WISCONSIN COURT OF APPEALS
DISTRICT 3

State of Wisconsin,
Plaintiff-Respondent,

v. Case No. 16-AP-2536

Bryan J. Landwehr,
Defendant-Appellant.

Defendant-Appellant's Brief

Appeal from the circuit court for Marathon County, Lamont K. Jacobson, Judge.

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Statement of the Issues

I. Was the defendant's seizure inside his attached garage without a warrant and without probable cause illegal?

The court held that the officer was permitted both to enter onto the property and to seize the defendant in the attached garage, based on reasonable suspicion.

The circuit court also mentioned the community caretaker doctrine, but the court did not ultimately rely on that doctrine as a basis to deny the motion.

Statement on Oral Argument and Publication

Oral argument is not necessary, as the issues are not complex. This is a one-judge case, so the decision should not be published.

Statement of Case

Bryan Landwehr was arrested for misdemeanor OWI & operating with a prohibited alcohol content (PAC), on August 4, 2015. (2:1) Landwehr moved to suppress all evidence attendant to the arrest, asserting he was illegally seized in his attached garage without *probable cause*, in violation of the Fourth Amendment, Article I, section 11 of the Wisconsin Constitution, and ***State v. Smith***, 131 Wis. 2d 220, 388 N.W.2d 601 (1986). (10:1-2) The arresting officer testified at an evidentiary hearing on the motion. (28:1-2) At the conclusion of that hearing, the circuit court denied the motion. (28:32)

However, part of the court's rationale was that the record was inadequate regarding "seizure." ***Id.*** The parties then stipulated that the judge should review the police squad's audio-video recording from the evening of the arrest. (26:2) The court viewed the DVD and issued an oral ruling. ***Id.*** The court affirmed its earlier determination that Landwehr's seizure in the attached garage was lawful because it was supported by *reasonable suspicion*. (26:4-5) Following denial of his suppression motion, Landwehr pled no contest to the PAC charge. (19:1)

Statement of Facts

The entire police encounter on the evening in question was audio-video recorded, (28:14) and the circuit court eventually reviewed the recording. (26:2) However, Rothschild police officer Mitchell Klieforth was the only witness to testify at the suppression motion hearing. (28:2,4) He testified largely consistent with his incident report, which was attached to the criminal complaint. (2:4-5) Klieforth was parked at a gas station on the corner of Grand Avenue and Volkmann Street in Rothschild, when he observed a woman walk from the Shopko Plaza onto Volkmann around 8:45 p.m. (2:4; 28:4-5) The woman walked southbound on Volkmann, on both the shoulder and the southbound traffic lane. (2:4, 28:5) The woman was staggering and

her back was to traffic, so Klieforth activated his emergency lights, stopped his vehicle near her, and made contact. (28:5)

The woman stated she was walking home and repeatedly told Klieforth to leave her alone. (2:4; 28:5-6, 14) The woman got emotional and mentioned her children; Klieforth smelled alcohol on her breath. (2:4; 28:5) She repeatedly told Klieforth there was no problem and she just wanted to walk home. (2:4) The woman asked Klieforth to turn off the emergency lights, and she eventually asked to enter the vehicle and for a ride home. (2:4, 14) She denied being in any altercation. (2:4, 14) Via her driver's license, Klieforth identified the woman as Sarah Paulson,[1] residing on Woodward Avenue in Rothschild. (2:5) On cross-examination, Klieforth acknowledged he informed another officer that Paulson was fine to leave on her own but that he suspected something had happened. (28:15, 23) Paulson continued becoming emotional and upset in Klieforth's vehicle, both while stopped and as he drove away to take her home. (2:4-5; 28:6)

Klieforth came up behind a vehicle at an intersection, and Paulson volunteered that it was her vehicle. (2:5; 28:6) When asked, she told Klieforth her boyfriend was driving and was meeting her at home. (2:5; 28:6) Paulson denied getting in any fight with her boyfriend and stated she just wanted to go home. (2:5) Klieforth then requested that dispatch have another officer, Jeff Zwicky, respond to the home. (2:5; 28:6) Paulson overheard the request and stated, "Seriously?" (2:5; 28:6) She subsequently stated her boyfriend was mad at her and she needed his money to help support her kids. (2:5; 28:6-7) Based on her conduct, Klieforth suspected that "something had gone on between the two of them because she didn't want him to get in trouble for something." (2:5: 28:7) He further explained:

> I looked at it as a domestic dispute investigation, and I wanted another officer there so we could keep the parties separated and talk to both of them. (28:10) …
>
> [N]ow there was kind of another piece to the puzzle why she may be upset like this, so if they had been fighting in the evening I didn't want to get there and then if they start fighting again, so that is why

[1] This person is not a victim whose identity must be omitted; the defendant was neither arrested nor charged for any crime against her.

> … I called for backup once I knew that there was going to be another party at the residence. (28:11)

As they continued following her boyfriend home, Paulson repeatedly told Klieforth to leave her alone and let her out, and that nothing happened. (2:5; 28:9, 12, 12-13) He responded that he was going to confirm with her boyfriend that nothing happened. (2:5; 28:9) Klieforth followed the boyfriend home and made contact when the boyfriend exited the car. (2:5; 28:10) Officer Zwicky also arrived. (28:18, 19)

After the boyfriend exited the vehicle, Klieforth asked if anything was going on between him and Paulson. (2:5) The boyfriend responded that she had left the tavern and started walking. (2:5) When asked if they got into any fights, the boyfriend responded "not that he knew of." (2:5) The boyfriend indicated he saw Klieforth when he drove by on Volkmann Street, and they had been at Next Stop Lounge. (2:5) Klieforth then identified him as Bryan Landwehr. (2:5)

On cross-examination, Klieforth acknowledged that no call was ever received from anyone that there had been an altercation; that he observed no physical marks on Paulson suggesting an altercation; and that Paulson stated there had been no altercation. (28:15) Klieforth further acknowledged he ignored Paulson's repeated requests to stop and let her out. (28:16-17) It was after the third or fourth ignored request that Paulson became more upset and refused to answer Klieforth's questions regarding the boyfriend's name and physical location of the house. (28:17) Just as they were entering her driveway, Paulson again stated nothing happened and to leave her alone. (28:17) Klieforth ignored the requests and drove into Paulson's driveway. (28:18) At that point, officer Zwicky's car was present on the road, and Landwehr was inside the attached garage. (28:18-19)

Klieforth further testified on cross that, as Landwehr was exiting the car, Klieforth instructed him to come outside and talk to Klieforth. (28:19) Klieforth did not tell him he was free to leave or that speaking with Klieforth would be voluntary. (28:19) Klieforth had not observed any bad driving by Landwehr. (28:19) Klieforth acknowledged there was no physical evidence or witness testimony suggesting that a crime had occurred. (28:19-20) Klieforth agreed that

while in the driveway, officer Zwicky spoke with Paulson and then called out to Klieforth that everything seemed fine. (28:20) The cross-examination ended as follows: (28:20-21)

> Q. Okay, so I guess here is my question, Officer. She had made clear to you before you drove into the driveway she did not want you to do that, correct? She made clear to you she wanted you to stop the car and let her out?
>
> A. Correct.
>
> Q. And no one invited you into the driveway after that point?
>
> A. Correct.

The circuit court then recounted some of the pertinent testimony in its oral decision—including that Klieforth ignored five requests from Paulson to stop the car and release her. (28:30, 28-31) The court observed that the encounter started as a community-caretaker situation, which transitioned to a criminal investigation. (28:30) However, the court suggested there was "still an element of community caretaker at the point the Defendant is contacted," to ensure the "distraught female" was "safe" vis-à-vis her "boyfriend who perhaps there was a disagreement with." (28:30) The court restated this concern as follows: (28:31)

> [B]ut [Klieforth] also has that other purpose, and that's to ensure the safety of the female who he's dropping off at her house and once he leaves she's going to be at home alone with the individual who at least was present with her earlier in the evening before she chose to walk home … leaving her car behind.

Regardless of any residual community caretaker function, the court concluded: (28:31-32)

> [C]ertainly the reasonable suspicion becomes greater over time, simply because you have a woman who is walking home from a bar who is obviously upset, talks about a boyfriend who is mad at her, then engages in activity that clearly is meant to discourage the officer from having contact with the boyfriend.
>
> In the context in which this is all occurring, the totality of the circumstances, that enhances any suspicion that the officer may have had that there was a domestic incident, or at least something that should be investigated as a domestic between the two individuals.

> [S]omething worthy of investigation so that by the time the officer makes contact with the Defendant *in the garage*, he has a reasonable suspicion to believe something has occurred, at least to the point where he should make contact with the Defendant and ask him for whatever happened that evening …. (Emphasis added.)
>
> So I think that the officer was justified in making contact with the Defendant and justified in going upon the premises of [Paulson].

Defense counsel then followed up, seeking a ruling as to whether Landwehr was seized, particularly by Klieforth having cut off the route of escape. (28:32) The court rejected the argument because the record was inadequately developed. (28:32)

However, the court subsequently reviewed the police squad's audio-video recording of the entire encounter with Paulson and Landwehr and rendered another oral ruling. (26:2-3) First, the court noted, "So I earlier made a finding that there was reasonable suspicion. That was based upon the entire circumstances, and I already in the earlier ruling indicated what … gave rise to the reasonable suspicion." (26:3)

The court next recounted the facts supporting reasonable suspicion, ultimately discussing the encounter with Landwehr. (26:3-4) It observed: (26:4)

> The officer then does pull into the driveway, then does block the vehicle that was being operated by Mr. Landwehr because he parks directly behind it and the *vehicle is inside of the garage*, steps out of his car and then asked if he can speak to Mr. Landwehr for a second. (Emphasis added.)

The court then indicated that in a case relied upon by the defense, the government had conceded there was no reasonable suspicion. The court reasoned that here, however, it had already determined "there was reasonable suspicion to justify a detention or seizure." (26:4) It held, "[T]herefore, the interaction with Mr. Landwehr that followed and the evidence gained therefrom was lawfully obtained, so I will deny the Defense motion." (26:4-5) The court never mentioned any community-caretaker rationale at the second hearing.

The rest of the story: the DVD

Additional vital facts and context appear in the DVD recording that the circuit court reviewed.[2] (13) The DVD reveals the following facts (some of which are merely set forth with the time, to assist the court of appeals on review).

Much of Paulson's "emotions" during the encounter concerned her troubled family, whose last name she assumed was known to officer Klieforth; this included references to her nephews whom she was raising while her brother was in prison. (13:A:1:35-:40 (mentions kids); 2:08-:25 ("The Trotzers are my family." "Trotzer. Trotzer. Yeah. We're allll fucked up man."); 3:40 ("I'm trying to take care of my delinquent nephews."); 5:37 ("Four kids. Four kids."); 6:21-:50 ("My brother's in prison right now. Aaron Trotzer. You have to know him. … I try to raise his kids and they're at my house tonight so that's my problem. I'm sorry. I try to give everything. And I never get drunk, ever."); 6:53-7:25 ("I'm trying to raise a delinquent kid." [crying] "I have four kids of my own. I'm sorry." "Rothschild should know our story, so ask them. We've all been there." [crying])); (13:B:2:48 [Paulson still in squad in driveway, now talking to officer Zwicky] ("Hey Jeff, I already know you. Hey Jeff I'm Sara. Paulson. Trotzer."); 2:56 ("I'm trying to raise my Trotzer boys."); 3:23 ("Dude, you know my brother. He's a fricking—he's in prison. Aaron Trotzer."))

The DVD also confirms that much of Paulson's initial angst was related to Klieforth leaving his emergency lights on after refusing her initial repeated requests to leave her alone. (13:A:1:34 ("Can I get in your car please?"); 1:56 ("Can I get in your car? Can you turn your lights off please?); 2:02 (Turn your lights off. Please turn your lights off." "[Klieforth] Nobody can see us." "Yes they can."); 3:03 ("Turn the lights off, please?"))

Paulson noticed her car ahead of them when it stopped at a stop sign. (13:A:7:33) Landwehr enters the home's driveway. (13:A:9:42)

[2] The recording commences at approximately 20:45 (8:45 p.m.), showing a running ten-minute slider/timer at the base of the screen that starts at 0:00. The timer then unexpectedly resets for another ten minutes at 20:54:55. It then does so again, at 21:04:55, and at 21:14:55. References herein to the first ten minutes are to (13:A:[timer]); to the second ten minutes are to (13:B:[timer]), and so on.

Klieforth drives into driveway. (13:A:9:51) Landwehr's vehicle parked inside attached garage, which has two stalls but a single overhead door. (13:B:0:06) Klieforth approaches the garage, with his left hand on his utility belt. (13:B:0:13) Landwehr starts exiting the vehicle and Klieforth calls out, "How you doing?" (13:B:0:17)

While standing at the garage entrance, Klieforth then directed Landwehr to exit. (13:B:0:20 ("Step outside for a second." "I wanna talk to ya.")) Landwehr proceeds to the front of the garage, Klieforth steps forward and leans in toward him, and asks, "Anything going on between you and [Paulson] right now?" (13:B:0:28) As the interrogation continues, officer Zwicky simultaneously questions Paulson in the vehicle; she confirms that Landwehr lives with her at the home. (13:B:3:43) Zwicky calls out twice to Klieforth to tell him "everything's fine." (13:B:4:00) Eventually, Klieforth directs Landwehr to the front of his squad to perform field sobriety tests. (13:B:4:49) Klieforth administers a PBT. (13:C:2:18-:44) Landwehr is placed in handcuffs. (13:C:4:40) Paulson is repeatedly getting upset, sobbing, and requesting to be released from the squad. (e.g., 13:C:0:43 ("Can I get out of here?"); 13:C:6:27 ("I can't breathe" "Let me out of here.") Paulson is finally released and walks in front of the squad. (13:C:9:15; 21:14:09)

Paulson enters the home via the attached garage, confirming that the entry door from the garage into the home was within arm's reach of where officer Klieforth stood when he ordered Landwehr to exit. (13:C:9:25; 21:14:19) Up to that point, the interior of the garage was visible, lit by the squad's headlights; the garage is full of household items and appears to be very confined quarters; one stair up to the unseen entry door was visible at the front left of the garage interior. (e.g. 13:B:0:06; 13:C:9:33)

The squad then backs up and gives a good view of the driveway and front of the home. (13:C:9:33) The video shows there is a paved walkway extending from about halfway up the driveway to a front door. (13:C:9:38-:42) Then, near the garage, there are steps (perpendicular to the driveway) up to a small covered porch, which is recessed from the home's main front wall; the garage front wall sits even further back from the road, and there is a chair in the space between the stairs and garage. (13:C:9:33-:38; 13:A:9:59) The garage

roof extends substantially out over the driveway, covering the porch to the left and in line with a privacy-fenced, landscaped area to the right of the driveway; a dripline from the roof's front edge appears visible on the driveway surface; two black iron supports run from the porch railing to the roof, demonstrating the roof extends even beyond the porch. (13:C:9:33; 13:A:9:53-59) Klieforth was standing well within that roofline—at the far end of, if not beyond, the porch steps—when he ordered Landwehr to come out. (13:B:0:20)

Argument

I. Landwehr was illegally seized in the attached garage of his home without probable cause, much less a warrant.

A. Standard of review and guiding principles of law.

"Whether evidence should be suppressed is a question of constitutional fact." ***State v. Alexander***, 2008 WI App 9, ¶7, 307 Wis. 2d 323, 744 N.W.2d 909 (quoting ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899). The circuit court's factual findings are upheld unless clearly erroneous, but an appellate court independently reviews the application of constitutional principles to those facts, *i.e.*, de novo review. ***Id.*** However, the appellate court may review documentary evidence, e.g., a DVD documentary, de novo because it is in the same position as the circuit court with respect to such review. *See* ***State v. Schmitt***, 2012 WI App 121, ¶9, 344 Wis. 2d 587, 824 N.W.2d 899.[3]

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause

[3] Documentary videotapes are not, however, reviewed de novo if the parties disputed what occurred. ***State v. Walli***, 2011 WI App 86, ¶¶13-14, 17, 334 Wis. 2d 402, 799 N.W.2d 898. In the present case, it does not appear that the underlying facts are in dispute, i.e., the videotape is consistent with, but supplements, the officer's testimony.

…." Article I, Section 11 of the Wisconsin Constitution is a substantively identical provision that is interpreted consistently with the Fourth Amendment. ***State v. Richter***, 2000 WI 58, ¶27, 235 Wis. 2d 524, 612 N.W.2d 29. "It is a '*basic principle* of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." ***State v. Dumstrey***, 2016 WI 3, ¶22, 366 Wis. 2d 64, 873 N.W.2d 502 (quoting ***Payton v. New York***, 445 U.S. 573, 586 (1980)) (emphasis added).

"The protections of the Fourth Amendment extend beyond the walls of the home to the 'curtilage.'" ***State v. Davis***, 2011 WI App 74, ¶9, 333 Wis. 2d 490, 798 N.W.2d 902. Curtilage is "the land immediately surrounding and associated with the home …. to which extends the intimate activity associated with the 'sanctity of a [person's] home and the privacies of life.'" ***Oliver v. United States***, 466 U.S. 170, 180 (1984) (quoting ***Boyd v. United States***, 116 U.S. 616, 630 (1886)).

In ***United States v. Dunn***, 480 U.S. 294, 301 (1987) (citations omitted), the Supreme Court explained:

> [C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a "correct" answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.

Dunn factors notwithstanding, the general rule is that a home's attached garage is always considered curtilage. ***Davis***, 333 Wis. 2d 490, ¶12; ***Dumstrey***, 366 Wis. 2d 64, ¶35.

B. Landwehr was seized in his attached garage.

Landwehr's suppression motion alleged he was illegally seized in his garage without probable cause. (10:1) The State never denied Landwehr was seized in his garage. The circuit court found that officer Klieforth "does pull into the driveway, then does block the vehicle that was being operated by Mr. Landwehr because he parks directly behind it and the vehicle is in the garage" and that Klieforth then exited his squad and indicated he wanted to speak to Landwehr. (26:4) Then, addressing a case Landwehr cited and attached as part of his motion, the circuit court concluded "there was reasonable suspicion to justify a detention or a seizure." (26:4)

While it was undisputed that Landwehr was seized in his attached garage, Landwehr will nonetheless address the issue to ensure it is preserved/fully developed. In arguing he had been seized, Landwehr's motion relied in part on ***United States v. Smith***, 794 F.3d 681 (7th circ. 2015). (10:1) That case observes: "The 'crucial' test for determining if there has been a seizure is 'whether taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" ***Id.*** at 684 (quoting ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). Stated otherwise, a seizure occurs "when an officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen." ***State v. Young***, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729 (citations omitted).

> Circumstances that suggest a seizure include "the threatening presence of several officers, display of their weapons, physical touching of the private citizen, use of forceful language or tone of voice (indicating that compliance with the officers' request might be compelled), and the location in which the encounter takes place." ***United States v. Clements***, 522 F.3d 790, 794 (7th Cir. 2008) (citing ***United States v. Mendenhall***, 446 U.S. 544, 554, (1980)). Courts also consider whether police made statements to the citizen intimating that he or she was a suspect of a crime, …, whether the citizen's freedom of movement was intruded upon in some way, [***Michigan v.***] ***Chesternut***, 486 U.S. [567,] 575, whether the encounter occurred in a public or private place, …, and whether the officers informed the suspect that he or she was free to leave.

Smith, 794 F.3d at 684 (citations omitted).

In ***Smith***, ***id.*** at 683, the defendant was in an alley when approached by two officers on bicycles who stopped in his path about five feet away. One officer dismounted, approached Smith, and asked an accusatory question; Smith was not informed he was free to leave. ***Id.*** The court concluded Smith was seized, emphasizing the location in a dark alley, threatening presence of multiple officers, aggressive nature of questioning, and physical obstruction of Smith's freedom of movement. ***Id.*** at 685. It also noted that while the alley was a public place, there was "limited room in which to maneuver," ***id.***, and rejected the argument that the officers did not entirely block Smith's path or exit, ***id.*** at 686 ("case law makes clear that officers need not totally restrict a citizen's freedom of movement in order to convey the message that walking away is not an option") (discussing cases).

Similarly, in ***State v. Griffith***, 2000 WI 72, ¶¶10, 27, 33, 80 (dissent), 236 Wis. 2d 48, 613 N.W.2d 72, there was a seizure when a car parked in an apartment complex lot and police then pulled in behind and blocked the exit. (citing 4 Wayne R. LaFave, *Search and Seizure* § 9.3(a), at 103-04 (3d ed. 1996)).

Here, Landwehr was followed home by a police squad car that stopped in his driveway and blocked his exit (28:10; 26:4); a second police squad parked in the road (28:18, 19); the police had Landwehr cornered inside a dark, private garage, which was especially confined quarters due to household items and another car inside (e.g., 13:B:0:06; 13:C:9:33); Landwehr's only escape would have been to go directly past the officer, through either the overhead garage door or the home entry door (***id.***; 13:C:9:25; 21:14:19)); the officer approached with one hand on his police utility belt (13:B:0:13); the officer told Landwehr to come out (28:19; 13:B:0:20); and the officer did not indicate Landwehr was free to ignore his demand (28:19). "Step outside for a second. I wanna talk to ya." (13:B:0:20)

These circumstances—including both a show of authority and restraint of freedom of movement—conclusively demonstrate Landwehr was seized inside the attached garage. *See* ***Young***, 294 Wis. 2d 1, ¶18; ***Griffith***, 236 Wis. 2d 48, ¶¶27, 80 (dissent); ***Smith***, 794 F.3d at 685-86.

And if there were any lingering question, the officer took it one step further and confirmed the nature of the encounter when Landwehr proceeded to the front of the garage. *See* ***Smith***, 794 F.3d at 684, 686 ("The line between a consensual conversation and a seizure is crossed when police convey to an individual that he or she is suspected of a crime."). Klieforth steps forward, leans in toward Landwehr, and asks accusingly, "Anything going on between you and [Paulson] right now?" (13:B:0:28) No person in their right mind would have felt free to ignore officer Klieforth and go about their business. *See* ***Bostick***, 501 U.S. at 434.

C. Landwehr's seizure in his attached garage was illegal because the police failed to secure a warrant.

> [W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a [person] to retreat into his [or her] own home and there be free from unreasonable governmental intrusion.' [T]he right to retreat would be significantly diminished if police could enter a [person]'s property to observe his [or her] repose from just outside the front window. We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.' That principle has ancient and durable roots. … This area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'

Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (citations omitted).

Landwehr's seizure in his attached garage was illegal because the police failed to secure a warrant. Police cannot rely on mere reasonable suspicion to seize a person within the curtilage of their home. *See* ***Dumstrey***, 2016 WI 3, ¶¶2-3. Here, the circuit court bit on the State's suggestion in argument that reasonable suspicion properly sustained the seizure. (28:26, 27, 28) However, to legally seize Landwehr in his attached garage, the police needed a warrant issued upon probable cause; this is a "basic principle." *See* ***id.***, ¶22; ***Davis***, 333 Wis. 2d 490, ¶9.

Moreover, police were trespassing when Landwehr was seized, amplifying the unreasonableness of the privacy intrusion. Klieforth

testified in no uncertain terms that Paulson had revoked any implicit invitation to enter onto the property. (28:16-18, 20-21) The court applied the wrong standard when it upheld the seizure based on reasonable suspicion, and therefore its order denying the suppression motion must be reversed.

The court of appeals can and should stop its analysis here, resolving the appeal on the narrowest grounds. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983). The following argument is provided merely as additional support and to ensure no defense arguments are forfeited.

D. Police lacked probable cause to obtain a warrant or to seize Landwehr based on any exception to the warrant requirement.

Probable cause to arrest is a requirement of both the Fourth Amendment and article I, sec. 11 of the Wisconsin Constitution. ***State v. Koch***, 175 Wis. 2d 684, 700, 499 N.W.2d 152 (1993). "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***Id.*** at 701. Stated otherwise: "Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." ***Id.*** (source omitted)).

Here there was no evidence of any crime of any kind—only a hunch (which, it turned out, was unfounded). In the circuit court, the State failed in the first instance to identify by statute any crime that Landwehr probably committed, referring generally to "a domestic" and "domestic abuse." (28:26, 27, 28) That shortfall aside, the State did not even attempt to dispute Landwehr's argument that there was no probable cause. (*see* 10:1-2; 28:25)

The State's concession by silence was well founded. It would have been apparent to a reasonable officer from the totality of circumstances that Paulson's demeanor was due to her embarrassment on the roadside beneath the squad's emergency lights, moderate inebriation, and discontentment with her family (nephews

and inmate brother); there was no evidence that anyone reported any disturbance, much less criminal activity, from the tavern or anywhere else; Paulson stated nothing was wrong; Paulson had no injuries; Paulson never even mentioned Landwehr or a significant other until she and the officer chanced upon Landwehr driving ahead; Paulson denied Landwehr had done anything wrong; and Landwehr committed no driving offenses nor exhibited any suspicious or erratic driving or behavior. (28:14-17, 19-20)

It is not suggestive of criminal behavior that Paulson did not want the officer to involve her boyfriend. There is nothing inherently unusual or suspicious about that desire, particularly considering the already-known reasons for Paulson's demeanor. Likewise, her remarks that Landwehr was upset with her and she needed his money to help raise the kids are not enlightening as to any crime. It is not a crime to have a disagreement; it is not even suspicious; it is a perfectly normal part of any relationship. Of course Paulson did not want the police to hassle her boyfriend; indeed, it would be peculiar if she *did*.

If the facts of this case constitute probable cause to arrest Landwehr for committing a crime, then no person on the street is free from arbitrary arrest based on the slightest hunch. No reasonable officer could have concluded Landwehr had probably committed domestic abuse—or any other crime. *See* ***Koch***, 175 Wis. 2d at 700-01.

E. Police lacked reasonable suspicion that Landwehr had committed a crime.

To execute a valid investigatory stop, ***Terry*** and its progeny require that a law enforcement officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Such reasonable suspicion must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. ***Id.*** The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of circumstances. ***Id.***

As established above, reasonable suspicion is not the applicable standard for seizing Landwehr in his attached garage. But even that lower threshold was not satisfied here, for the same reasons above that probable cause did not exist. Landwehr himself did nothing suspicious, much less anything to lead a person to reasonably suspect he had committed any crime. Landwehr was simply going about his business—until he was interrupted inside his attached garage.

Klieforth's hunch most be considered in light of the totality of the circumstances. That is a "two-way street." It would be inappropriate to disregard the known factors contributing to Paulson's demeanor, already discussed above, i.e., her embarrassment on the roadside beneath the squad's emergency lights, moderate inebriation, and vociferous displeasure with her family.

As defense counsel aptly observed in the circuit court, its ruling—that Paulson's subsequent revocation of authority to enter onto her property formed the reasonable suspicion—puts citizens in an impossible bind: (27:3-4)

> My concern with that ruling, Judge, was if she says nothing, the officer's allowed to go on the driveway; is she says he can enter, clearly the officer has permission. If she says he can't enter, that is reason to enter the property. It's kind of a catch-22 where no matter what she says, the officer is going to be allowed to enter the property.

Considering all the circumstances here, it would not be reasonable to suspect Landwehr of committing any crime. While likely well intentioned, this is an unfortunate case of an overzealous officer refusing to accept the facts. At some point, citizens' rights to be left alone must be respected. Paulson did not request, need, or want Klieforth's intervention, but he was unwilling to hear it; he had his own hunch.

F. The community caretaker doctrine did not excuse the otherwise illegal seizure in the attached garage.

"The community caretaker function provides that the police may act in certain situations which are 'totally divorced from the detection,

investigation, or acquisition of evidence relating to the violation of a criminal statute.'" ***State v. Kelsey C.R.***, 2001 WI 54, ¶34, 243 Wis. 2d 422, 626 N.W.2d 777 (sources omitted). To find a community-caretaker seizure reasonable, a 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. ***Id.***, ¶35.

The circuit court mentioned the community caretaker doctrine at the initial motion hearing, but, to the extent initially relied upon, the court apparently abandoned that rationale at the continued hearing. (26:3-5) The State, for its part, never suggested the community caretaker doctrine was relevant to Landwehr's seizure in his garage. Rather, it explicitly argued that the encounter shifted focus once the officer happened upon Landwehr. Responding to the defense's argument that police were trespassing upon entering the home's driveway, the State argued: (28: 26, 28)

> Your Honor, I don't think consent is an issue in this case. I believe this is a situation where a law officer was going to look into a potential domestic abuse situation. …
>
> An objective officer would at that point realize there's a reason that her stance went from I want a ride home to I want to get out and walk, trying to break that nexus, that investigation, so I don't believe consent is the issue here. I believe it's an investigation, and based upon the totality of the circumstances, I believe the officer did have a reasonable suspicion to investigate the domestic abuse possibility[.]

The State was correct; it was solely a criminal investigation at the Paulson/Landwehr residence. Officer Klieforth's only concern with Paulson's wellbeing when he approached Landwehr was that she was the potential victim of a crime by Landwehr. Klieforth had acknowledged she was otherwise fine to proceed on her own while they were still stopped on the roadside. (28:15, 23) He explained he called for "backup" to meet him at the home "[b]ecause I thought that … something had happened between the two of them. And I looked at it as a domestic dispute investigation …. (28:10) Even the circuit court acknowledged that the concern was for Paulson's safety relative to Landwehr. (28:31)

In any event, if the concern for Paulson's safety was not as a crime victim, Klieforth could have simply dropped her off in front of the home and waited to see that she made it inside. And if this was a community-caretaker seizure, it was unreasonable and not the least intrusive means. "Overriding this entire process is the fundamental consideration that any warrantless intrusion must be as limited as is reasonably possible, consistent with the purpose justifying it in the first instance." ***State v. Clark***, 2003 WI App 121, ¶21, 265 Wis. 2d 557, 666 N.W.2d 112 (source omitted). If necessary to go onto the property, the least intrusive means would have been to walk up and knock on the front door.

Conclusion

For the foregoing reasons, Landwehr requests that this court reverse the judgment of conviction and that the cause be remanded with directions to grant Landwehr's motion to suppress.

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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 using the following font:
Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 5,907 words.

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