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**CLERK OF COURT OF APPEALS
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Appeal No. 2016 AP 0002536
Marathon County Circuit Court Case 2015 CM 001552

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BRYAN LANDWEHR,

Defendant-Appellant.

ON APPEAL FROM AN ORDER ENTERED IN MARATHON COUNTY CIRCUIT
COURT, THE HONORABLE Lamont K. Jacobson, PRESIDING.

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Whether the trial court's denial of Landwehr's motion to suppress was clearly erroneous as the trial court found that the officer's contact with Landwehr was satisfied under the officer's community caretaker function.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The County does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22 (2) (b) (2015-16). Publication is not necessary.

STATEMENT OF THE CASE

On November 30, 2015 a suppression hearing was held before the Honorable Lamont K. Jacobson in the Branch III court room. (R.Doc, 28. ps.1-3)

At that hearing, officer Mitchell Klieforth of the Rothschild Police Department testified about the facts leading up to his contact with Landwehr. (R.Doc, 28. ps.4-24)

Subsequently, after hearing the evidence the trial court denied Landwehr's motion. (R. Doc, 26. Ps.1-6) Landwehr plead guilty to a §346.63(1)(a)violation on September 16, 2016 and asked that the sentence be stayed to allow an appeal. (R.Doc, 27. pg.1-16) That appeal is now before this court.

STATEMENT OF THE FACTS

On August 4, 2015 at approximately 8:45 p.m. Officer Mitchell Klieforth of the Rothschild Police Department was on duty in a fully marked squad car, sitting in the parking lot a gas station on Volkman Street in the village of Rothschild, when he observed a women staggering down Volkman Street. (R.Doc, 28. ps.5-6)The women was wadling in the roadway with her back to traffic.

Klieforth made contact with the women and observed that she was "clearly intoxicated", upset, very emotional and crying. (R.Doc, 28. Ps.5-6) Klieforth also ascertained from his conversation with the women that she was walking home from a bar and that there may have some sort of incident with her boyfriend as she informed Klieforth that "he was so mad at me." (R.Doc, 28. P6) After some discussion it was agreed that Officer Klieforth would give the women a ride home.

Subsequently, during the ride home the women informed Klieforth that a vehicle travelling in front of the squad car and in the same direction was her vehicle and that her boyfriend was the driver. (R.Doc, 28. ps.5-10)

Klieforth testified that this information raised concerns in his mind and that he radioed for another squad to meet them at the woman's address. Once the women heard him ask for another vehicle, her demeanor changed. She demanded that the officer stop the vehicle and let her out and became uncooperative. The women made statements to Klieforth that she did not want him (her boyfriend) to get in trouble, she needed his money for her children, and that she would not give his name away. (R.Doc, 28. P5-10)

Klieforth then transported the women home and made contact with Landwehr who was the driver of the vehicle in question. That contact led to an OWI investigation and arrest. (R.Doc, 28. Ps 5-23)

The trial court then denied Landwehr's motion based upon the following reasoning;

- 1) That there was two separate things at play that night as Officer Klieforth was acting in both his traditional law enforcement crime investigation capacity and also in his community caretaker capacity,
- 2) That Klieforth made contact with a clearly intoxicated and troubled woman walking home from a bar and that the officer was concerned about her well-being,
- 3) That while Klieforth was giving the woman a ride home he was informed of circumstances and facts that led him believe that something of note may have transpired and that the woman might be in danger once she was home alone with Landwehr,
- 4) The trial court noted that the officer's purpose was not to follow Landwehr, but to take the woman home,

5) Finally, the trial court considered all the facts under the totality of the circumstances and found that "by the time the officer makes contact with the defendant in the garage, he has 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, but he 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, and I'm inferring walk home leaving her car behind." (R. Doc, 28. Ps29-32)

ARGUMENT

I. LANDWEHR'S MOTION WAS CORRECTLY DENIED BY THE TRIAL COURT AFTER A HEARING BECAUSE THE OFFICER'S CONDUCT FELL WITHIN THE SCOPE OF A REASONABLE COMMUNITY CARETAKER FUNCTION.

A. Standard of Review.

On appeal, the circuit court's factual findings are reviewed pursuant to the clearly erroneous standard. The

appellate court will uphold those factual findings unless they are clearly erroneous. *State v. Popke*, 317 Wis.2d 118, 765 N.W.2d 569. However, applying those facts to constitutional principles is a question of law that is reviewed *de novo*. *Id.*

B. LANDWEHR'S ARGUMENT

Landwehr argues that he was illegally seized in his garage without a warrant or probable cause and the community caretaker function did not excuse the seizure. (See Landwehr's brief)

C. STATE'S ARGUMENT

The Wisconsin Supreme Court in *State v. Kramer*, 315 Wis.2d 414, 759 N.W.2d 598 addressed the community caretaker function in relation to a law enforcement officer's concurrent subjective suspicion of criminal activity. There the Court held that the State bears the burden of proving that the officer's conduct fell within the scope of a reasonable care taker function. (*Id.* at §424)The Court then cited *State v. Anderson*, 142 Wis.2d 162, 417 N.W.2d 411, a case which had created a three step test to help satisfactorily analyze whether the police

contact was a bona fide community caretaker function. (Id. at §21)

The three steps that trial courts use to determine whether the community caretaker function justifies a seizure of a person are 1) whether a seizure within the meaning of the Fourth amendment has occurred; 2) if so, whether the police conduct was a bona fide community caretaker activity; 3) and if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual. (Id. at §21)

APPLICATION OF THE THREE STEP TEST

The first step in the analysis is whether a seizure has occurred. (Id. at §21) Here, Landwehr was in a garage when he was instructed by the officer to talk with law enforcement. The record does not illuminate Landwehr's rights relating to the garage and residence, only that the female refers to residence as hers. For arguments sake the State will agree that Landwehr was seized.

The second step in the analysis is whether the police conduct in question was a bona fide community caretaker function. (Id. at §22) It is during this second requirement that the trial court considers whether the police conduct

is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute". (Id. at §23, *Kramer* Court citing *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523)

The Court in *Kramer* then tackled the issue of what does the term "totally divorced" actually means in the context of a community caretaker function, or in other words, what factor does the officer's subjective motivation play in the equation. The Court in *Kramer* found that the officer's subjective motivation would be a factor that might warrant consideration but that it would not be dispositive, but merely one factor among many. (Id. at §25-27)

The Court then went on to find that when evaluating whether a community caretaker function is bona fide, the trial court must examine the facts under the totality of the circumstances as they existed at the time of the police contact. (Id. at §30)

The *Kramer* Court then found that "we conclude that the "totally divorced" language from *Cady* does not mean that if the police officer has any subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function. Rather, we conclude that in a

community caretaker context, when under the totality of the 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. at §30) More specifically, the Court found that if the officer has "articulated an objectively reasonable basis for the community caretaker function, he has met the standard of acting as bona fide community caretaker." (Id. at §36)

In the case presently before the court, under the totality of the circumstances, the officer's contact with Landwehr was a valid community caretaker function. A reasonable officer would have concluded, based upon the facts available to him, that he needed to ensure that the female person he was transporting would be safe when left alone with Landwehr.

A reasonable officer would have had concerns about his female passenger's safety when considering all the circumstances before him. The woman is clearly intoxicated, coming from a bar, very emotional, and making statements that would lead a reasonable officer to believe that she had some kind of disagreement with her boyfriend. Furthermore, that boyfriend is now driving her vehicle and

a reasonable officer would wonder why she would not be a passenger in her own vehicle. The final straw would have been the women's reaction once she realized that the officer was taking an interest in that night's proceedings. She demanded to be let out of the officer's vehicle and made further statements that any reasonable officer would construe to be admissions that something did transpire between her and her boyfriend. The officer clearly had an obligation to make contact with the women's boyfriend (Landwehr) and assure himself that she would be safe once law enforcement left. The officer was acting in his capacity as a bona fide community caretaker.

Lastly, the court conducts the balancing test by balancing a public interest or need that is furthered by the officer's conduct against the degree of and nature of the liberty interest. (Id. at §40) While balancing these interests, four factors are considered.

The first factor is the degree of the public interest and the exigency of the situation. (Id. at §41) Here the public has a substantial interest in ensuring that women are safe from potential domestic abuse situations. We want law enforcement to be concerned for the safety of women and especially vulnerable women. Here the women was clearly

vulnerable as she was very intoxicated. Also, this was a situation where law enforcement had to act promptly as it could have been too late once they left.

The second factor is the attendant circumstances surrounding the seizure, including time, location, and the degree of authority or force. (Id. at §41) Here it was after hours of darkness and in a semirural setting. It was also to be presumed that the woman and Landwehr were going to enter the residence where they would have been out of the public view and help would have not been available to the woman. Also, the officer did not use force and Landwehr answered to a request from the officer to talk.

The third factor is whether an automobile was involved. Here the contact took place after everyone was clear from a vehicle.

The fourth factor concerns the availability, feasibility and effectiveness of alternatives to the contact or intrusion actually accomplished. (Id. at §41) Here there was no alternative open to the officer other than making contact with Landwehr. He had already ascertained from the woman that there was some sort of issue going on and he needed to assure himself that she would be safe once law enforcement left the scene. There

was no other alternative to asking Landwehr questions in order to insure the woman's safety.

CONCLUSION

Based on the above analysis, this court should uphold the trial court's denial of Landwehr's motion to suppress.

Dated this 14 day of May, 2017, at Wausau, WI.

Respectfully submitted:

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CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

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Attorney Sidney A. Brubacher
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CERTIFICATION OF MAILING

I certify that on this 22nd day of December, 2016,
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Signed,

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CERTIFICATION OF ELECTRONIC BRIEF

I certify that on this 22nd day of December, 2016, I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of sec. 809.19(12) of the Wisconsin Statutes. I further certify that this electronic brief is identical in content and in format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed,

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