FILED
06-11-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP1715-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY J. PROMER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE SARAH MAE HARLESS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutions

INTRODUCTION

This case involves a stop and search of a driver and a car under law enforcement officers' community caretaker function. Two sheriff's deputies responded to a report of a driver passed out or asleep in a car in a bar's parking lot. The deputies learned from dispatch that the car was registered to Randy J. Promer, who had six prior convictions for operating a motor vehicle while under the influence of an intoxicant (OWI), and was prohibited from driving with an alcohol concentration in excess of 0.02. The first deputy to arrive saw the car traveling on the road in front of the bar, then turn into the same parking lot the caller had reported it had been in, and drive slowly through the parking lot. The deputy activated his emergency lights, and Promer pulled into a parking spot, driving his car onto the curb. When deputies contacted Promer, they observed that he was slumped over in his seat, could not keep his head up or his eyes open, and had slurred speech. When Promer refused field sobriety tests, the deputies arrested him for operating a motor vehicle while under the influence of an intoxicant.

The circuit court correctly denied Promer's motion to suppress evidence gathered after the stop because it recognized that the deputies validly stopped Promer in their community caretaker function, and that after they observed and spoke to Promer, they had reasonable suspicion that he had committed a crime. This Court should affirm.

ISSUES PRESENTED

1. Were the officers acting in their community caretaker function when they stopped Promer's car?

The circuit court answered "yes," so it denied Promer's motion to suppress evidence gathered after the stop.

This Court should answer "yes," and affirm.

2. Did the officers have reasonable suspicion of criminal activity after the stop to justify further investigating and requesting field sobriety tests?

The circuit court answered "yes," so it denied Promer's motion to suppress evidence gathered after the stop.

This Court should answer "yes," and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and this case can be decided by application of well-established principles to the facts presented.

STATEMENT OF THE CASE AND FACTS

On July 1, 2019 at around 9:30 or 9:40 p.m., a bartender at a sports bar in Eau Claire called police to report that a person was passed out or sleeping in a car parked in the bar's parking lot. (R. 55:4–5.) Eau Claire County Sheriff's Deputies Ryan Schulner and Kyle Jacobson responded to the call. (R. 55:4–5, 25–26.) Dispatch informed the deputies that the car was a blue Volkswagen Jetta that was registered to Randy Promer, and that Promer was on probation, had six prior OWIs, and was subject to the 0.02 restriction on his driving privilege. (R. 55:7, 26.)

When Deputy Schulner arrived at the bar about ten minutes after the dispatch, he observed the car on the road the bar was on. (R. 55:5–6.) As he turned into the parking lot, the car followed him in. (R. 55:6.) Deputy Schulner circled around and got in back of the Jetta as it drove slowly through the parking lot. (R. 55:6.) He testified that seeing the car driving back into the parking lot where the driver had reportedly been passed out was "kind of concerning." (R. 55:20.)

Deputy Jacobson arrived and observed the Jetta traveling slowly with Deputy Schulner's squad car right behind it. (R. 55:26–27.) Deputy Schulner activated his squad car's emergency lights, intending to "make contact with the driver and essentially check [his] welfare." (R. 55:7.) The Jetta continued a short distance and then entered a parking spot. (R. 55:8.) The Jetta drove up onto the curb and then back down. (R. 55:8, 27.) Deputy Schulner parked his squad car. (R. 55:8.) Deputy Jacobson parked his squad car and activated the squad's emergency lights. (R. 55:27.)

The deputies contacted the driver, whom Deputy Schulner recognized from prior contacts as Promer. (R. 55:9, 27.) The deputies observed that Promer was slouched in his seat with his head dropping forward, and that Promer appeared to be unable to keep his head up or his eyes open. (R. 55:9–10, 28–29.) When Deputy Jacobson asked Promer if he was okay, Promer sat up and said "yeah." (R. 55:28.) The deputies observed that Promer's speech was slurred. (R. 55:11, 31.) Promer told the deputies that he was tired, and his blood sugar level was off. (R. 55:11, 33.) Promer said he was going home from a friend's house in Altoona. (R. 55:31.) Deputy Jacobsen testified that based on where Promer lived, his story "didn't make sense." (R. 55:31.) Promer said he was resting his eyes, and that he pulled back into the parking lot to rest for a few minutes. (R. 55:30.) Promer denied drinking or using drugs. (R. 55:32–33.) The deputies asked Promer if he wanted to be checked out by EMS, but he declined. (R. 55:12, 33.)

Deputy Jacobson, who is a trained drug recognition officer (R. 55:23–24), did not believe that Promer's condition was caused by his blood sugar level being off (R. 55:36). The deputy believed that Promer's condition—his head slumping over, and his eyes closed—was consistent with coming down after using a stimulant drug. (R. 55:36.) Deputy Jacobson asked Promer three or four times to get out of the car.

(R. 55:35.) When Promer got out, he could not stand still. Deputy Jacobson said it was as if Promer was doing "a dance." (R. 55:37.) When deputies asked Promer to perform field sobriety tests, Promer began to walk away. (R. 55:13, 37.)

Deputy Jacobson arrested Promer, and the deputies searched him incident to arrest. (R. 55:13–14.) They found a scale between Promer's t-shirt and a sweatshirt that was tied around his waist. (R. 55:14, 16.) Deputy Schulner said the scale was consistent with one used to weigh drugs. (R. 55:14.) He observed that the scale had a white substance on it that was consistent with illegal drugs. (R. 55:16.) The officer also found a vape pen in Promer's pocket, a vape cartridge labeled "THC" in the car, and a pipe between the driver's door and the driver's seat. (R. 55:16–17.) Deputy Jacobson testified that pipe was the kind used to smoke methamphetamine. (R. 55:17.) Deputy Jacobson asked Promer if he would submit to a request for a blood sample, but Promer refused. (R. 55:17.)

The State charged Promer with five crimes: operating a motor vehicle while under the influence of a controlled substances as a 7th offense, possession of methamphetamine as a repeater, possession of THC as a repeater, possession of drug paraphernalia as a repeater, and operating a motor vehicle with a detectable presence of a restricted controlled substance in his blood as a 7th offense. (R. 2; 14.)

Promer moved to suppress the evidence gathered after his arrest. (R. 10; 13.) The circuit court denied Promer's motion after a hearing at which Deputies Schulner and Jacobson testified. (R. 55:44–46.) The court concluded that the deputies were justified in stopping Promer's car in performance of their community caretaker function. (R. 55:46.) The court noted that shortly after a bartender reported that Promer was passed out in his car in the parking lot, one of the deputies saw the car coming back into the parking lot at a slow rate of speed. (R. 55:45.) The court recognized that the deputies had information including "[t]he

description of a person passed out coupled with the somewhat unusual behavior of, after being described as passed out, getting onto the road and then coming right back into the parking lot." (R. 55:45.) The court concluded that this information "shows something unusual enough to suggest that the police should be able to check out and make sure that this person is okay." (R. 55: 45–46.)

The court found that after stopping Promer's car, the deputies observed that the car hit the curb, and that Promer was slumped over, with his eyes shut, and his pupils dilated, and his speech slurred. (R. 55:46.) The court noted that Deputy Jacobson has training and experience in drug recognition, and that he reasonably suspected that Promer was under the influence of a drug. (R. 55:46.) The court concluded that the deputies had reasonable suspicion to further investigate, and were justified in requesting field sobriety tests. (R. 55:46.)

Promer pleaded no contest to operating a motor vehicle with a detectable presence of a restricted controlled substance in his blood as a 7th offense, and possession of methamphetamine, without the repeater enhancer. (R. 27; 28; 29.) The remaining charges were dismissed but read in at sentencing. (R. 49:4–5.) The court accepted Promer's plea and imposed the jointly recommended sentence of six years of imprisonment, with three years of initial confinement and three years of extended supervision. (R. 49:16, 18–19.) Promer now appeals. (R. 42.)

STANDARD OF REVIEW

When reviewing a decision on a motion to suppress evidence, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Lonkoski*, 2013 WI 30, ¶ 21, 346 Wis. 2d 523, 828 N.W.2d 552.

ARGUMENT

I. The deputies were justified in stopping Promer's car in performance of their community caretaker function.

A. Police are justified in seizing a person when they have an objectively reasonable basis for believing the person may need assistance, and the public need or interest outweighs the intrusion on the person's privacy.

The Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches. *State v. Rome*, 2000 WI App 243, ¶ 10, 239 Wis. 2d 491, 620 N.W.2d 225. A warrantless search is unreasonable unless an exception to the warrant requirement applies. *Id.* One exception is the community caretaker doctrine. *Id.* ¶ 11.

"[A] police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures." *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592. An officer's community caretaker function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State v. Kramer*, 2009 WI 14, ¶¶ 19, 23, 315 Wis. 2d 414, 759 N.W.2d 598 (quoting *Cady v. Dombrowski*, 413 U.S.

433, 441 (1973)). If "the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." *Id.* ¶ 36.

"A community caretaker action is not an investigative *Terry* stop and thus does not have to be based on a reasonable suspicion of criminal activity." *State v. Ellenbecker*, 159 Wis. 2d 91, 96, 464 N.W.2d 427 (Ct. App. 1990). A court determines whether an officer who performed a search or seizure in his community caretaker role did so reasonably, by balancing the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen. *Kramer*, 315 Wis. 2d 414, ¶ 40.

A court considering whether a seizure is justified by the community caretaker functions must therefore 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.* ¶ 21 (quoting *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)).

B. The deputies reasonably seized Promer under their community caretaker function.

There is no dispute that the deputies seized Promer when they activated their squad cars' emergency lights and stopped his car. What remains is whether the officers were engaged in bona fide community caretaker activity when they stopped Promer's car, and if so, whether the public need and interest outweighed the intrusion on Promer's privacy. As the circuit court recognized, the seizure was justified because the

deputies were acting reasonably in their community caretaker function.

1. The deputies were engaged in bona fide community caretaker activity when they stopped Promer's car.

To be engaged in a bona fide community caretaker activity, police conduct must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. The Wisconsin Supreme Court has explained that "totally divorced . . . does not mean that if the police officer has any subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function." *Kramer*, 315 Wis. 2d 414, ¶ 30. Instead, "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.* ¶ 30 "[I]f the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." *Id.* ¶ 36.

Here, as the circuit court recognized, there was an objectively reasonable basis for stopping Promer's car. The court found that a bartender called in a report of a man passed out in a car in the bar's parking lot, and that when a deputy arrived about ten minutes later, "that same vehicle had gone out back onto London Road, but then was coming back into the parking lot, traveling through the parking lot at a slow rate of speed." (R. 55:45.) The court recognized that a person being passed out, along "with the somewhat unusual behavior of, after being described as passed out, getting onto the road

and then coming right back into the parking lot" was "unusual enough to suggest that the police should be able to check out and make sure that this person is okay." (R. 55:45–46.) The court concluded that "this is the type of situation that shows an objectively reasonable basis for going and checking and seeing if the person is okay." (R. 55:46.)

Promer claims that the circuit court was wrong, and that the deputies were not acting as community caretakers when they stopped his car. (Promer's Br. 14–20.) He argues that the deputies were not engaged in bona fide community caretaker conduct when they stopped his car because they "were unable to verify that [he] ever needed assistance." (Promer's Br. 14.) Of course, the only way that the officers could reasonably have verified whether he needed assistance was to stop his car and ask him.

Promer argues that had the deputies found him passed out or asleep in his car, "it would be reasonable to believe the person may need assistance and the community caretaker function arguably would be in play," but since he was driving when the officers arrived, the initial safety concern had dissipated. (Promer's Br. 14–15.) He compares his case to *State v. Ultsch*, 2011 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505. (Promer's Br. 15, 16.) But the situation here is nothing like the one in *Ultsch*.

In *Ultsch*, a car hit a building, causing damage to the building, but damage to only the car's front fender. *Id.* ¶¶ 2, 19. The driver—Ultsch—then drove to a house two to three miles away, left the car in deep snow, and went into the house. *Id.* ¶¶ 2–3. When officers arrived at the house, the driver's boyfriend, who owned the house, was leaving. *Id.* ¶ 3. The boyfriend said the driver was inside and maybe asleep. *Id.* He did not indicate that she was injured or in need of assistance. *Id.* ¶ 20. The officers knocked and then entered the house uninvited. *Id.* ¶ 4. The Wisconsin Supreme Court concluded that the officers were not acting in their community caretaker

role when they entered the house because "there was not an 'objectively reasonable basis to believe that Ultsch was in need of assistance." *Id.* ¶ 22 (citation omitted). The court noted that "no person had given officers information that would indicate that Ultsch was in a vulnerable situation, nor did they observe anything that would indicate she was injured." *Id.* ¶ 20. It concluded that they "had no indication whatsoever that Ultsch might need assistance." *Id.* ¶ 21.

In contrast, in this case, the bartender gave police information indicating that Promer was in a vulnerable situation—passed out or asleep in his car. (R. 55:45–46.) And while Promer had awoken and driven away a short distance, he returned to the parking lot where he reportedly had passed out or fallen asleep and was driving slowly through the parking lot. (R. 55:45–46.) The deputies therefore observed something that reasonably made them think he still might need assistance. And unlike in *Ultsch* where the driver had stopped driving and had gone home, here Promer was driving. If he had been in medical distress, or simply was overtired, he and the public were imperiled.

Promer is essentially arguing that if the deputies had encountered him while he was sleeping or passed out in his car, whether before or after he left the parking lot and drove a short distance and returned to "rest his eyes," it would have been objectively reasonable to believe he needed assistance. (R. 55:30.) But he argues that because the deputies arrived just after he awoke and drove out of the parking lot and then back in so that he could park his car and "rest his eyes," but before he parked his car, it was not objectively reasonable to believe he needed assistance. (R. 55:30.) (Promer's Br. 15, 17–18.)

But that Promer awoke and was driving rather than still being passed out did not indicate that he did not need assistance. This is not a situation in which he woke up, started the car, and drove away, and officers encountered him later, when he was driving safely. Here, Promer presumably woke up, started the car, drove out of the parking lot, and then drove slowly back into the parking lot. Rather that indicating that he was okay, by driving back into the parking lot Promer indicated that he might not be okay. And Promer's statements to police made it clear that the officers were correct to think that Promer might need assistance. He told the deputies that he returned to the parking lot to rest for a few minutes. (R. 55:30.) In so doing, he tacitly acknowledged that he understood his condition rendered him unable to drive safely. Indeed, it seems incongruent to say that a report of a sleeping/passed out person in a vehicle would justify a stop based on the community caretaker exception, but that the exception would not apply when the same person regains consciousness and begins operating the vehicle in a strange manner.

Promer argues that once the deputies saw him driving, "this case pivoted from a community caretaker action into a criminal investigation." (Promer's Br. 16.) But Deputy Schulner testified that while concern that Promer might be impaired "possibly was in the background," that was "not the reason for the stop." (R. 55:22.) The stop was "to check the welfare of the operator based on the information we had been provided." (R. 55:22.) And Deputy Jacobson testified that he and Deputy Schulner wanted to make contact with Promer, "[t]o check on his welfare to make sure that he's okay." (R. 55:40.)

At the time the deputies stopped the car, it was objectively reasonable to believe that he needed assistance. After all, Promer claimed that he had returned to the parking lot to "rest[] his eyes." (R. 55:30.) And he demonstrated that he could not drive safely when he drove up the curb while parking. And even though the deputies knew that Promer had six prior OWIs and could not legally drive with an alcohol concentration above 0.02, any subjective belief that he may have been under the influence of drugs "does not negate" the "objectively reasonable basis for stopping" the car to see if he needed assistance. *Kramer*, 315 Wis. 2d 414, ¶ 39.

The deputies' actions once they stopped the car demonstrated that they were acting as community caretakers. When Deputy Jacobson observed that Promer was slumped over, he asked Promer if he was okay. (R. 55:28.) Promer sat up and opened his eyes and loudly said "yeah." (R. 55:30.) And after the deputies observed that Promer could not keep his head up or his eyes open, they asked if he wanted medical attention. (R. 55:33.)

When the deputies saw Promer driving slowly into and through the parking lot in which he had been passed out, it was objectively reasonable for them to think he might need assistance. They therefore acted as bona fide community caretakers when they stopped his car.

2. The public interest outweighed the intrusion upon Promer's privacy.

The final step in determining whether the traffic stop was justified as a bona fide community caretaker function is whether the exercise of that function was reasonable. *Kramer*, 315 Wis. 2d 414, ¶ 40. In making this determination, a reviewing court considers "(1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3)

whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." *Id.* ¶ 41 (quoting *State v. Kelsey C.R.*, 2001 WI 54, ¶ 36, 243 Wis. 2d 422, 626 N.W.2d 777).

Here, the public interest in stopping the car and checking on Promer easily outweighed the intrusion on his privacy. There was a strong public interest in checking on Promer's well-being, to protect both Promer and the public. As the circuit court noted, "the police should be able to check out and make sure that this person is okay. As a society, we need police to be able to perform a community caretaker function and check if individuals are in need of help or assistance." (R. 55:45–46.) As the court further recognized, "[i]f police ignored calls where people were passed out in a parking lot and then the person was having a medical issue, that would certainly be problematic." (R. 55:46.)

There also is obviously a strong public interest in keeping unsafe drivers off the road. And the deputies had reason to believe that Promer was an unsafe driver. After all, he was reported to be passed out in his car, and then he was driving slowly back into the car where he had been passed out. (R. 55:4–6.) After Deputy Schulner activated his squad's emergency lights Promer demonstrated that he could not drive safely, by running over the curb, and then acknowledging that he needed to rest his eyes for a few minutes. (R. 55:8, 27, 30.) And Promer's condition further demonstrated that he could not drive safely, as he was slumped over, and could not keep his head up or his eyes open. (R. 55:9–10, 28–29.) Even if Promer had not had a detectable presence of a restricted controlled substance in his blood, and did not possess drugs and drug paraphernalia, and his condition actually had been caused by blood sugar issues and tiredness, the deputies would have been justified in stopping his car to protect him and the public.

Promer asserts that "[t]he public need was minimal" because there is no evidence that the parking lot was full, that traffic was interrupted, or that evidence needed to be preserved. (Promer's Br. 19.) He argues that "[n]othing indicated a risk to the public, or to Mr. Promer, if the officers failed to act quickly." (Promer's Br. 19.) He also points out that when a deputy activated his squad's emergency lights, he "drove slowly and parked in a parking stall." (Promer's Br. 19.)

Promer's assertions ignore the reality of the situation. The officers did not know that Promer was about to park his car. And they did not know that if they had waited a few seconds, they likely would have observed him driving up the curb when he parked, which added to the report of him being passed out, would obviously have given them reasonable suspicion to stop the car. What the officers could not reasonably have done is watch as Promer continued driving, hoping that he did not need medical assistance, that he could drive safely, and that he would not harm or kill himself or anyone else.

The attendant circumstances surrounding the seizure also show that it was reasonable. Unlike in *Ultsch*, where officers went into the driver's bedroom and awakened her, *Ultsch*, 331 Wis. 2d 242, ¶ 26, here the deputies stopped Promer's car in a parking lot which Promer had purposely entered. And Promer did exactly what he presumably was planning to do when he entered the parking lot—park his car. Once Promer parked, the deputies approached his car. They did not use any force or show any authority. They just stood next to his window and asked him questions.

Promer asserts that "[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." (Promer's Br. 19–20.)

But a reasonable person who had passed out or slept in his car, woke up, drove a short distance, and then returned to the same parking lot intending to park his car because his tiredness and low blood sugar rendered him unable to drive safely, would likely not be alarmed at all. A reasonable person would understand why officers might be concerned for his safety and the safety of the public. There is no indication that Promer himself was in any way alarmed. After all, he was slumped over when a deputy asked him if he was okay, and he sat up and opened his eyes and loudly said "yeah." (R. 55:30.)

Moreover, a reasonable person who did not have a detectable presence of a restricted controlled substance in his blood, and drugs and drug paraphernalia in his car and on his person, but who was parking his car because he was tired, would have had nothing to be concerned about. If such a person had told the deputies that he had slept in his car, awoke and felt fine, but then got tired so he decided to sleep some more before going home, the deputies could simply have told him to be careful and to have a nice day. But Promer instead was slumped over, could not keep his head up, and could not even keep his eyes open. He was quite obviously not fine.

The third factor is whether the seizure took place in an automobile. As the Supreme Court has stated, "What is reasonable for vehicles is different from what is reasonable for homes." *Caniglia v. Strom*, 141 S Ct. 1596, 1600 (2021). Here, the seizure took place in an automobile.

The fourth factor is what alternatives the officers had. The deputies had no reasonable alternatives. They could either stop Promer's car to check on him, or do nothing and hope he could drive safely, notwithstanding that he had reportedly been passed out in his car a few minutes before, and he had then left the parking lot but returned and was driving slowly through the parking lot.

Promer claims that there were "obvious alternatives to this aggressive approach." (Promer's Br. 20.) He suggests that "One deputy could have remained in his squad car while the other spoke to Mr. Promer." (Promer's Br. 20.) But he does not explain why one officer standing next to his car and talking to him, rather than two, would have changed the situation, especially since when the officers approached his car, Promer was slumped over with his head down and his eyes closed.

Promer argues that "the most obvious alternative was for the deputies to simply move on." (Promer's Br. 20.) But as explained above, it would have been unreasonable for the officers not to even ask Promer if he was okay. After all, they had a report that he was passed out in his car in a parking lot, and when they arrived a few minutes later, he was driving slowly back into that same parking lot. Stopping Promer's car to check to see if he was okay, was the only reasonable alternative. If Promer had passed out due to a health problem, awoke and drove and a short distance and returned to the parking lot to pass out again, "it may have been too late for effective assistance at some later time." *Kramer*, 315 Wis. 2d 414, ¶ 45. As the circuit court recognized, "If police ignored calls where people were passed out in a parking lot and then the person was having a medical issue, that would certainly be problematic." (R. 55:46.)

Promer claims that even if the stop was justified, "the community caretaker exception terminated once the deputies spoke with Mr. Promer" and "there was no longer an objectively reasonable basis to believe that Mr. Promer, like the defendant in *Ultsch*, required assistance." (Promer's Br. 16, 17.) He argues that "During that conversation it became clear that Mr. Promer did not need assistance." (Promer's Br. 17.) He claims that he "did not provide a mumbled, nonsensical response to the deputies' questions," but "provided a detailed explanation" for his actions. (Promer's Br. 17.) He asserts that he explained "where he was coming

from and where he was going, the purpose [of] his decision to turn into the parking lot." (Promer's Br. 17–18.) He notes that he explained "that he was diabetic; the name of his medication . . . that he had not been properly checking his blood sugar," and "that he had not slept in days," and that he declined medical assistance. (Promer's Br. 17.)

Viewed objectively, nothing that Promer told the deputies dispelled the belief that he needed assistance. Instead, what Promer told the deputies, and their observations of him, made it apparent that he *did* need assistance. Promer was slouched in his seat with his head dropping forward, and he appeared to be unable to keep his head up or his eyes open. (R. 55:9–10, 28–29.) The deputies observed that Promer's speech was slurred. (R. 55:11, 31.) Promer told the deputies that he was tired, and his blood sugar level was off. (R. 55:11, 33.) He said he was resting his eyes, and that he pulled back into the parking lot to rest for a few minutes. (R. 55:30.) And Promer did tell the deputies where he was coming from and where he was going, but Deputy Jacobson thought that Promer's story "didn't make sense." (R. 55:31.) If there had been no report of Promer passed out in his car, but instead the deputies had come into the parking lot and made the same observations, they would have been justified in seizing Promer had he started to drive away because he obviously was in no condition to drive.

In total, the seizure occurred in an automobile, and the other three factors demonstrate that the deputies reasonably acted under their community caretaker function. Under all of the circumstances, the deputies were justified in stopping Promer's car in their role as community caretakers.

II. Once the deputies made contact with Promer, they were justified in further investigating and requesting field sobriety tests because they had reasonable suspicion of criminal activity.

When officers have validly stopped a vehicle, they may request field sobriety tests from the driver if they have reasonable suspicion that the person has committed an OWI-related offense. *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 420, 659 N.W.2d 394. "Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729. "A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient." *Id.* "On the other hand, 'police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.'" *Id.* (citation omitted). Reasonable suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence." *Alabama v. White*, 496 U.S. 325, 330 (1990).

Once deputies stopped Promer's car and made contact with him, they had reasonable suspicion that he had committed a crime. Deputies had a report that Promer was passed out or asleep in his car. (R. 55:4–5.) Then, a few minutes later, they saw him driving slowly through the parking lot he had been passed out or asleep in. (R. 5–6.) And after they stopped Promer's car, they observed that he was slumped over, had difficulty lifting his head or keeping his eyes open, and had slurred speech. (R. 55:9–11, 28–29, 31.) As Deputy Jacobsen testified, Promer's condition was consistent with coming down after using a stimulant drug. (R. 55:36.) The deputies also knew that Promer had six prior OWI convictions and was prohibited from driving with an alcohol concentration above 0.02. (R. 55:7, 26.) Given all this information, there easily was reasonable suspicion that Promer had driven while under the influence of an intoxicant,

whether alcohol, drugs, or both. The deputies were therefore justified in requesting field sobriety tests, and Promer does not dispute that after he refused to perform them, the deputies had probable cause to arrest him and to search him and his car. The circuit court therefore properly denied Promer's motion to suppress evidence gathered in the searches.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 11th day of June 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

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 with a proportional serif font. The length of this brief is 5584 words.

Dated this 11th day of June 2021.

Electronically signed by:

s/ Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 11th day of June 2021.

Electronically signed by:

s/ Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General