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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2020AP1715-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY J. PROMER,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered in
the Eau Claire County Circuit Court,
the Honorable Sarah M. Harless, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

1. When the report of a person sleeping or passed out in parked car is contradicted by the deputies' observation of the car driving on the road without any traffic violations, is there reasonable suspicion to stop the car or can police justify the stop based on the community caretaker exception to the warrant requirement?

   After the stop, when the driver provides a detailed explanation and declines any medical attention, can the deputies use the community caretaker exception to extend the stop to perform field sobriety tests?

The circuit court denied the defendant's motion to suppress, holding that community caretaker exception applied to the seizure in this case. (55:44-46; App. 105-107).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. Counsel anticipates that the briefs will adequately address the issue presented.

STATEMENT OF THE CASE

The state filed a complaint on July 2, 2019, charging Mr. Promer with operating while intoxicated, 7th offense, in violation of Wis. Stat.

§ 346.63(1)(a); possession of methamphetamine as a repeater in violation of Wis. Stat. §§ 961.41(3g)(g) and 939.62(1)(b); possession of THC as a repeater in violation of Wis. Stat. §§ 961.41(3g)(e) and 939.62(1)(a); possession of drug paraphernalia as a repeater in violation of Wis. Stat. §§961.573(1) and 939.62(1)(a). (2).

On July 25, 2019, the state filed an information with the same counts. (4). An amended information filed on October 22, 2019, added one count of operating with restricted controlled substance in blood, 7th offense, in violation of Wis. Stat. § 346.63(1)(am). (14).

Defense counsel filed motions to suppress alleging: (1) there was no reasonable suspicion supporting the traffic stop and (2) the community caretaker exception did not apply. (17). The court held a hearing on those motions on November 22, 2019. (7; 10; 13; 55). The circuit court denied the motion to suppress. (55:46; App. 107).

The case proceeded to a plea and sentencing hearing held on December 10, 2019. (49). Mr. Promer entered no contest pleas to operating with a restricted controlled substance, 7th offense, and possession of methamphetamine (without the repeater). (49:4-5). The circuit court followed the parties' joint recommendation for three years initial confinement and three years of extended supervision on the operating with

restricted controlled substance charge and nine months in jail on the possession of methamphetamine with the two counts running concurrent. (49:19-19).

STATEMENT OF FACTS

While on patrol in his marked squad car on a July evening, Deputy Sheriff Riley Schulner received a dispatch regarding a man sleeping or passed out in a car in a parking lot. A bartender from a nearby sports bar had called the police. (55:5). The deputy was told the car was a blue Volkswagen Jetta and was provided with the license plate number. (55:4-5).

Dispatch also informed the deputy that the registered owner of the Volkswagen was Mr. Promer and that Mr. Promer was on probation with a .02 restriction in regards to blood alcohol concentration while driving. The deputy testified that "I believe" prior OWIs were mentioned. (55:7). Deputy Schulner knew Mr. Promer from prior police contacts. (55:20).

The deputy never verified the report of a person in need of assistance because when he arrived in the parking lot, only 10 minutes after receiving the call, he did not see the parked car or a person sleeping/passed out in a car. (55:5). Instead, he saw the blue Volkswagen driving on the road. The car slowed down and turned into the parking lot behind Deputy Schulner and his marked squad car. (55:6).

Deputy Schulner circled around to move his squad car behind the Volkswagen and followed it "for a short distance." (55:6). The deputy did not identify any traffic violations but merely noted that the Volkswagen was "traveling kind of at a slower speed" through the parking lot. (55:6).

At that point the deputy put on his emergency lights. (55:8). He testified that he did this "essentially" to check the welfare of the driver. (55:7). However, he admitted that he intended to do a traffic stop. (55:20).

After the squad car activated its emergency lights, the Volkswagen turned into a parking stall in front of a video store, bumped the curb, then stopped and came off the curb into the parking spot. (55:8).

Once the Volkswagen was parked, the deputy got out of his squad car. At this moment another officer, Deputy Kyle Jacobson, arrived in the parking lot. (55:8). Dispatch told Deputy Jacobson that while Mr. Promer's driving status was valid, he was on probation, had a .02 alcohol restriction, had six prior OWIs and had a warrant out of Florida. (55:26).

When Deputy Jacobson, the only person in the sheriff's department with specialized drug recognition training, arrived in the parking lot, he saw Deputy Schulner's squad car driving behind Mr. Promer's Volkswagen. (55:26, 38).

After Mr. Promer was stopped, Deputy Jacobson activated his emergency lights and parked his squad car next to Deputy Schulner's. (55:27).

The two officers discussed what Deputy Schulner observed and both deputies went to the driver's side window of the Volkswagen. (55:8-9). Deputy Schulner recognized Mr. Promer as the driver. (55:9).

Deputy Jacobson noted that Mr. Promer appeared to be slumped. He asked Mr. Promer if he was okay and Mr. Promer said that he was. Mr. Promer had his eyes shut, explaining that he was tired. He told the deputies that he had pulled back into the parking lot to rest for a few minutes while on his way home from a friend's house. (55:28-31). Deputy Schulner felt that Mr. Promer slurred his speech. (55:11).

Mr. Promer answered the deputies' questions and explained his situation in detail. He denied consuming alcohol or using drugs. (55:32-33). He told the two deputies that he was tired (he said he had not slept in days) and his blood sugar was high. He described the diabetes medication he took, Metformin, and disclosed that he had not been checking his blood sugar over the past few weeks. (55:11-12, 33). Deputy Jacobson conceded that low blood sugar can cause a person to slump. (55: 39). Mr. Promer declined medical attention. (55:33).

After hearing this information, Deputy Schulner guessed Mr. Promer was "coming off methamphetamine." (55:21). Deputy Jacobsen guessed Mr. Promer was coming down from a stimulant drug. (55:36).

The deputies asked Mr. Promer to get out of the car to do field sobriety tests. (55:34). Mr. Promer asked to be given a breathalyzer. The deputies refused. (55:35). The deputies concluded that Mr. Promer was not cooperative with the field sobriety testing and arrested him. (55:13).

A search of Mr. Promer's person and car turned up a scale with a white substance on it, a pipe and a vape cartridge. (55:14, 16-17).

The circuit court denied Mr. Promer's motion to suppress, referencing the claims raised in the suppression motion as it made its findings. (55:44; App. 105). The circuit court specifically found that the warrantless seizure was justified by the community caretaker exception because the dispatch about a sleeping/passed out person in a car combined with "the somewhat unusual behavior" of driving back into the parking lot was "enough to suggest that the police should be able to check out and make sure that this person is okay." (55:45-46; App. 106-107).

Noting the deputies' observations of Mr. Promer's physical state, the circuit court approved of the deputies' speculation that Mr. Promer was on some sort of drug. (55:46). The circuit court concluded that Deputy Jacobsen's observations, along with his training and experience, were sufficient for him to further investigate and request field sobriety tests. (55:46).

Mr. Promer appeals from the denial of his motion to suppress and the judgment of conviction.

ARGUMENT

I. There was no reasonable suspicion and no community caretaker exception justifying the seizure when the officers could not verify a report that a person needed assistance. Instead, the officers saw the car driving on a road without any traffic violations. Once the officers stopped the car, any safety concerns the officers might have had dissipated when the driver provided a detailed explanation of his behavior and his health and declined medical assistance.

A. Introduction

There was no reasonable suspicion that a crime was being committed when the information about the sleeping/passed out

person in a parked car was never verified and police did not observe any traffic violations or evidence of any criminal offense before stopping Mr. Promer's car.

With no confirmation of a person needing assistance, along with the absence of irregular driving or any indicia of a safety issue, the stop was not justified by the community caretaker exception. The continuation of the stop once the car was parked was not allowable via the community caretaker exception because the interaction between Mr. Promer and the deputies confirmed that Mr. Promer was not in any danger.

The Fourth Amendment to the United States Constitution and Article 1, Section 11, of the Wisconsin Constitution protect an individual's right to be free from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729.

Whether evidence should be suppressed is a question of constitutional fact. This court reviews the circuit court's findings of historical facts under the clearly erroneous standard but the circuit court's application of historical facts to constitutional principles is a question of law this court reviews de novo. *State v. Brooks*, 2020 WI 60, ¶7, 393 Wis. 2d 402, 944 N.W.2d 832.

B. There was no reasonable suspicion for the stop because sleeping or passing out in a parked car in a parking lot is not a crime, the officers never verified that Mr. Promer slept or passed out in his parked car and the officers did not observe any behavior that would lead to a reasonable belief that a crime had occurred, was in progress, or would be committed.

To execute a valid investigative stop, an officer must have reasonable suspicion to believe that a crime has been, is being, or will be committed. *State v. Young*, 2006 WI 98, ¶20. Reasonable suspicion requires that the officer possess specific and articulable facts, not merely a hunch, that warrant a reasonable belief that criminal activity is afoot. *Id.* at ¶21.

The deputies had two main pieces of information when they stopped Mr. Promer: someone reported seeing a person sleeping or passed out in a car in the parking lot and the deputies knew Mr. Promer had prior OWIs. (55:7, 26).

First, sleeping in a car is not a crime. If an exhausted driver feels it is unsafe to continue driving, pulling into a parking lot to nap is safe and smart, not criminal.

Second, while deputies testified that they knew Mr. Promer had prior OWIs and a .02

restriction, that fact does not support reasonable suspicion because that fact was not accompanied by any other specific and articulable facts that a crime has been, is being, or will be committed. (55:7, 26). An officer does not have reasonable suspicion to stop any driver he knows has prior OWIs on the hunch that the driver might have a blood alcohol level above .02. More is required.

Reasonable suspicion may exist where an officer was aware of prior OWIs *and* there are additional facts that give rise to reasonable suspicion. But in Mr. Promer's case, there were no traffic violations, Mr. Promer was driving appropriately, his car had no equipment violations, there was no assertion that Mr. Promer was not wearing a seatbelt or didn't have his headlights on. There was no evidence of impaired driving. To the contrary, there was evidence of *unimpaired* driving. Mr. Promer drove safely on the road, executed a safe turn into the parking lot and drove carefully, or as the deputy described, Mr. Promer drove "kind of at a slower speed" through the parking lot. (55:6). It is also significant that Mr. Promer turned into the parking lot behind a squad car. (55:6). This is hardly the action of a person in the midst of committing a crime.

The facts simply do not support a finding of reasonable suspicion because there was no objectively reasonable evidence of wrongful conduct.

C. The deputies were not acting in a community caretaking function when, instead of finding Mr. Promer asleep or passed out in a parked car in the parking lot, they watched him drive his car on the road and turn into a parking lot without any traffic violations or any indication that he was in distress.

1. Community caretaker test.

An investigative stop that is not supported by reasonable suspicion may nonetheless be justified as an exercise of the officer's duties as a community caretaker. *State v. Maddix*, 2013 WI App 64, ¶14, 348 Wis. 2d 179, 831 N.W.2d 778.

Warrantless seizures are presumptively unreasonable. The warrant requirement is subject to limited exceptions, including one exception that allows law enforcement to perform a warrantless seizure when acting in their "community caretaker" role. *State v. Asboth*, 2017 WI 76, ¶¶12, 13, 376 Wis. 2d 644, 898 N.W.2d 541. The community caretaker function describes actions by police that are "totally divorced from the detection, investigation, or acquisition of evidence relating to violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

Determining whether law enforcement officers are acting in a community caretaker role is an objective analysis: whether the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function. *State v. Kramer*, 2009 WI 14, ¶36, 315 Wis. 2d 414, 759 N.W.2d 598. Wisconsin case law has set out a multistep test for the validity of a community-caretaker seizure: (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. *State v. Maddix*, 2013 WI App 64, ¶14.

The state has the burden of proving the officer's conduct falls within the scope of the community caretaker function. *State v. Kramer*, 2009 WI 14, ¶21.

2. Mr. Promer was seized when two squad cars with their emergency lights flashing got behind his car and stopped him in a parking lot.

A police-citizen encounter becomes a seizure when the law enforcement officer "by means of physical force or show of authority" in some way restrains the liberty of the citizen. *United States v. Mendenhall*, 446 U.S. 544, 552 (1980). A seizure will generally occur when "in

view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Young*, 294 Wis. 2d 1, ¶3. An investigative stop is a seizure within the meaning of the Fourth Amendment. *State v. Harris*, 206 Wis. 2d 243, 258-59, 557 N.W.2d 245 (1996).

The parties and the circuit court appeared to agree that a seizure took place. The state did not argue against seizure. The circuit court's ruling clearly implied that police seized Mr. Promer in the parking lot. (55).

This conclusion makes sense based on the facts elicited at the suppression hearing. Two marked squad cars, with their emergency lights on, pulled behind Mr. Promer in the parking lot. (55:6-8, 26-27). Two deputies approached Mr. Promer while he sat in his car and questioned him as the deputies stood blocking his door. (55:8-9). A reasonable person in this situation would not have felt free to leave. This was a seizure.

3. The police conduct was not bona fide community caretaker activity because police were unable to verify that Mr. Promer ever needed assistance. Instead, police only saw Mr. Promer safely operating his car on the road and in the parking lot.

To prove that officers acted as bona fide community caretakers, the state bears the burden of showing an objectively reasonable basis to believe there was a member of the public who needed assistance. *Maddix*, 348 Wis. 2d 179, ¶20. The totality of the circumstances as they existed at the time of the police conduct must be examined. *Kramer*, 2009 WI 14, ¶30.

During the analysis of this step in the test, the court considers whether police conduct is "totally divorced from the detection, investigation, or acquisition of evidence relating to violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. at 441.

In Mr. Promer's case, the deputies were dispatched to address a person sleeping or passed out in a car in a parking lot. (55:4-5). Had they found a person in that situation, it would be reasonable to believe the person may need assistance and the community caretaker function arguably would be in play.

But the deputies did not find a person sleeping or passed out in a parked car. To the contrary, the deputies found the car driving safely on the road and observed the car safely execute a turn into a parking lot. (55:5-6, 26). Just because the dispatch may have triggered a community caretaker function does not mean that the community caretaker function continues after the initial safety concern dissipates.

The concept of dissipation is illustrated in *State v. Ultsch*, 2011 WI App 17, ¶2, 331 Wis. 2d 242, 793 N.W.2d 505. In *Ultsch*, officers were dispatched to a scene where a car had smashed into a brick building. The damage was extensive; the brick wall had partially caved in and the building owners were concerned about the structural integrity of the building. The car had left the scene of the accident but police found it two to three miles away parked at the end of a driveway. Police walked up the driveway and entered the unlocked home.

On appeal, this court rejected the community caretaker justification that the officers were motivated by concern for the driver's well being when they entered the home. Noting that damage to the car was not extensive and no one at the scene had provided information indicating that the driver was in a vulnerable situation or injured, "the officers had no indication whatsoever that Ultsch was in need of assistance." *Id.* at ¶¶19-21.

While home entry is more scrutinized than the seizure in Mr. Promer's case, the reasoning in *Ultsch* is useful. Once the deputies discovered that Mr. Promer was awake and driving safely, there was no longer an objectively reasonable basis to believe that Mr. Promer, like the defendant in *Ultsch*, required assistance.

After the deputies saw Mr. Promer awake and safely driving, this case pivoted from a community caretaker action into a criminal investigation. The deputies' conduct was no longer "totally divorced from the detection, investigation, or acquisition of evidence relating to violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. at 441.

Deputy Schulner knew Mr. Promer from prior criminal contacts, knew he was on probation, knew he had prior OWIs and knew Mr. Promer has a .02 alcohol restriction. (55:7, 20). Deputy Jacobsen was the only specially trained drug-recognition deputy in the sheriff's office, knew Mr. Promer was on probation, knew he had six prior OWIs, knew he was on probation and knew Mr. Promer had an active warrant from Florida. (55:26, 38). The deputies' knowledge of these facts could not help but impact the focus of the investigation once they saw that Mr. Promer was not sleeping/passed out in his car.

Deputy Schulner admitted as much. During his testimony, he conceded that he was conducting a traffic stop when he put his emergency lights on and stopped Mr. Promer. (55:20). While a police officer's subjective assessment or motivation is not dispositive it is a significant factor to consider when determining if the police action is totally divorced from the detection of crime. *Kramer*, 2009 WI 14, ¶31. And here, where there was no indication that Mr. Promer needed assistance, the subjective motivation of Deputy Schulner is a significant factor in the totality of the circumstances.

If contrary to Mr. Promer's position and despite the facts showing he was not a person in need of assistance, this court finds that the community caretaker function still existed at the time of the stop, it is Mr. Promer's position that the community caretaker exception terminated once the deputies spoke with Mr. Promer.

During that conversation it became clear that Mr. Promer did not require assistance. Mr. Promer did not provide a mumbled, nonsensical response to the deputies' questions. He provided a detailed explanation that included: the fact that he was diabetic; the name of his medication; an acknowledgement that he had not been properly checking his blood sugar; setting forth that he had not slept in days; a description of where he was coming

from and where he was going, the purpose for his decision to turn into the parking lot and, finally, declining medical assistance. (55:32-33). This explanation, coupled with an absence of erratic driving, eliminated the community caretaker justification.

The community caretaker purpose dissipated once the deputies saw Mr. Promer. The facts do not support a bona fide community caretaker activity because the facts do not show that a member of the public needed assistance.

4. The public need and interest did not outweigh the intrusion upon Mr. Promer's privacy.

In the third step of the community caretaker test, the court considers four factors: (1) the degree of public interest and the exigency of the situation; (2) the attendant circumstances surrounding the search, 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. *State v. Pinkard*, 2010 WI 81, ¶42, 327 Wis. 2d 346, 785 N.W.2d 592.

The more extensive the intrusion on the person's liberty and the more minimal the public need, the more likely the police conduct

will be held to be unreasonable. *Kramer*, 2009 WI 14, ¶41.

The public need was minimal. While an automobile was involved, this car was in a parking lot with the state presenting no evidence suggesting that the lot was full or busy. No traffic was interrupted, there was no evidence that needed to be preserved and there was no risk to the public due to a damaged or disabled car blocking traffic or causing a dangerous diversion.

Further, this situation did not present exigencies. The deputies did not find Mr. Promer sleeping/passed out behind the wheel. Mr. Promer drove slowly and parked in a parking stall when the deputies put on their emergency lights. (55:8). Nothing indicated a risk to the public, or to Mr. Promer, if the officers failed to act quickly.

Despite the lack of exigency and public need, the attendant circumstances surrounding the search were intrusive. After 9:00 p.m., Mr. Promer legally operated his car on the road and in a parking lot when suddenly two squad cars appeared behind him with their emergency lights flashing. Two officers approached his car and questioned him as they stood next to his window. (55:8-9, 26-27). A reasonable person, who by his own admission was tired enough to pull off the road to rest and who suffered from

low blood sugar, would be alarmed by the squad cars and officers.

Finally, there were obvious alternatives to this aggressive approach. One deputy could have remained in his squad car while the other spoke to Mr. Promer. Where Mr. Promer was awake and driving and not in any distress, followed all traffic regulations and apparently had no equipment violations, the most obvious alternative was for the deputies to simply move on.

All of the evidence obtained after the illegal seizure should be suppressed. Because the stop and the questioning were illegal, there was no basis to go forward with the field sobriety tests and the ensuing search. The stop in the parking lot was not supported by reasonable suspicion that criminal activity was afoot. The community caretaker exception to the warrant requirement cannot justify the seizure because not only did the deputies fail to corroborate the claim that Mr. Promer was sleeping/passed out in his car in the parking lot, when the deputies saw Mr. Promer driving his car with no traffic violations the report was contradicted. Finally, once the officers spoke to Mr. Promer and he provided a detailed explanation for his actions there was no basis to believe he was a person in need of assistance. All evidence obtained after this illegal seizure must be suppressed.

CONCLUSION

For these reasons, Mr. Promer respectfully requests that this court to reverse the judgment of conviction and remand to the circuit court with directions to suppress all evidence obtained during the unlawful seizure.

Dated this 10th day of March, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,959 words.

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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this 10th day of March, 2021.

Signed:

SUSAN E. ALESIA
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of March, 2021.

Signed:

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