STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP908

COUNTY OF WASHINGTON,

Plaintiff-Respondent,

vs.

DANIEL L. SCHMIDT,

Defendant-Appellant

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY,
THE HON. JAMES K. MUEHLBAUER, PRESIDING

Respectfully submitted,

COUNTY OF WASHINGTON,
Plaintiff-Respondent

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent recognizes that this appeal, as a one judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought. Plaintiff-Respondent does not seek oral argument as the briefs should adequately present the issues on appeal.

STATEMENT OF THE FACTS AND THE CASE

Plaintiff-respondent State of Wisconsin ("the State") does not have any facts in addition to the facts provided by defendant-appellant-petitioner Daniel L. Schmidt ("Schmidt").

ARGUMENT

I. THE DEPUTY HAD MULTIPLE JUSTIFICATIONS FOR MAKING CONTACT WITH MR. SCHMIDT.

A. The deputy had an obligation under his role as a community caretaker to make contact with the Schmidt vehicle stopped on the side of the road.

In evaluating claims of police community caretaker functions, the Court of Appeals employs the following test:

> [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.

State v. Kramer, 2009 WI 14, ¶ 21, 315 Wis. 2d 414, 759 N.W. 2d 598 (citing *State v. Anderson*, 142 Wis. 2d 162, 169, 417, N.W. 2d 411 (Ct. App. 1987)). As to the second determination, the State must establish that the officer's conduct fell within the scope of a reasonable community

caretaker function. *State v. Ziedonis*, 2005 WI App 249, ¶ 15, 287 Wis. 2d 831, 707 N.W. 2d 565.

Mr. Schmidt seems to argue that the activation of the deputy's emergency lights on his squad car created a seizure. (Schmidt's brief at 6). There is case law throughout the United States that indicates that the activation of emergency lights may or may not be tantamount to a seizure. It comes down to the context in which the contact arises. Here, the State will assume without conceding that a seizure occurred within the meaning of the Community Caretaker exception to the Fourth Amendment for ease of argument and brevity.

The Kramer Court recognized that "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." *Kramer*, 315 Wis. 2d 414, ¶ 32, 759 N.W. 2d 598. This emergency aid function was recognized in *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1975), wherein the United States Supreme Court found no Fourth Amendment violation when officers reasonably believed that someone needed immediate attention. The Wisconsin courts have also recognized this "emergency aid" community caretaker

function. *State v. Ferguson*, 2001 WI App 102, ¶¶ 13-19, 244 Wis. 2d 17, 629 N.W. 2d 788(adopting emergency aid doctrine in holding that police entry was justified by possibility that underage incapacitated drinkers inside the home needed assistance); *State v. Horngren*, 2000 WI App 177, ¶¶ 11, 15, 238 Wis. 2d 347, 617 N.W. 2d 508 (police dispatch to possible suicide threat was exigent and of utmost public concern). The Kramer Court also recognized that an officer "may have law enforcement concerns, even when the officer has an objectively reasonable basis for performing a community caretaker function." *Kramer*, 315 Wis. 2d 414, ¶ 32, 759 N.W. 2d 598.

This is exactly the case with the Schmidt vehicle. The deputy received information via dispatch around 2:52 a.m. regarding a blue pickup truck "swerving, almost going off the road, deviating from their lane." (R.23, p. 13) Prior to the deputy even locating the suspect pickup truck, he was advised by dispatch that it had stopped on the off ramp to Highway K from I41. (R.23, p. 15) Deputy Schulz subsequently located the suspect vehicle matching the description provided by dispatch just exiting I41 on the quarter mile long off ramp to Highway K off the shoulder side of the off ramp there parked. (R.23, PP. 15, 16) The deputy observed someone out in front of the stopped

vehicle. (R.23, p. 16) The deputy activated his emergency lights, and he attempted to make contact with the person, who re-entered the vehicle by the time the deputy made it up to the vehicle. (R.23, pp. 16, 17)

Schmidt also argues that the Community Caretaker Doctrine cannot apply because of the deputy's knowledge of the driving complaint, and his framing of the deputy's responses to questioning during the refusal hearing. (Schmidt's Brief at 6) The deputy specifically testified, "[T]ypically our procedure is to stop out and make sure, one, a vehicle isn't disabled and you cannot legally park on the side of a highway regardless." (R.23, p. 25) The deputy continued in response to a question that the vehicle had already been brought to law enforcement's attention due to the driving complaint. (R.23, p. 25)

The Kramer Court recognized and concluded "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." *Kramer*, 315 Wis. 2d 414,¶ 36, 759 N.W. 2d 598.

The information known to the deputy at the time of he attempted to make contact with the driver of the blue pickup truck was such that it was within Deputy Schulz's community caretaker function to offer assistance to what could likely be a stranded motorist. Perhaps it was vehicle issues that led to the inability to keep the pickup truck operating properly. Moreover, the presence of the driver at the front of the pickup suggests that there was likely some issue, mechanical or otherwise, impeding the operation of the vehicle.

Having for the sake of brevity and ease of argument stated but not conceded that a seizure occurred and determined that the deputy was engaged in a bona fide community caretaker function, there must be a determination as to the reasonableness of the exercise of this role by Deputy Schulz. The Wisconsin Supreme Court first adopted a reasonableness standard in community caretaker cases over 30 years ago in *Bies v. State*, 76 Wis. 2d 457, 251 N.W.2d 461 (1977), which the court of appeals later developed in *State v. Anderson*, 142 Wis. 2d 162, 417 N.W. 2d 411 (Ct. App. 1987), and further adopted in *Kelsey C.R.*, 243 Wis. 2d

422, ¶ 35, 626 N.W. 2d 777. This reasonableness standard was also adopted by the Kramer Court. 315 Wis. 2d 414, ¶ 40, 759 N.W. 2d 598 (citing *Kelsey C.R.* , *supra*). The court must consider the following factors: the degree of public interest and exigency of the situation; the attendant circumstances surrounding the seizure, including the time, location, and degree of overt authority and force displayed; 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).

There is a high degree of public interest in having law enforcement officers come to and render assistance to stranded motorists. The Kramer Court noted that:

> [T]he public has a substantial interest in ensuring that police assist motorists who may be stranded on the side of a highway, especially after dark and outside of an urban area when help is not close at hand.

315 Wis. 2d 414, ¶ 42, 759 N.W. 2d 598 (citing *State v. Goebel*, 103 Wis. 2d 203, 208, 307 N.W. 2d 915 (1981) (noting that when police stop to assist motorists, such contact is "not only authorized, but constitute[s] an important duty of law enforcement officers"), *Ziedonis*, 287

Wis. 2d 831, ¶ 29, 707 N.W. 2d 565 (holding that the "officers' fear for the safety of the occupant" was a significant public interest supporting the community caretaker function, because "the officers did not know the physical condition of the person and reasonably concluded that the situation was an emergency")(citing *Ferguson*, 244 Wis. 2d 17, ¶ 22, 629 N.W. 2d 788). This factor weighs heavily in the favor of Deputy Schulz's actions given that it was near 3:00 a.m. on a non-urban stretch of U.S. Highway 41.

As to the second factor, a determination of the reasonableness of the deputy's action considering the time, location, and degree of authority shown, all of these considerations weigh in favor of the reasonableness of the exercise of the community caretaker function. Deputy Schulz only arguable display of authority was the use of his emergency lights, which are a safety precaution to alert other motorists to the potential presence of people, parked vehicles, and hazards near or in the roadway. Moreover, Schmidt did not yield to any showing of authority. The Schmidt vehicle was already pulled over onto the shoulder of the off ramp.

Under the third factor, the involvement of a vehicle, specifically an automobile, effects the determination of the reasonableness of the community caretaker function. Here, the deputy was walking up to the Schmidt vehicle to determine to ask "[b]asic questions. Why are you stopped on the side of the road? Is the vehicle okay?" and the deputy stated that he specifically asked, "if he did strike anything…" (R.23, p. 18) This type of police action is the only reasonable means to put the community caretaker function into practice.

There were no other available, feasible, or effective alternatives available to the officer, especially considering that the vehicle was also the subject of a citizen witness driving complaint. Here it was, stopped on the side of the off ramp to Highway K, with a subject standing outside of the vehicle appearing to examine the front end. (R.23, pp. 15-16) All of the considerations point to a bona fide community caretaker function, which was reasonably performed under the totality of the circumstances.

B. The deputy had reasonable suspicion to affect a seizure of Mr. Schmidt under the Fourth Amendment.

The State is not conceding that a classic "traffic stop" took place, as the testimony at the refusal hearing illustrated that Mr. Schmidt's vehicle pulled onto the shoulder of the roadway absent any showing of force other than the illumination of squad car emergency lights by a law enforcement officer who pulled up behind the vehicle. (R.23, pp. 15-18) If any seizure occurred, it was a temporary questioning without arrest, pursuant to section 968.24, Wis. Stats., did ensue. The State believes that the deputy did have reasonable suspicion to make a temporary seizure of the Schmidt vehicle based upon the citizen caller's information.

In *State v. Kelsey C.R.*, 243 Wis. 2d 422, ¶ 33, 626 N.W. 2d 777, the supreme court held, "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." The point at which a seizure could have occurred is at the time when the deputy made contact with Mr. Schmidt, who was seated in the driver's seat of his vehicle parked on the side of the off ramp.

Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106. A two-step standard of review to questions of constitutional fact is applied. *Id.* First, the circuit court's findings of historical fact are reviewed. *Id.* The circuit court's findings will be upheld unless they are clearly erroneous. *Id.* Second, questions of constitutional fact will be reviewed *de novo*. *Id.*

The temporary detention of individuals during automobile stops, even for a brief period and limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-810, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* at 810. Whether reasonable suspicion exists to justify a stop is based on the totality of the circumstances at the time of the stop. *See State v. Johnson*, 2007 WI 32, ¶¶ 35-36, 299 Wis.2d 675, 729 N.W.2d 182.

Schmidt claims that Deputy Schulz effected a traffic stop of the Schmidt vehicle, absent reasonable suspicion. (Schmidt brief at 6) Again, the State will assume without

conceding, that a traffic stop based upon reasonable suspicion did occur. The facts and circumstances of the present case are similar to those described in *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W. 2d 516, with one important exception, citizen caller remained in the area and spoke to a fellow deputy. The State does not dispute that the deputy did not observe any bad driving. The only driving the deputy observed was to see that the Schmidt vehicle exited U.S. Highway 41 onto Highway K off ramp. (R.23, p. 15-16)

In *Rutzinski*, the officer also relied entirely upon the citizen caller's information when a traffic stop occurred. *Rutzinski*, 241 Wis. 2d 729, ¶ 7, 623 N.W. 2d 516. "Before an informant's tip can give rise to grounds for an investigative stop, the police must consider its reliability and content." *Id.* at ¶ 10. If the reasonable suspicion aspect is assessed from the perspective of a wholly anonymous tipster, the State still believes that there is reasonable suspicion for a seizure. Much like the tipster from *Rutzinski*, the citizen caller provided specific information regarding the Schmidt vehicle - a blue Ford F-150 driving southbound in the area of U.S. Highway 41 and Highway 33. (R.23, pp. 13-15) The dispatches continued such that as the deputy was arriving to the area

of US Highway 41 and Highway K, the deputy received a dispatch that the suspect vehicle was exiting and stopping on the Highway K off ramp, and the deputy actually visually observed this occurring as well. (R.23, p. 15) Thus, Deputy Schulz reasonably could conclude that the information provided was credible and reliable. *Rutzinski*, 241 Wis. 2d 729, ¶ 33, 623 N.W. 2d 516. This information also indicated that the citizen caller was in the immediate vicinity of the deputy, and it potentially exposed the caller to being identified by law enforcement. We know that the citizen caller did meet with Deputy Kell and provided a statement. (R.23, p. 19)

In addition, the citizen caller's information also provided a basis for the deputy to reasonably believe that the operator of the blue Ford F-150 posed a threat to others on the roadway. The description of the driving was more than simply terming it "erratic" driving, although "[e]rratic driving is one possible sign of intoxicated use of a motor vehicle. *Rutzinski*, 241 Wis. 2d 729, ¶ 34, 623 N.W. 2d 516 (citing *State v. Swanson*, 164 Wis. 2d 437, 453 n. 6, 475 N.W. 2d 148 (1991). The citizen caller described that blue Ford F-150 was "swerving, almost going off the road, deviating from their lane." (R.23, p. 13)

The citizen caller's tip in this case contained abundant indicia of reliability and provided a basis to believe there was an impending danger to public safety. All of these factors greatly outweigh the insignificant intrusion that a contact under section 968.21, Wis. Stats., would have presented to Schmidt. But for Schmidt's intoxication, the contact would have likely ended there. Therefore, the deputy's actions were reasonable in making an investigatory seizure.

II. Ample probable cause existed for the arrest of Mr. Schmidt for operating a vehicle while under the influence of an intoxicant.

When answering whether there was probable cause for the arrest of Mr. Schmidt the test applied is a common sense test. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508. An officer has the requisite probable cause to arrest when the totality of circumstances within the officer's knowledge at the time of arrest would lead a reasonable police officer to believe the defendant committed an offense. *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). Although the guilt of the arrestee must be more than mere possibility, the officer's observations need not be sufficient to prove guilt beyond a

reasonable doubt, nor even need to prove that guilt is more likely than not. *State v. Mitchell*, 167 Wis.2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992).

The totality of circumstances is a common sense test, which does not require specific indicators such as field sobriety tests to find probable cause. *State v. Wille*, 185 Wis.2d 673, 684-84, 518 N.W.2d 325, 329-30 (Ct. App. 1994); *State v. Kasian*, 207 Wis.2d 611, 622, 558 N.W.2d 687, 692 (Ct. App. 1996). In *Wille* the defendant was involved in a car accident and was injured so the officer decided not to perform sobriety tests. *Id.* at 678, 518 N.W.2d at 327. The probable cause was based only upon the smell of intoxicants on the defendant, the fact the defendant had run his vehicle into a parked vehicle, and his statement that he had to "quit doing this." *Id.* In *Mitchell* the mere odor of marijuana coupled with smoke emanating from a vehicle was found sufficient to constitute probable cause. 167 Wis.2d at 684, 482 N.W.2d at 368-69.

The facts of the present case provided Deputy Schulz with probable cause that exceeded the standard set forth in cases such as *Wille* and *Mitchell*. Deputy Schulz had unverified information from the citizen caller that Schmidt was "swerving, almost going off the road, deviating from their lane." (R.23, p. 13) In addition to this, he

observed Schmidt examining the front end of the blue Ford F-150 as he pulled up behind it. (R.23, p. 16) When the deputy approached Schmidt's blue Ford F-150, Schmidt had returned to the driver's seat, and a conversation ensued. (R.23, p. 17). The deputy asked Schmidt "[b]asic questions. Why are you stopped on the side of the road? Is the vehicle okay?" (R.23, p. 18) In addition, the deputy also questioned whether or not Schmidt had struck anything, to which Schmidt admitted that he had struck a guardrail. (R.23, p. 18)

Having now confirmed some of the information he received by dispatch, Deputy Schulz made his own observations about Schmidt. The deputy observed Schmidt to have bloodshot, glassy eyes, slurred speech, and a strong odor of alcoholic intoxicants. (R.23, p. 19) The deputy also testified that he is certified in the administration of field sobriety exercises, and he administered the three standardized tests. (R.23, p. 20) The officer testified that based upon his administering of the three standardized exercises to Schmidt, he believed that Schmidt was impaired. (R.23, p. 20)

Probable cause in the context of an OWI arrest may be demonstrated in many ways. In *State v. Kasian,* 207 Wis. 2d 611, 558 N.W. 2d 687, the court of appeals concluded that

there was probable cause to arrest for OWI when police found Kasian injured at the scene of a one-car accident, smelled intoxicants on Kasian, and noted Kasian's speech was slurred. Similarly, in *State v. Wille*, 185 Wis. 2d 673, 683-84, 518 N.W. 2d 325 (Ct. App. 1994), it was concluded that police had probable cause to arrest Wille after Wille struck a car parked on the shoulder of a highway and the police smelled intoxicants on Wille at the hospital, knew that a firefighter had smelled intoxicants on Wille as well, and Wille told them he had "to quit doing this."

Here, Deputy Schulz possessed the following knowledge prior to arrest: a dispatch regarding poor driving by the Schmidt vehicle southbound on US Highway 41 at approximately 2:52 a.m.; Schmidt examining the front end of the blue Ford F-150 that was the subject of the dispatch; an admission by Schmidt to striking a guardrail; observations of Schmidt's physical condition which included bloodshot, glassy eyes, slurred speech, and a strong odor of alcoholic intoxicants; performance on field sobriety exercises such that impairment was concluded. These observations are more than sufficient to lead a reasonable officer to believe a violation of the law has occurred, specifically that Schmidt was operating a motor vehicle

while under the influence of an intoxicant. *See Kasian*, 207 Wis. 2d at 622, 558 N.W. 2d 687; *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W. 2d 300 (1986).

III. MR. SCHMIDT'S REFUSAL WAS UNREASONABLE.

Schmidt argues that his refusal was predicated upon "Deputy Schulz's implication that Mr. Schmidt had a right to an attorney," so there should not have been a finding of improper refusal. Schmidt points to *In re Verkler*, 2003 WI App 37, 260 Wis. 2d 391, 659 N.W. 2d 137, as the basis for his argument. Under Wisconsin's Implied Consent Law, the Informing the Accused Form must contain the following language: "If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense." Section 343.05(4), Wis. Stats. "[I]t is clear from those provisions that he accused does not have a right to choose a test *instead of* the one the officer asks him or her to take; rather, the "alternative test" is *in addition to* that test." *State v. Schmidt*, 2004 WI App 235, ¶ 11, 277 Wis. 2d 561, 691 N.W. 2d 379 (emphasis in original).

Mr. Schmidt oversells his agreement to submit to an evidentiary test, because when he was asked to submit to an evidentiary chemical test of his breath, per Deputy Schulz's request, Mr. Schmidt answered, "I'll do blood but only with my lawyer present." (R. 23, p. 22) Mr. Schmidt was also afforded the opportunity to read over the Informing the Accused form, and even then, he stated that he did not want to submit to a breath test at that time without a lawyer. (R. 23, p. 23) The deputy also testified that he never actually offered anything related to the blood test to Schmidt, he only asked about the breath test between five and ten times. (R. 23, p. 24) Schmidt refused to comply with the deputy's request for an evidentiary chemical test of his breath in favor of a blood test. There was no injury or physical disability as a basis for the refusal to submit to the breath test either. (R. 23, P. 24)

There is a similarity to the circumstances in *Verkler* in that at no time in the field, in the ride to Slinger Police Department, or at the Slinger Police Department Intoximeter Room. There was no indication that Schmidt was provided information that had a right to counsel during the evidentiary chemical test, nor is there any concrete indication that the right to counsel was implied. Despite

Schmidt's request to have an attorney present for a blood draw, according to the deputy's testimony, a blood draw was never even offered to the defendant. (R. 23, p. 24)

As in *Verkler*, the deputy never "expressly assured or implicitly suggested a right to counsel." 260 Wis. 2d 391, ¶ 19, 659 N.W. 2d 137. The testimony from the deputy is uncontroverted. There is no indication that the refusal was reasonably made. Schmidt's refusal, as the trial court determined, was unreasonably made.

CONCLUSION

For the reasons given, the County respectfully requests this Court affirm the trial court's finding that the deputy exercised a reasonable law enforcement function in acting as a community caretaker or had the requisite reasonable suspicion for a seizure under section 968.24, Wis. Stats., that the deputy had probable cause to arrest Schmidt for operating a motor vehicle while intoxicated, and that Schmidt's refusal was unreasonable.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font.

I certify that this brief does not contain an appendix, as the relevant court records were attached to the Defendant-Appellant's filing.

I further certify pursuant to § 809.19(b)(12)(f), Wis. Stat., that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Pursuant to § 809.80(3)(b), Wis. Stats., I hereby certify that on the 16th day of September, 2016, in the City of West Bend, Washington County, Wisconsin, I routed this brief to our office station in a properly enclosed postage-paid boxes the original and required copies of the Plaintiff-Respondent's Brief addressed to the following named person(s) at the following post office address:

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Dated this 16th of September.

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