STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1144-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHEL L. WORTMAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, BOTH ENTERED IN THE FOND DU LAC COUNTY CIRCUIT COURT, THE HONORABLE DALE L. ENGLISH, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court correctly deny Michel L. Wortman's motions to suppress evidence from a traffic stop?

The circuit court denied Wortman's two suppression motions because Wortman was not under arrest or in custody during the traffic stop. (72:31–40, R-App. 101–11; 73:1–9, R-App. 112–20.)[1] This Court should reach the same conclusion.

2. Did the circuit court impose a fine within the statutory limit?

The circuit court concluded that the fine was lawful. (112, R-App. 121–29.) This Court should reach the same conclusion.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument because the briefs should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-established principles to the facts of the case. Publication of this Court's opinion might be warranted to resolve the fine issue regarding Wis. Stat. § 346.65(2)(am).

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[1] The circuit court granted one of Wortman's motions to the extent that it concluded that his post-arrest statements were inadmissible in the State's case-in-chief because they were obtained without warnings as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). (73:5, 7–9, R-App. 116, 118–20.)

STATEMENT OF THE CASE

On February 14, 2012, around 8:00 at night, Fond du Lac County Sheriff's Deputy James Peiffer received a call about a pickup truck in a ditch along Highway KK east of Highway 49. (72:4, 32.) He arrived at the accident scene within a minute or two after receiving the call. (72:5.) The road conditions were "good" and there was no snow on the road, although there was a "very small amount" of snow in the ditch. (72:22.) There also was snow on the shoulder. (*See generally* 84:DVD.) He saw a pickup truck in the bottom of the ditch. (72:5.) Tracks in the ditch indicated that the truck had crossed the highway centerline, gone over a driveway, and ended up in the ditch. (72:5; *see also* 84:DVD at 2:46–2:49.) While stopped near the truck, his squad car's headlights illuminated a person about 100 yards away walking on the shoulder of the highway away from the accident scene. (72:5–6.)

Deputy Peiffer drove ahead about 150 yards, did a U-turn, turned on his squad car's "flashers," and drove back toward the pedestrian. (72:14.) He stopped his car in front of the pedestrian on the shoulder. (72:14–15.) The car was facing east and the pedestrian was heading west. (72:15.) The car blocked the pedestrian's path. (72:15.) The pedestrian walked around the car and about 15 seconds later Deputy Peiffer activated the squad car's red and blue flashing lights. (84:DVD at 0:20–0:35.)

Deputy Peiffer asked the pedestrian how he "ended up in the ditch." (84:DVD at 1:05–1:07.) The pedestrian said, "I fell asleep." (84:DVD at 1:07–1:09.) Deputy Peiffer asked, "Did you get hurt at all?" (84:DVD at 1:10–1:12.) The pedestrian said, "No." (84:DVD at 1:12–1:13.) He then said, "You're going to haul me in. I ain't got my license." (84:DVD at 1:20–1:23.) Deputy Peiffer identified the pedestrian as

Wortman based on his driver license. (72:6.) Deputy Peiffer asked Wortman how he wanted to get his truck out of the ditch, and Wortman said that he would call his mother and she would call a tow truck. (84:DVD at 1:49–1:57.) Deputy Peiffer smelled alcohol on Wortman's breath and noticed that his eyes were "glassy." (72:8, 16–17.) After speaking with Wortman for about two minutes, Deputy Peiffer told Wortman, "Jump in the back. We're going to go back by your truck." (84:DVD at 1:57–2:01.)

Wortman got into the back seat of the squad car because the front was full of equipment. (72:15.) Deputy Peiffer drove the car about 100 yards back to the accident scene. (72:16, 23.) This drive took less than 40 seconds. (84:DVD at 2:17–2:53.) The squad car's rear doors were locked from the inside. (72:15–16.) However, Wortman did not try to exit the car. (72:16.)

When they arrived at the accident scene, Deputy Peiffer checked Wortman's driving record. (72:9, 18.) Wortman said that his license was revoked. (84:DVD at 5:35–5:39; *see also* 72:18–19.) Deputy Peiffer confirmed that Wortman's license was revoked, he was on extended supervision, and he had eight prior convictions for operating while intoxicated (OWI). (72:9, 17–18; *see also* 84:DVD at 9:41–9:45.) Deputy Peiffer knew that, as a result of those convictions, Wortman's blood alcohol concentration (BAC) legal limit was 0.02. (72:9.) Wortman also said that he had drunk a "king can" of beer from a Kwik Trip. (72:8, 18.)

Deputy Peiffer let Wortman out of the squad car about ten minutes after they arrived at the accident scene. (84:DVD at 2:53–12:37.) Deputy Peiffer administered standard field sobriety tests—specifically, the one-leg stand, heel-to-toe test, and the A-to-Z alphabet test. (84:DVD at 12:39–16:40.) Wortman showed four signs of intoxication

during the one-leg stand test and three signs during the heel-to-toe test. (72:9–10.) He recited the alphabet correctly but was a "little choppy." (72:10.) Deputy Peiffer testified that normally four signs of intoxication on the one-leg stand test will justify a blood draw. (72:20.)[2]

Shortly after the sobriety tests, Deputy Peiffer said that he was "placing [Wortman] under arrest for OWI" and handcuffed him. (84:DVD at 16:57–17:45.) He drove Wortman to St. Agnes Hospital for a blood draw. (72:10.) He never said the *Miranda* warnings to Wortman. (72:16.)

In April 2012, the State subsequently charged Wortman with ninth-offense OWI, ninth-offense operating with a prohibited alcohol concentration, and two related counts of bail jumping. (8.)

That same month, Wortman filed two suppression motions. (13; 14.) One moved the circuit court to suppress his statements to Deputy Peiffer because he did not receive the *Miranda* warnings. (13.) The other motion sought suppression of evidence resulting from the traffic stop on the grounds that Deputy Peiffer unlawfully arrested Wortman. (14.) In September 2012, the circuit court denied both motions. (72:31–40, R-App. 102–11; *see also* 40.) About a week later, the court partially granted the *Miranda* motion by ruling that the State could not introduce Wortman's post-arrest statements in its case-in-chief. (73:5, 7–9, R-App. 116, 118–20.)

[2] Deputy Peiffer testified that after the standard field sobriety tests, he administered a preliminary breath test (PBT) and the results were 0.07. (72:10, 21.) However, the squad car video does not show Deputy Peiffer administering a PBT.

In October 2012, Wortman pled no contest to ninth-offense OWI and was convicted. (74:13, 15.) The circuit court dismissed and read-in one bail-jumping count and dismissed outright the other two counts. (74:9–10.) In January 2013, the court sentenced him to five years of initial confinement and five years of extended supervision. (75:34.) It also imposed a $1200 fine.[3] (75:35.)

Wortman, through counsel, filed a no-merit report, which this Court rejected. (98; 101; 102.) This Court extended his time for filing a postconviction motion. (102.)

In May 2016, Wortman filed a postconviction motion to vacate the fine on the grounds that it exceeded the statutory maximum. (103.) The circuit court denied the motion, referring to it multiple times as "frivolous." (112, R-App. 121–29; *see also* 105.)

Wortman appeals from his judgment of conviction and the circuit court's order denying his May 2016 postconviction motion. (106.)

ARGUMENT

Wortman argues that he is entitled to suppression of evidence from the traffic stop because Deputy Peiffer did not have probable cause to arrest him at the outset of their interaction. (Ward Br. 17–21.) He further argues that the circuit court imposed a fine in excess of the statutory maximum. (*Id.* at 21–24.)

[3] The judgment of conviction and amended judgment of conviction state that the court imposed a $1524 fine. (37:2; 47:2.)

Wortman is not entitled to any relief. He is not entitled to suppression for two reasons. First, Deputy Peiffer initiated at most an investigative stop when he made contact with Wortman; to do so, he merely needed reasonable suspicion, which he had.[4] Second, even if Deputy Peiffer did not have reasonable suspicion, he lawfully detained Wortman because he was acting as a community caretaker. Further, the fine is within the statutory limit.

I. Wortman is not entitled to suppression because the deputy had reasonable suspicion to perform an investigative stop, rendering it lawful.

A. Controlling legal principles.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729 (footnotes omitted). There are two types of seizures. *Id.* ¶ 20. "The first type, an investigatory or *Terry* stop,[5] usually involves only temporary questioning and thus constitutes only a minor infringement on personal liberty. An investigatory stop is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *Id.* (footnote renumbered) (citation omitted). "Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Id.* ¶ 21 (citation omitted).

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[4] The State assumes for the sake of argument that Deputy Peiffer seized Wortman by blocking his path while he was walking on the shoulder of the highway.

[5] *Terry v. Ohio*, 392 U.S. 1 (1968).

"The second type of seizure, a full-blown arrest, is a more permanent detention that typically leads to 'a trip to the station house and prosecution for crime. . . .'" *Id.* ¶ 22 (ellipsis in *Young*) (quoting *Terry v. Ohio*, 392 U.S. 1, 16 (1968)). "An arrest is not constitutionally justified unless the police have probable cause to suspect that a crime had been committed." *Id.* (citation omitted).

A routine traffic stop is more analogous to a *Terry* stop than to a formal arrest. *State v. Iverson*, 2015 WI 101, ¶ 51, 365 Wis. 2d 302, 871 N.W.2d 661. Although "traffic stops may be justified by either probable cause or reasonable suspicion[,]" "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." *State v. Houghton*, 2015 WI 79, ¶¶ 29–30, 364 Wis. 2d 234, 868 N.W.2d 143 (citation omitted).

"When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and considered under the totality of the circumstances." *State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305 (citation omitted). A court must give deference to reasonable inferences drawn by police officers in light of their experience and training. *State v. Seibel*, 163 Wis. 2d 164, 183, 471 N.W.2d 226 (1991) (citing *Terry*, 392 U.S. at 27).

The State carries the burden of proving that a traffic stop was reasonable. *State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634. When determining whether a traffic stop was lawful, an appellate court upholds the circuit court's factual findings unless they are clearly erroneous, and it "review[s] independently the application of those facts to constitutional principles." *Id.* ¶ 8.

B. At most, the deputy's initial interaction with Wortman was an investigative stop, not an arrest.

"In Wisconsin, the test for whether a person has been arrested is whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances." *State v. Blatterman*, 2015 WI 46, ¶ 30, 362 Wis. 2d 138, 864 N.W.2d 26 (quotation marks and quoted source omitted). If police do not tell a person that he is under arrest, handcuff him, or read *Miranda* warnings to him, these omissions suggest that a traffic stop is not an arrest. *State v. Swanson*, 164 Wis. 2d 437, 448, 475 N.W.2d 148 (1991), *abrogated on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. Merely being asked to perform sobriety tests does not indicate that a traffic stop is an arrest, because the implication is that a person will be free to leave if he passes the tests. *Id.*

Further, police do not turn an investigative stop into an arrest by moving a suspect a short distance. *State v. Quartana*, 213 Wis. 2d 440, 448–51, 570 N.W.2d 618 (Ct. App. 1997). The defendant in *Quartana* drove his car into a ditch and walked to his parents' house about a mile away. *Id.* at 443–44. A police officer located Quartana, saw that he appeared intoxicated, and drove him to the accident scene so that a different officer who was waiting there could administer field sobriety tests. *Id.* at 444. On appeal, Quartana argued that the transportation amounted to an arrest. *Id.* at 449.

This Court "conclude[d] that a reasonable person in Quartana's position would not have believed he or she was under arrest. Quartana was not transported to a more institutional setting, such as a police station or interrogation

room." *Id.* at 450 (citations omitted). The police did not detain him for an unusually long time. *Id.* Further, an officer told Quartana that he was being detained temporarily for investigation and that he was being taken to his car, not a police station. *Id.* "At no time prior to taking the field sobriety test did any police officer communicate to Quartana, through either words or actions, that he was under arrest, or that the restraint of his liberty would be accompanied by some future interference with his freedom of movement." *Id.* at 450–51. This Court rejected the notion that "the fact that the officer kept Quartana's driver's license leads to a conclusion that an arrest has taken place." *Id.* at 449.

Here, similarly, a reasonable person in Wortman's situation would not have thought that he was under arrest when Deputy Peiffer first approached him or transported him to his truck. Deputy Peiffer stopped a squad car in front of Wortman on the shoulder of a highway, talked with him briefly about how his truck had ended up in a ditch, drove him for less than 40 seconds to his truck, checked his record for several minutes, and then had him perform field sobriety tests. (84:DVD at 0:20–16:40.) Right after Wortman failed the tests, Deputy Peiffer expressly placed him under arrest and handcuffed him. (84:DVD at 16:57–17:45.) This investigative detention was not unusually long. Deputy Peiffer placed Wortman under arrest about 15 minutes after initiating contact with him. Further, Deputy Peiffer never read the *Miranda* warnings to Wortman and never said anything about an arrest until he formally placed Wortman under arrest. (72:16, 21–22.) Under these facts, a reasonable person would not have thought that he was under arrest until Deputy Peiffer formally arrested and handcuffed him.

Wortman argues that he was in custody because Deputy Peiffer blocked his path when he was walking along a highway, transported him to his truck, and did not

immediately return his driver license. (Wortman Br. 20–21.) At most, Deputy Peiffer initiated a *Terry* stop by blocking Wortman's path and extended the stop by transporting Wortman to his truck. As explained below, those actions were lawful because they were based on reasonable suspicion. Further, under *Quartana*, Deputy Peiffer did not turn the *Terry* stop into an arrest by not immediately returning Wortman's driver license.

C. The deputy had reasonable suspicion to briefly detain Wortman for investigation.

A stop is constitutional and deemed investigatory if it is "temporary and last[s] no longer than is necessary to effect the purpose of the stop." *State v. Colstad*, 2003 WI App 25, ¶ 16, 260 Wis. 2d 406, 659 N.W.2d 394 (quotation marks and quoted source omitted). An officer may lawfully extend a traffic stop to pursue an OWI investigation if, during the course of the stop, he or she discovers facts that create reasonable suspicion that the suspect is intoxicated. *Id.* ¶ 19.

In *Colstad*, this Court concluded that a police officer had reasonable suspicion to stop Colstad's vehicle for inattentive driving in violation of Wis. Stat. § 346.89(1). *Id.* ¶ 14. The court reasoned that Colstad's vehicle had collided with a child who darted into the road, the road was straight, and nothing had obstructed Colstad's view. *Id.* The court further concluded that the officer had reasonable suspicion to extend the stop to administer field sobriety tests because the officer smelled a mild odor of alcohol and knew that the child had not run into the street "from behind an obstruction, such as a parked car." *Id.* ¶ 21. The court emphasized that the officer was not required to believe Colstad's assertion that the child had suddenly darted out in front of his vehicle. *Id.* Instead, the officer could reasonably

assume that Colstad had collided with the child due to intoxication. *Id.*

Here, similarly, Deputy Peiffer had reasonable suspicion to stop Wortman for inattentive driving. He reasonably concluded that the truck's driver had been inattentive. The road conditions were "good" and there was no snow on the road. (72:22.) Tracks in the ditch indicated that the truck had crossed the highway centerline, gone over a driveway, and ended up in the ditch. (72:5; *see also* 84:DVD at 2:46–2:49.) Further, Deputy Peiffer reasonably concluded that Wortman had been driving the truck. Deputy Peiffer reached the truck about two minutes after receiving a call about it. (72:5.) He saw Wortman about 100 yards away walking on the shoulder of the highway away from the truck. (72:5–6.) Video from Deputy Peiffer's squad car camera did not show anyone else walking along the highway before he made contact with Wortman. (84:DVD at 0:00–0:20.) Accordingly, if Deputy Peiffer seized Wortman by blocking his path, he acted lawfully because he had reasonable suspicion that Wortman had committed inattentive driving.

After briefly talking with Wortman, Deputy Peiffer reasonably extended the stop to investigate whether Wortman was intoxicated. Wortman indicated that he had driven his truck into a ditch because he had fallen asleep. (84:DVD at 1:05–1:09.) Deputy Peiffer was not required to believe that excuse. Further, Deputy Peiffer smelled alcohol on Wortman's breath and noticed that his eyes were "glassy." (72:8, 16–17.) These facts allowed Deputy Peiffer to continue his investigation, which he did by driving Wortman to the accident scene. (72:15–16, 23.) After they arrived at the accident scene, Wortman said that he had consumed a "king can" of beer from a Kwik Trip. (72:8, 18.) Deputy Peiffer learned that Wortman's driver license was revoked, he was on extended supervision, and he had eight prior OWI

convictions. (72:9, 17–18; *see also* 84:DVD at 9:41–9:45.) Deputy Peiffer knew that, as a result of those convictions, Wortman's BAC legal limit was 0.02. (72:9.) Prior OWI convictions are especially relevant in an OWI investigation when, as here, they reduce a suspect's BAC limit to 0.02. *Blatterman*, 362 Wis. 2d 138, ¶ 36. These facts allowed Deputy Peiffer to extend his investigation to administer field sobriety tests, which he did next. (72:9.) Deputy Peiffer arrested Wortman after he performed poorly on the tests. (72:9–10.) Deputy Peiffer lawfully extended the stop to investigate whether Wortman was intoxicated.

In sum, Deputy Peiffer's interaction with Wortman constituted a *Terry* stop until he formally arrested and handcuffed Wortman. Every portion of this *Terry* stop was based on reasonable suspicion and, therefore, was lawful.[6]

II. Alternatively, the deputy acted lawfully because he exercised a community caretaker function.

Even if Deputy Peiffer lacked reasonable suspicion to detain Wortman, he acted lawfully because he acted as a community caretaker.

A. Controlling legal principles.

"A community caretaker action is not an investigative *Terry* stop and thus does not have to be based on a reasonable suspicion of criminal activity." *State v.*

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[6] Wortman alleges in passing that he is entitled to suppression under *Miranda*. (Wortman Br. 19.) A Fourth Amendment analysis and a *Miranda* analysis are not the same. *State v. Morgan*, 2002 WI App 124, ¶¶ 10–16, 254 Wis. 2d 602, 648 N.W.2d 23. This Court should decline to consider Wortman's undeveloped *Miranda* argument. *See State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

Ellenbecker, 159 Wis. 2d 91, 96, 464 N.W.2d 427 (Ct. App. 1990) (citation omitted). Similarly, an officer may perform a seizure without probable cause while acting as a community caretaker. *Blatterman*, 362 Wis. 2d 138, ¶ 39. "A law enforcement officer exercises a community caretaker function, rather than a law enforcement function, when an 'officer discovers a member of the public who is in need of assistance.'" *Id.* (quoting *State v. Kramer*, 2009 WI 14, ¶ 32, 315 Wis. 2d 414, 759 N.W.2d 598 (*Kramer II*)). The State has the burden of showing that an officer's conduct was a reasonable community caretaker function. *Id.* A court independently determines whether a seizure was lawful under the community caretaker doctrine. *Id.* ¶ 16.

When the State relies on the community caretaker doctrine to justify a seizure, a court must consider (1) whether a seizure occurred, (2) if so, whether the police conduct was a bona fide community caretaker function, and (3) if so, whether the public interest outweighs the intrusion on the individual's privacy. *Id.* ¶ 42.

Under the second prong, a court considers the totality of the circumstances as they existed at the time of the police conduct at issue. *Kramer II*, 315 Wis. 2d 414, ¶ 32.

> [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 . . . .

Id. ¶ 36.

Under the third prong, a court considers several 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.

Id. ¶ 41 (quotation marks and quoted source omitted).

B. The deputy acted as a community caretaker.

Deputy Peiffer acted at a community caretaker when he made contact with Wortman.

Under the first prong of the community caretaker test, the State assumes for the sake of argument that Deputy Peiffer seized Wortman by blocking his path.

Under the second prong, Deputy Peiffer exercised a bona fide community caretaker function by making contact with Wortman. In *Kramer*, an officer exercised this function by stopping his vehicle behind Kramer's vehicle, which was parked on a highway shoulder after dark with its hazard flashers activated. *Kramer II*, 315 Wis. 2d 414, ¶ 37. Here, similarly, Deputy Peiffer had an objectively reasonable basis for making contact with Wortman. As explained above, Deputy Peiffer responded to a call about a truck in a ditch around 8:00 p.m. in February, saw Wortman walking away from the truck on the shoulder of a highway, and drove his squad car to Wortman. Further, Deputy Peiffer displayed a subjective concern for Wortman's well-being by asking him how his truck had ended up in the ditch and asking him whether he was hurt. (84:DVD at 1:05–1:12.)

Under the third prong, the public's interest far outweighed Wortman's privacy interest. With respect to the first factor, "the 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." *Kramer II*, 315 Wis. 2d 414, ¶ 42. "In many such situations, citizens would *want* an officer to stop and offer assistance." *State v. Kramer*, 2008 WI App 62, ¶ 29, 311 Wis. 2d 468, 750 N.W.2d 941 (*Kramer I*), *aff'd*, 315 Wis. 2d 414. Here, the public had a substantial interest in ensuring that Deputy Peiffer made contact with Wortman. Deputy Peiffer saw a truck in a ditch in February around 8:00 p.m. in a rural area, it was dark outside, there was snow on the shoulder of the highway, and Wortman was walking on the shoulder away from the truck. (*See generally* 84:DVD.) This first factor strongly weighs in favor of finding Deputy Peiffer's conduct reasonable.

The second factor also heavily weighs in favor of Deputy Peiffer's reasonableness. With respect to time and location, again, Deputy Peiffer saw Wortman walking along a rural highway after dark in February. With respect to the degree of authority displayed, it is difficult to imagine Deputy Peiffer acting less coercively than he did. He stopped his car in front of Wortman, activated his red and blue flashing lights, and then asked Wortman how he had driven into a ditch and whether he was hurt. There is no evidence that Deputy Peiffer frisked Wortman or drew a weapon. (72:35, R-App. 106.) He did not handcuff Wortman until he formally placed Wortman under arrest several minutes later. (*See* 72:10; 84:DVD at 16:57–17:45.) Although red and blue flashing lights sometimes constitute a show of authority, they are a safety precaution when an officer stops his vehicle on the side of a dark rural highway to speak with a possibly stranded motorist. *Kramer II*, 315 Wis. 2d 414, ¶ 43.

The third factor—whether an automobile was involved—weighs in favor of an officer's reasonableness when, as here, the officer made contact with a person who might have been experiencing car trouble. *See id.* ¶ 44.

The fourth factor also heavily supports Deputy Peiffer's conduct. He did not have any reasonable alternatives. Arguably, Deputy Peiffer could have seemed slightly less coercive had he stopped his squad car next to, rather than in front of, Wortman. However, law enforcement officers cannot be expected to stop their vehicles in the middle of a dark rural highway to speak with a possibly stranded motorist. *See id.* ¶ 43. Instead, it is entirely reasonable for an officer under those circumstances to stop on the shoulder near the motorist. *See id.* Accordingly, it was reasonable for Deputy Peiffer to stop his vehicle in front of Wortman on the shoulder of the highway.

Other conceivable alternatives—doing nothing or waiting to make contact with Wortman—would have been unreasonable for two reasons. First, if an officer could reasonably suspect that a motorist is injured or ill, the preferred course of conduct is to approach the motorist immediately because it may be too late for assistance at a later time. *See id.* ¶ 45; *State v. Truax*, 2009 WI App 60, ¶ 21, 318 Wis. 2d 113, 767 N.W.2d 369. Here, Deputy Peiffer reasonably could have thought that Wortman was injured or ill. An injury or illness could have explained why Wortman drove his truck into a ditch. Further, Wortman could have received or exacerbated an injury by driving into a ditch. Indeed, one of the first questions that Deputy Peiffer asked Wortman was, "Did you get hurt at all?" (84:DVD at 1:10–1:12.)

Second, courts have rejected the notion that an officer should ignore a person who may be experiencing car trouble,

especially on a dark highway in a rural area. *Kramer II*, 315 Wis. 2d 414, ¶ 45. If the person actually is experiencing car trouble and the officer does not stop to offer help, the person might exit the vehicle and begin walking along the highway, putting his or her safety at risk. *Id.*; *see also Truax*, 318 Wis. 2d 113, ¶ 21. This concern is even stronger here than it was in *Kramer* and *Truax* because Wortman was already walking along a dark rural highway—thereby putting himself in danger of serious injury or death—when Deputy Peiffer first saw him. For these reasons, the fourth factor heavily supports Deputy Peiffer's decision to stop his vehicle in front of Wortman and determine whether he was hurt.

In sum, Deputy Peiffer acted reasonably in a community caretaker function when he made contact with Wortman. He did exactly what society would expect of a reasonable law enforcement officer. Even if he seized Wortman without reasonable suspicion or probable cause, the seizure was constitutional under the community caretaker doctrine.

III. The circuit court imposed a fine within the statutory limit.

The circuit court imposed a fine of $1200. (75:35.) Wortman argues that this fine exceeded the maximum allowed under Wis. Stat. § 346.65. (Wortman Br. 21–24.) He is wrong.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "[S]tatutory interpretation begins with the language of the statute." *Id.* ¶ 45 (quotations marks and quoted source omitted). Courts interpret statutory language

"reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46 (citations omitted). "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* (citations omitted).

"Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.* (citations omitted). "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.* ¶ 47 (citations omitted). However, a court may look at statutory history—that is, prior versions of a statute—even if a statute's meaning is plain. *Cnty. of Dane v. LIRC*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571. "When asked to interpret statutes that appear to be inconsistent, [this Court] look[s] for compatibility, not for conflict." *Liberty Grove Town Bd. v. Door Cty. Bd. of Supervisors*, 2005 WI App 166, ¶ 8, 284 Wis. 2d 814, 702 N.W.2d 33.

This Court interprets and applies a statute de novo. *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 24, 339 Wis. 2d 125, 810 N.W.2d 465.

The statute at issue provides penalties for any person who violates Wis. Stat. § 346.63(1), the OWI statute. Wis. Stat. § 346.65(2)(am)(intro.) (2011–12). Subdivision one provides that any person who violates the OWI statute "[s]hall forfeit not less than $150 nor more than $300, except as provided in subds. 2. to 5. and par. (f)." *Id.* § 346.65(2)(am)1. It is undisputed that subdivisions two through five and paragraph *f* do not apply to Wortman. Subdivisions two through five provide enhanced penalties for second- through sixth-offense OWI. *Id.* § 346.65(2)(am)1.–5. Paragraph *f* provides enhanced penalties for a person who commits OWI with a minor in the vehicle. *Id.* § 346.65(2)(f).

Wortman was convicted of ninth-offense OWI. (74:15.) The applicable penalty for a seventh, eighth, or ninth offense is in subdivision six, which provides that these three levels of OWI are Class G felonies. Wis. Stat. § 346.65(2)(am)6. (2011–12). A Class G felony carries a maximum $25,000 fine and a maximum of ten years of imprisonment. Wis. Stat. § 939.50(3)(g) (2011–12). Accordingly, the circuit court's $1200 fine was well within the statutory limit.

Wortman argues that his maximum penalty was a forfeiture between $150 and $300. (Wortman Br. 22–23.) He reaches this conclusion because subdivision one of § 346.65(2)(am) states that the maximum penalty for OWI is a forfeiture between $150 and $300 "except as provided in subds. 2. to 5. and par. (f)," but it does not exempt the penalty provision that applies to a ninth-offense OWI (subdivision six). (Wortman Br. 22–23.)

This Court should reject Wortman's argument for three reasons. First, it would lead to absurd results. Under his view, a fifth- or sixth-offense OWI conviction would result in a minimum fine of $600 and minimum of six months of imprisonment, *see* Wis. Stat. § 346.65(2)(am)5. (2011–12), but a seventh or greater OWI conviction would carry the same maximum penalty as a first offense: a $300 forfeiture. A defendant could not be imprisoned for a seventh or greater OWI. *See id.* § 346.65(2)(am)1. Further, a seventh or greater OWI would not constitute a crime because "[c]onduct punishable only by a forfeiture is not a crime." Wis. Stat. § 939.12 (2011–12).

Second, the statutory history of § 346.65 shows that the Legislature did not intend to create those absurd results. Under a previous version of this statute, the penalty structure had only five subdivisions. Wis. Stat. § 346.65(2)(am)1.–5. (2005–06.) The highest penalty—which

was located in subdivision five—applied to a *fifth or greater* OWI offense. *Id.* § 346.65(2)(am)5. (2005–06). Accordingly, it is plain that the Legislature meant for the maximum $300 forfeiture in subdivision one to apply only to first-offense OWI.

When the Legislature subsequently amended the statute, it inadvertently created the potential conflict upon which Wortman's argument relies. The Legislature amended the statute to create subdivisions six and seven. 2007 Wisconsin Act 111, §§ 3–4. Under this new version of the statute, subdivision five applied to a fifth or sixth offense; subdivision six applied to a seventh, eighth, or ninth offense; and subdivision seven applied to a tenth or greater offense. *E.g.*, Wis. Stat. § 346.65(2)(am)5.–7. (2007–08.) However, the Legislature did not amend subdivision one to state that a maximum $300 forfeiture is not applicable when a defendant is sentenced under subdivision six or seven. 2007 Wisconsin Act 111, §§ 3–4. This omission, as the circuit court explained, was an "oversight." (112:5, R-App. 125.)

Third, Wortman's understanding writes provisions out of the statute. In contrast, the State's and circuit court's understanding of the statute creates statutory compatibility and gives effect to every provision in § 346.65(2)(am), including subdivisions six (applying to a seventh through ninth offense) and seven (applying to a tenth or greater offense). A legislature intends to give effect to language when, as here, it amends a statute to create that language. *See Stone v. I.N.S.*, 514 U.S. 386, 397–98 (1995). The Legislature thus intended for subdivisions six and seven to have effect.

In short, Wortman's fine is lawful.

CONCLUSION

The State respectfully requests that this Court affirm Wortman's judgment of conviction and the circuit court's orders denying his postconviction motions.

Dated this 1st day of February, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5532 words.

_____
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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).

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Dated this 1st day of February, 2017.

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