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 Reply Brief

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

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Argument

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

The State violated a citizen's fundamental constitutional right.

"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 …." Fourth Amendment, U.S. Constitution.

Here, the State has now conceded that Landwehr was seized in his home without a warrant, and without probable cause.[1] *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

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

The State is singing a new tune on appeal; despite the circuit court's mentioning of the topic, the State never relied on the community-caretaker doctrine below. Instead, it argued Landwehr was properly seized on suspicion of committing the crime of domestic abuse. It is inconsistent to argue the seizure was attendant *solely* to a proper criminal investigation, and then take the opposite position after the former has been shown improper.

"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

[1] The State wrongly asserts in passing that "the record does not illuminate Landwehr's rights relating to the garage and residence, only that the female refers to (sic) residence as hers." (Red br.:7). Rather, Landwehr's primary brief indicates the woman "confirm[ed to police] that Landwehr lives with her at the home. (13:B: 3:43)." (Blue br.:10)

422, 626 N.W.2d 777 (sources omitted). Any notion that the community-caretaker exception applies here was adequately dispelled in Landwehr's primary brief. (Blue br.:18-20). Nonetheless, he will elaborate.

First, the circuit court (a) never recited, much less conducted, the three-part community-caretaker analysis, (b) did not clearly rely on that doctrine as the basis of its initial ruling, and (c) omitted any reference to the doctrine in its final ruling. Yet, the State's overall contention on appeal is that: "The trial court correctly found Landwehr's law enforcement contact to be reasonable under the Community Caretaker Doctrine." (Red br.:i) Already, the State starts from a false premise.

Second, the State bears the burden to prove that the community-caretaker doctrine applies. ***State v. Kramer***, 2009 WI 14, ¶17, 315 Wis. 2d 414, 759 N.W.2d 598. While the State can certainly rely on any evidence in the record, that evidence must be evaluated in light of that ultimate burden. In other words, it us not up to Landwehr to convince any court that the doctrine does not apply; it is presumed not to apply.

Third, the police conduct here was not bona fide community caretaker activity. *See* ***id.***, ¶¶21, 23. The State relies on ***Kramer*** to argue that the doctrine may still apply where an officer also has subjective concerns of criminal conduct. That case is easily distinguished. It involved an officer who pulled behind a car parked on the side of the highway with its flashers on. ***Id.***, ¶5. The officer testified he stopped to check if there was a driver and to offer assistance, and that typically those situations involve vehicle problems. ***Id.*** However, the officer acknowledged that he did not know what the situation involved and that he generally always remained on alert for criminal conduct. ***Id.***, ¶6. Ultimately, the court held that was bona fide community caretaker conduct under the totality of the circumstances, and that the officer's general law enforcement concerns at the time of the seizure did not negate the primary function of the stop, which was to render aid. ***Id.***, ¶¶34-39.

Here, the initial stop of *Paulson* on the side of the road may have been community caretaker activity. However, as noted previously

(Blue br.:19), the encounter had shifted focus to a criminal investigation by the time of Landwehr's seizure in the attached garage. Indeed, the State itself vehemently argued to the circuit court that the encounter had already become a criminal investigation warranting Landwehr's seizure, at the time officer Klieforth pulled behind Landwehr on the roadway. (28:26-28) The State argued:

> I believe this is a situation where a law officer was going to look into a potential domestic abuse situation. The standard is the totality of the circumstances, was there reasonable suspicion by an objective officer that there might have been an offense committed.
>
> In this case the offense would have been a domestic. He had a bunch of pieces to the circumstances. … He made contact with her. She stated at first she didn't want help, then she said she would take a ride.
>
> Then he started asking her questions about a potential domestic when he found out that she was coming from a bar … and really it comes down to when he got behind the vehicle driven by the Defendant ….
>
> And when they got behind the vehicle and it became clear to her and he called for backup that the officer was going to look into an investigation for a domestic, at that point she said, I want to get out, I want to walk ….
>
> Based upon all those circumstances, I believe the officer … had a reasonable suspicion that something did happen. …
>
> An objective officer would at that point realize there's a reason that her stance went from I want a ride to I want to get out and walk, trying to break that nexus, that investigation …. I believe it's an investigation, and based upon the totality of the circumstances, I believe the officer did have reasonable suspicion to investigate the domestic abuse possibility, Your Honor, so for that reason I'd ask the Court to deny the motion. (28:26-28)

To summarize, the State asked the circuit court to deny Landwehr's suppression motion solely because the officer was justifiably investigating a crime. Similarly, the State does not now direct this Court to any officer testimony that he was acting in a

community caretaker function when he seized Landwehr.[2] Rather, officer Klieforth 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) This case is not remotely similar to ***Kramer*** or the circumstances that case is intended to address.

The bottom line is that there simply was no bona fide caretaker function afoot. Officer Klieforth's only concern with Paulson's wellbeing when he seized Landwehr in the garage was that she was a potential victim of domestic abuse. Klieforth had already acknowledged she was otherwise fine to proceed home on her own when they were stopped on the roadside. (28:15, 23, 25)(13:C: 4:15-4:33) Specifically, officer Klieforth had told another officer that Paulson wanted to go home, and he then explained: "She's fine to leave on her own, but she's real emotional, real upset; I think something, I wonder if something didn't happen." (13:C: 4:15-4:33) Even the circuit court acknowledged that the concern for Paulson's safety was in relation to Landwehr. (28:31) And even now on appeal, the State is arguing that Officer Klieforth was acting in a bona fide community caretaker capacity because "he needed to ensure [Paulson] would be safe when left alone with Landwehr" in light of his concerns the two "had some kind of disagreement" or that "something did transpire between" them. (red br.:9-10).

Fourth, even assuming arguendo that this case involved a bona fide community caretaker activity, the public need and interest do not outweigh the intrusion upon the privacy of the individual. ***Kramer***, ***id.,*** ¶¶21, 40-41.

The State argues the public interest at stake here is "ensuring that women are safe from potential domestic abuse situations" and asserts the police "had to act promptly as it could have been too late once they left." (Red br.:10-11) While there is certainly a public interest in preventing domestic abuse, that is irrelevant to this analysis. Ferreting out the crime of domestic abuse is not a community caretaker function; it is a law enforcement function. The

[2] Clearly then, the State has not shown "that *the officer has articulated* an objectively reasonable basis under the totality of the circumstances for the community caretaker function." *See* ***State v. Kramer***, 2009 WI 14, ¶36, 315 Wis. 2d 414, 759 N.W.2d 598 (emphasis added).

State's reference to acting promptly likewise refers to investigating the possibility of domestic abuse. The same goes for the State's assertion that Landwehr and his potential victim were likely to be "out of the public view and help would have not been available to the woman." (Red br.:11)

The State pleads, "Here there was no alternative open to the officer other than making contact with Landwehr." (Red br.:11) That is all well and good, but "making contact" was investigating a potential crime. The officer was welcome to do so, so long as he followed the Fourth Amendment rules. Further, the officer did not employ the least intrusive means. If necessary to go onto the property to question Landwehr, the least intrusive means would have been to park on the street and then walk up and knock on the home's front door. Or, perhaps the officer could have attempted to call Landwehr on the telephone. There was no need whatsoever to seize Landwehr.

Alternatively, if the concern for Paulson's safety was not as a potential crime victim, officer Klieforth could have simply dropped her off in front of the home and waited to see that she made it inside. However, even a general assertion that Klieforth wanted to ensure Paulson safely made it inside her home falls flat if one watches the DVD to the end of the encounter. When Paulson is finally released, Klieforth turns his back on her and walks away before she is inside the home; he then drives away with the garage left wide open. (13:C: 9:20 [21:14:14]) Of course, as noted above, Klieforth had already long since determined Paulson was fine to walk home on her own.

Conclusion

Warrantless searches are per se unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions that "have been 'jealously and carefully drawn,' and the burden rests with those seeking exemption from the warrant requirement to prove that the exigencies made that course imperative." ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983) (citations omitted). This Court should maintain that jealous guard and not permit the carefully delineated exception to swallow the whole Fourth Amendment rule.

The State's position in this appeal is akin to arguing that the community caretaker exception: permits seizures of suspected drunken drivers to protect nearby drivers and pedestrians, permits seizures of suspected dangerous assailants to protect citizens from attack, and permits seizures of suspected drug dealers to protect users or drug-violence bystanders. The State's interpretation would permit these seizures and countless more without complying with the usual Fourth Amendment rules of reasonable suspicion, probable cause, or warrants, so long as the State could point to some concern for a victim or potential victim. That simply cannot be the rule.

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 all evidence obtained pursuant to his illegal seizure.

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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 1,917 words.

Dated: May 31, 2017

James D. Miller

CERTIFICATE OF COMPLIANCE WITH 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 s. 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 certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: May 31, 2017

James D. Miller