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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2016AP2363-CR
Circuit Court No. 2014CT500

Matthew P. Elliott,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order Denying Defendant's Motion to Suppress Evidence Entered by the Honorable Michael J. Aprahamian, Circuit Judge, Branch 9, Waukesha County

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BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Was the initial interaction between Sergeant Wiercyski and Elliott a consensual encounter, and thus there was no seizure within the meaning of the Fourth Amendment?

   Circuit Court Answer: The Circuit Court did not answer this question.

2. In the alternative, if there was a seizure by Sergeant Wiercyski, was he engaged in a bona fide community caretaker function when pulling up behind Elliott's vehicle and speaking with him?

   Circuit Court Answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("State") submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE AND FACTS

Matthew Elliott was charged with Operating While Intoxicated and Operating with a Prohibited Alcohol Concentration, Second Offense, contrary to sections 346.63(1)(a) and (1)(b), Wisconsin Statutes (2013-2014). Elliott filed a motion to suppress the fruits of an illegal stop, and a motion hearing was held in front of the Honorable Donald J. Hassin, Jr., on July 24, 2014. Sergeant Rob Wiercyski and Elliott testified.

Sergeant Rob Wiercyski testified that he was on duty for the Town of Oconomowoc Police Department on April 6, 2014, around 2:20 a.m. (R.50, p. 4.) While in the Downtown Okauchee area, Sergeant Wiercyski observed a vehicle pull out of Foolery's parking lot, which was a local bar. (*Id.*) Sergeant Wiercyski started following the vehicle, and it then made a quick turn into the parking lot of Buckey's Tavern. (*Id.* at 7.) While following the vehicle, Sergeant Wiercyski did not observe any bad driving that caught his attention. (*Id.* at 6.) Buckey's Tavern was closed, and no one was parked in the lot other than the suspect vehicle. (*Id.* at 7.) Further, Sergeant Wiercyski testified that the business was not open for business at all because it was moving to a new location. (*Id.* at 8.) Sergeant Wiercyski passed the vehicle, and then observed the reverse lights come on. (*Id.* 7.) Sergeant Wiercyski testified that he believed the suspect vehicle was trying to avoid him, and that is why it pulled into the parking lot. (*Id.*) When the vehicle did not pull out of the parking lot, which was about a minute and a half to two minutes, Sergeant Wiercyski went back to the parking lot to check if the person in the vehicle was okay. (*Id.* at 8, 20.) When Sergeant Wiercyski pulled into the parking lot, he observed that the driver of the vehicle was possibly passed out because his head was tilted back and to the left, but he could not see if the suspect's eyes were open or closed (*Id.* at 8, 18.) The lights were still on and the vehicle was still running. (*Id.* at 8.)

Sergeant Wiercyski pulled his squad vehicle into the lot and parked about 20 feet behind the suspect vehicle. (*Id.* at 9.) Sergeant Wiercyski did not block the parking lot, and parked behind the suspect vehicle at an angle. (*Id.*) Sergeant Wiercyski testified that the suspect vehicle could have backed up and left as

there was enough room to do so. (*Id*. at 11.) Sergeant Wiercyski did not have his red and blue lights activated; did not have his spot light illuminated; and did not have his high beams on. (*Id*.) While Sergeant Wiercyski was running the suspect vehicle plate, Matthew Elliott, got out of the vehicle. (*Id*. at 11-12.) Sergeant Wiercyski also exited his vehicle at the time and approached Elliott. (*Id*. at 12.) Sergeant Wiercyski then asked Elliott for his driver's license. (*Id*.)

Elliott also testified at the motion hearing, but would not answer question on cross examination. (*Id*. at 25-26.) Elliott testified that he observed a police SUV following him with its headlights on him for a few seconds. (*Id*. at 22.) Elliott stated that he turned into the parking lot, and after sitting there for a few minutes, he observed the police squad close to him. (*Id*. at 23.) Elliott stated that the headlights were shining on his car. (*Id*.) Elliott testified that: "[A]nd then I looked for just a moment, waited and then I opened my door because nothing was going on so I was basically just letting him know that I was waiting to talk to him like." (*Id*. at 24.) Elliott stated that he felt like he could not leave, but also stated when asked by his attorney what could he have done to leave, "I guess I could have." (*Id*. at 25.) After direct examination by his attorney, Elliott invoked his right to remain silent and would not answer any questions on cross examination, and more specifically about his alcohol consumption that night. (*Id*.)

After hearing the testimony, Judge Hassin denied the motion to suppress. (*Id*. at 26.) Judge Hassin stated that "this was a health and welfare check by the sergeant." (*Id*.) It was 2:20 in the morning, Elliott had just left a bar, and was parked in a closed business for no reason. (*Id*.) The trial court found that Elliott was observed to be half passed out behind the wheel of a motor vehicle, and the sergeant investigated Elliott's health and welfare interests. (*Id*. at 26-27.)

After the motion hearing, Elliott pleaded no contest to OWI-2nd offense on March 12, 2015, and was sentenced to 60 days jail with Huber, 16 months driver's license revocation, installation of the ignition interlock device, a fine, and 60 hours of community service. Elliott then filed an appeal requesting this court to reverse Judge Hassin's decision denying his motion to suppress.

ARGUMENT

I. The interaction between Sergeant Wiercyski and Elliott was a consensual encounter, and therefore, there was no seizure or Fourth Amendment violation.

A. Relevant Law

Whether someone has been seized is a two-part standard of review. This court will uphold the trial court's findings of fact unless they are clearly erroneous, but the application of constitutional principles to those facts is subject to de novo review. *County of Grant v. Vogt,* 2014 WI 76, ¶ 17, 356 Wis. 2d 343, 850 N.W.2d 253.

A seizure occurs when an officer by means of physical force or by a show of authority, has in some way restrained the liberty of a citizen. *United States v. Mendenhall,* 446 U.S. 544, 552 (1980). A person is seized within the meaning of the Fourth Amendment if under all the circumstances surrounding the contact a reasonable person would have believed that he is not free to leave. *Id* at 554. Police questioning by itself is unlikely to result in a Fourth Amendment violation. While most citizens respond to a police request, the fact that people do so, and without being told they are free not to respond, does not eliminate the consensual nature of the response. *INS v. Delgado,* 466 U.S. 210, 216 (1984); *State v. Williams,* 2002 WI 94, ¶ 23, 255 Wis. 2d 1, 646 N.W.2d 834. There is no seizure unless the encounter is so intimidating as to demonstrate that a reasonable person would have believed that he was not free to leave. *Id.* In determining whether a person has been seized, the court must replace the individual person with the model of a reasonable person and focus on the officer's conduct under the totality of the circumstances. *Vogt,* 2014 WI 76, ¶ 31.

The test in determining if there is a seizure or a consensual encounter is whether under the totality of circumstances, a reasonable person would believe that he or she was free to go or otherwise terminate the encounter. *State v. Luebeck,* 2006 WI App 87, ¶ 7, 292 Wis. 2d 748, 715 N.W.2d 639.

The seizure/consensual encounter test is objective, but it is complicated by the fact that most people defer to a symbol of authority, no matter how it is manifested. An officer's badge, however, does not by itself make a seizure. A person's consent is no less valid because the person felt bound by ethical pressures not to disrespect an officer of the law. *Vogt,* 2014 WI 76, ¶ 31. The *Vogt* court, in supporting the conclusion that a uniformed police officer asking to speak to a citizen can be compatible with the definition of a consensual encounter, wrote:

> Were it otherwise, officers would be hesitant to approach anyone for fear that the individual would feel "seized" and that any question asked, however innocuous, would lead to a violation of the Fourth Amendment.

Id.

B. Applying the relevant law to the facts

The State first argues that Sergeant Wiercyski's initial interaction with Elliott was not a seizure, and instead was a consensual encounter. Therefore, there was no violation of the Fourth Amendment.

This Court needs to look at Sergeant Wiercyski's conduct under the totality of circumstances, and not just look at whether Elliott believed he was not free to leave, but whether a reasonable person would believe he was not free to leave. Sergeant Wiercyski did not exert his authority during this encounter—he parked 20 feet behind Elliott's vehicle; his squad was positioned in a way so that Elliott could still leave the parking lot if he desired to do so; and Sergeant Wiercyski did not turn on his emergency lights, siren, or spotlight. Further, Elliott got out of his vehicle and started to approach Sergeant Wiercyski on his own accord and without any prompting from Sergeant Wiercyski. Additionally, Sergeant Wiercyski asked Elliott for his driver's license, but did not order him to show his license.

Elliott testified that he felt that he could not leave, and would not do that because he thought he would be evading an officer. But, as the Court noted in *Vogt*, Elliott's consent to speak with Sergeant Wiercyski is not any less valid simply because he felt ethical pressures to not disrespect an officer of the law.

Overall, Elliott's encounter with Sergeant Wiercyski was not so intimidating to the point where a reasonable person would believe that they could not leave. Therefore, this was not a seizure and was instead a consensual encounter, meaning there was no Fourth Amendment violation.

II. In the alternative, if this Court believes there was a seizure, Sergeant Wiercyski was engaged in a bona find community caretaker function, and therefore, there was no violation of the Fourth Amendment.

A. Relevant law

An appellate court will independently review whether an officer's conduct falls under community caretaker standard or whether it constitutes a violation of the Fourth Amendment. *State v. Kramer*, 2009 WI 14, ¶ 16, 315 Wis. 2d 414, 759 N.W.2d 598.

While performing community caretaker functions, police are allowed to "conduct a seizure within the meaning of the Fourth Amendment without probable cause or reasonable suspicion provided that the seizure based on the community caretaker function is reasonable." *State v. Truax*, 2009 WI App 60, ¶ 9, 318 Wis. 2d 113, 767 N.W.2d 369. In order to evaluate whether a seizure was reasonable under the community caretaker function, a court needs to employ a three-part test and determine: (1) if a seizure within the meaning of the Fourth Amendment occurred; (2) if a seizure did occur, were the police engaged in a "bona fide community caretaker activity;" and (3) does "the public need and interest outweigh the intrusion upon the privacy of the individual." *Id.* ¶ 10 (citing *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)); *see also Kramer*, 2009 WI 14, ¶ 21; *State v. Blatterman*, 2015 WI 46, ¶ 42, 362 Wis. 2d 138, 864 N.W.2d 26.

The first prong of the community caretaker test is whether a seizure occurred. "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Florida v. Bostick*,

501 U.S. 429 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968)).

In evaluating the second prong of the test, whether the police engaged in a bona fide community caretaker activity, a court looks at "whether police conduct is 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Kramer*, 2009 WI 14, ¶ 23 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). But, the Wisconsin Supreme Court has "rejected the contention that community caretaker functions must be totally independent" from investigating a criminal offense. *Blatterman*, 2015 WI 46, ¶ 44. "[W]hen under the totality of 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.* (quoting *Kramer*, 2009 WI 14, ¶ 30) (internal quotations omitted).

When assessing the third prong of the test, balancing the public need and the individual's privacy, a court must consider four 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.

Kramer, 2009 WI 14, ¶ 41 (quoting *Kelsey C.R.*, 2001 WI 54, ¶ 36, 243 Wis. 2d 422, 626 N.W.2d 777) (internal quotations omitted); *see also Blatterman*, 2015 WI 46, ¶ 48.

B. Applying the law to the facts of this case

In the alternative, if the Court believes that a seizure did occur in this case when Sergeant Wiercyski pulled up behind Elliott in his squad vehicle, Sergeant Wiercyski was performing a community caretaker function. Therefore, there was no Fourth Amendment violation.

There are three factors that this Court must consider when evaluating Elliott's case: (1) was there a seizure within the

meaning of the Fourth Amendment; (2) if there was a seizure, was Sergeant Wiercyski engaged in a bona fide community caretaker activity; and (3) does the public need and interest outweigh the intrusion upon Elliott's privacy.

First, we will assume a seizure occurred when Sergeant Wiercyski pulled up behind Elliott in the parking lot of Bucky's Tavern. Next, Sergeant Wiercyski was engaged in a community caretaker function because he observed Elliott leave a bar, and appear to be passed out behind the wheel of a vehicle. Sergeant Wiercyski was checking on Elliott to make sure there he was not having a medical emergency, and was trying to evaluate Elliott's physical health. While the stop did eventually turn into an OWI arrest, it does not negate Sergeant Wiercyski's objective community caretaker functions that were present at the onset of the interaction.

Last, this Court must balance the public interests against an individual's privacy. First, the situation was potentially exigent if Elliott was passed out and in need of medical attention. Sergeant Wiercyski could not simply ignore his observations that someone was passed out behind the wheel of a running vehicle. The Court in *Blatterman*, stated that "[t]he public has a substantial interest in police ensuring the well-being and safety of citizens who may be suffering from health concerns and present exigencies." *Blatterman*, 2015 WI 46, ¶ 52.

Second, this was at 2:20 a.m., in a parking lot where no one else was located. Further, Sergeant Wiercyski did not overtly display his authority or force. He pulled up 20 feet behind the vehicle without his emergency lights or spotlight on. Sergeant Wiercyski did not even approach Elliott in his vehicle, but actually met him outside his vehicle.

Third, there was a vehicle involved in the situation, but Elliott was not in the vehicle at the time Sergeant Wiercyski made contact with him.

Fourth, there were no feasible alternatives other than Sergeant Wiercyski pulling up behind Elliott's vehicle and checking on him. Sergeant Wiercyski did not have an ability to call Elliott on his phone, or even know who Elliott was prior to the stop. The

only way Sergeant Wiercyski could determine if Elliott was okay was by pulling up behind him and making contact with him.

Based on the community caretaker analysis, there was presumably a seizure, Sergeant Wiercyski was engaged in a bona fide community caretaker function by checking on Elliott's physical health, and the public's interests outweighed the minimal intrusion into Elliott's privacy. For those reasons, there was no violation of the Fourth Amendment.

CONCLUSION

For all the foregoing reasons, the State respectfully requests this Court affirm the circuit court's denial of Elliott's motion to suppress.

Dated this 15th day of September, 2017.

Respectfully,

/s/ Melissa J. Zilavy_______
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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with proportional serif font. The length of this brief is 17 pages long.

Dated this 15th day of September, 2017.

/s/ Melissa J. Zilavy________
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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. § 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of September, 2017.

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