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.

REPLY BRIEF OF DEFENDANT-APPELLANT

SUSAN E. ALESIA
Assistant State Public Defender
State Bar No. 1000752

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1774
alesias@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. The United States Supreme Court recently held that community caretaking is no longer a standalone doctrine. Thus, this stop could only be justified if there was reasonable suspicion and there was no reasonable suspicion to seize Mr. Promer.

On May 17, 2021, a unanimous United States Supreme Court issued a decision in *Caniglia v. Strom*, - U.S. -, 141 S.Ct. 1596 (2021), eliminating the community caretaker doctrine as a standalone exception to the Fourth Amendment warrant requirement.[1]

The language in the lead opinion clearly rejects the community caretaker doctrine as a justification of warrantless searches and seizures in the home. *Id.* at 1598. But the Court goes further, noting that community caretaking in any situation was simply describing a reality of police work and not announcing a warrant exception "recognition that police officers perform many civic tasks in modern society was just that – a recognition that these tasks exist, and not an open-ended license to perform them anywhere." *Id.* at 1600. Justice Alito's concurrence expressly states "The Court holds – and I entirely agree – that there is no special Fourth Amendment rule for a broad category of cases involving 'community caretaking.'" *Id.* at 1600. Justice Alito noted that *Cady v. Dombrowski* 413 U.S. 433 (1973),

[1] The state in its brief mentions *Caniglia* in passing but does not specifically address its impact on the community caretaker doctrine. (State's Brief at 15).

did not recognize a freestanding exception and "merely used the phrase 'community caretaking' in passing." 141 S.Ct. at 1600.

Thus, based on the language in *Caniglia*, the community caretaking doctrine cannot support the seizure in Mr. Promer's case.

The state in its brief concedes that Mr. Promer was seized when the officers activated their squad cars' emergency lights and stopped his car. (State's Brief at 7).

Without community caretaking as a standalone justification for the seizure, the analysis in Mr. Promer's case is dependent on reasonable suspicion. And there was not reasonable suspicion for this stop.

The state appears to concede that there was no reasonable suspicion until *after* the stop, arguing only that reasonable suspicion supported further investigation and the field sobriety tests. (State's Brief at 18). Mr. Promer's position is that the analysis never gets to the question of post-stop reasonable suspicion because the stop itself violated his Fourth Amendment rights and pursuant to the "fruit of the poisonous tree" doctrine the state cannot benefit from evidence obtained due to an unlawful stop. *State v. Roberson*, 2006 WI 80, ¶32, 292 Wis. 2d 280, 717 N.W.2d 111.

The state was correct not to argue there was reasonable suspicion to stop Mr. Promer. Reasonable suspicion requires a belief that a crime has been, is being, or will be committed. *State v. Young*, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729. Here, there

was no objectively reasonable evidence of wrongful conduct. It is not a crime to sleep in a car. Mr. Promer's prior OWIs did not prohibit him from driving. There were no traffic violations. There were no equipment violations. There was no evidence of impaired driving.

The state failed to provide evidence of reasonable suspicion for the stop and the stop cannot be saved by the community caretaker doctrine.

II. Even applying the community caretaker analysis, there was no justification to seize Mr. Promer.

The state in its brief argues that there was an objectively reasonable basis for stopping Mr. Promer's car. The state offers that "the only way the officers could reasonably have verified whether he needed assistance was to stop his car and ask him." (State's Brief at 8-9).

This is overly broad. Under the state's theory, if the officers had seen Mr. Promer driving appropriately on the highway they could have stopped him because a stop is the only way to verify whether he needed assistance. Or if the officers saw Mr. Promer walking up to his home, the state's theory would allow officers to seize him. In reality, the way to verify whether an individual needs assistance is to observe and note whether the initial cause for concern (here, the report that Mr. Promer was sleeping in his car) has abated. When the officers observed Mr. Promer driving appropriately on the road, executing a turn into the parking lot and proceeding safely within the parking lot, the facts only verified that he was *not* in need of assistance.

The state attempts to factually distinguish *State v. Ultsch*, 2011 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505, with the argument that Mr. Promer was reported to be in a vulnerable situation while Ultsch was not. (State's Brief at 10). First, the defendant in *Ultsch* had smashed his car into a brick building with sufficient force that the building owners were concerned about the building's structural integrity. *Id.* at ¶2. In Mr. Promer's case, a witness observed Mr. Promer sleeping in his car in a parking lot. (55:5). Ultsch was in a more vulnerable situation than Mr. Promer.

Further, in both cases the defendants had left the scene. Ultsch drove away; Mr. Promer drove away. Mr. Promer was actually observed driving appropriately on the road, turning safely into a parking lot and driving "slowly" in the parking lot. (55:5-6, 26). Contrary to the state's claim that Mr. Promer and the public could have been "imperiled" the record simply does not support this. (State's Brief at 10). The bottom line is that this court found that the community caretaker function dissipated in *Ultsch* and the same reasoning should apply in Mr. Promer's case.

The state minimizes the fact that Mr. Promer safely drove his car out of the parking lot and onto the road while clearly awake, arguing that those actions did not dissipate the community caretaking need. (State's Brief at 10). The state argues "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." (State's Brief at 11). But that is *exactly* the situation. Mr. Promer woke up. Mr. Promer drove away. Officers encountered

Mr. Promer later, when Mr. Promer was driving safely on the road. (55:5-6, 26).

The state also describes Mr. Promer's driving as "strange" but the state does not identify anything "strange" about the driving. (State's Brief at 11). It was not "strange" to drive without any traffic violations, nor was it "strange" to appropriately execute a turn into a parking lot. It was not "strange" to drive slowly in a parking lot. Speeding through a parking lot might raise concern, but it seems that Mr. Promer's only misstep was to drive carefully. That is absurd. And Mr. Promer's motivation for pulling back into the parking lot is not relevant; the state conceded that the seizure took place when the deputies activated their squad cars' emergency lights and stopped the car. (State's Brief at 7). The seizure happened before the deputies spoke with Mr. Promer. If the stop violated Mr. Promer's Fourth Amendment rights, which he asserts it did, then the interactions and observations after that point do not save the legality of the seizure.

Next, the state argues that the public interest outweighed the intrusion. (State's Brief at 12). The state discusses the public interest in assisting a person who is passed out in his vehicle. (State's Brief at 13). To be clear, when the police stopped Mr. Promer he was not "passed out." He was driving safely. (55:5-6).

The state also notes a public interest in "keeping unsafe drivers off the road." (State's Brief at 13). As argued above, there is no evidence that Mr. Promer was driving unsafely.

Noting that the deputies were unaware that Mr. Promer was about to park his car at the time of the stop, the state asserts that it was unreasonable not to stop him due to the risk that he might harm or kill himself or someone else. (State's Brief at 14). First, there is absolutely no evidence in the record that any other cars or people were in the parking lot. The risk that Mr. Promer might kill someone as he drove slowly through the parking lot is ridiculous. Likewise, the fact that Mr. Promer was awake and driving safely on the road and in the parking lot makes it implausible that he was at risk of killing himself without the deputies' intervention.

The state also minimizes the deputies show of authority. (State's Brief at 14). To suggest that a person would "not be alarmed at all" by two squad cars with their lights on pulling him over and a person with nothing to hide "would have nothing to be concerned about" is specious. (State's Brief at 15). Recent events and common sense support the fact that being pulled over by the police is at a minimum an anxiety-provoking experience.

Finally, the state's analysis of the alternatives to a stop is oversimplified. The state imagines outcomes that did not happen in this case; guessing that without police intervention Mr. Promer might have died. (State's Brief at 16). Nothing in the record supports this. And the state's claim that the deputies could have stopped Mr. Promer if they had observed him passed out or sleeping in his car is not relevant because they did not see this. The deputies did not seize Mr. Promer after viewing him in this state. Instead, they seized Mr. Promer after watching

Mr. Promer drive his car without incident and without committing any traffic violations. (55:5-6).

The state's argument regarding the field sobriety tests is not relevant. As Mr. Promer argued in his brief-in-chief (at page 20) and in Argument I. in this reply brief, the illegal stop ends the analysis.

Mr. Promer was seized without a warrant. There was no reasonable suspicion to justify this seizure, and the community caretaker doctrine either fails to support the stop because it is not a standalone doctrine or because an application of the community caretaker test shows that the deputies were not acting in a community caretaker function.

CONCLUSION

For these reasons, as well as those set forth in the brief-in-chief, Mr. Promer respectfully requests that this court reverse the judgment of conviction and remand to the circuit court with directions to suppress all evidence obtained as a result of the unlawful seizure.

Dated this 28th day of June, 2021.

Respectfully submitted,

Electronically signed by Susan E. Alesia
SUSAN E. ALESIA
Assistant State Public Defender
State Bar No. 1000752

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1774
alesias@opd.wi.gov

Attorney for Defendant-Appellant

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 1,714 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including 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 28th day of June, 2021.

Signed:

Electronically signed by Susan E. Alesia
SUSAN E. ALESIA
Assistant State Public Defender