perceived as an emergency.

"The United States Supreme Court and courts of this state have recognized that a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures." Pinkard, ¶ 14.

It is widely understood that in addition to their law enforcement duties, police also serve as community caretakers. This idea stems from the United States Supreme Court's decision in Cady v. Dombrowski, 413 U.S. 433 (1973), which states:

"Local Police Officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for

want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady, at 441.

The Supreme Court noted,

"This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are "effects" and thus within the reach of the Fourth Amendment, warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not." S. Dakota v. Opperman, 428 U.S. 364, 367, 96 S. Ct. 3092, 3096, 49 L. Ed. 2d 1000 (1976)(emphasis added) (internal citations omitted)

The Wisconsin Court of Appeals discussed what the term "totally divorced" means in State v. Kramer, 2008 WI App 62, 311 Wis.2d 468, 750 N.W.2d 941. The Court stated that the term "cannot mean that an Officer must have subjectively ruled out all possibility of criminal activity in order to act in a community caretaker capacity," because "police commonly act as community caretakers in situations where it remains reasonably possible that they will discover some criminal activity." Id., ¶ 15.

The Wisconsin Supreme Court subsequently adopted a three-part test for determining whether the police were engaged in community caretaking:

"[W]hen 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." Kramer, ¶ 21(internal citation omitted).

In regards to the first prong, the State agrees with the Myer that a Fourth Amendment seizure occurred in the present case. The Court must then proceed to the second prong.

Officer Wilke testified that he observed a running vehicle parked with its headlights on at 2:35 a.m. in a parking lot of a business closed for the evening. (32:5; Ap.4). After turning his squad around, which took three to four minutes, Officer Wilke observed an unconscious driver with his head back and jaw open. (32:5-6,8; Ap.4-5,7). Based on his three decades of experience as a paramedic, and having dealt with narcotics overdoses, Officer Wilke understood the need for immediate action. (32:6-7; Ap. 5-6). Officer Wilke was aware that the car had not been moving for several minutes. (32:13; Ap. 10). Officer Wilke expressed his concern that if Myer was not breathing, brain

damage and/or death could result from being deprived from oxygen. (32:6,13; Ap. 5,10).

The trial court agreed that Officer Wilke acted in his community caretaker role, stating that it was Officer Wilke's obligation to act expediently to ensure that this individual was not overdosing or having a medical emergency. (32:18; Ap. 12).

The Wisconsin Supreme Court cautions courts, that in making this type of determination, they are to evaluate the totality of the circumstances. See, e.g., Kramer, ¶ 30; Pinkard, ¶ 20. It noted also in the same case that even if the Officers still retain some subjective law enforcement concerns, courts cannot automatically determine that there was no community caretaker function at work. See Kramer, ¶ 30; see also Pinkard, ¶ 40.

"[T]he 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. . . . Accordingly, the Officer may have law enforcement concerns, even when the Officer has an objectively reasonable basis for performing a community caretaker function. 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." Kramer, ¶¶ 32-33.

Officer Wilke was concerned with protecting Myer's life, a member of the community. What Officer Wilke did in this case was legitimate community caretaker activity as contemplated by the courts.

The third prong of the analysis in Kramer is that the court must determine whether the public need and interest outweigh the intrusion upon the privacy of the individual. at ¶ 21. One way courts have done this is to specifically balance the public's need for the stated concern with the Defendant's Fourth Amendment right to prevent unreasonable searches and seizures. See Pinkard, ¶ 26.

The public has a substantial need and interest in preventing the death of individuals due to life threatening emergencies. The public expects law enforcement to provide aid when they observe an individual they reasonably believe to be in danger, which in the present case was an individual who appeared in immediate danger of death or permanent brain damage due to oxygen deprivation.

Myer has a Constitutional right not to be seized without a warrant. In this case the intrusion into Myer's vehicle was a necessary and commensurable response to the

emergency situation identified by Officer Wilke. This measured and proportional intrusion into Myer's vehicle² is not of the kind or level which should outweigh the public's interest in being protected. The public desires and expects that law enforcement take reasonable actions to protect the lives of members of the community perceived to be in immediate danger of irreparable harm or even death, such as when there may be a medical emergency. Based on the three prong analysis, the Court should affirm the trial court's decision.

² It being a lesser intrusion than if Myer would have been in his home or office. See Supra at 8, quoting S. Dakota v. Opperman.

CONCLUSION

Based on the trial court's decision and for the reasons stated in this brief, this Court should affirm the trial court's finding that the seizure falls under the community caretaker exception to the Fourth Amendment warrant requirements.

Dated this 1st day of November, 2016.

Respectfully submitted,

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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 13 pages.

Dated: November 1, 2016.

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 1st day of November, 2016.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 1st day of November, 2016.

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