STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1715-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY J. PROMER,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Did the United States Supreme Court decision in *Caniglia v. Strom* eliminate the community caretaker doctrine as a standalone justification for warrantless seizures of vehicles effectuated without probable cause or reasonable suspicion? If not, did the state meet its burden of proving the officers' conduct fell within the scope of their community caretaking function?

The circuit court denied the defendant's motion to suppress, holding that the community caretaking exception applied to the seizure in this case. (55:44-46; App. 26-28).

The court of appeals held that *Caniglia* is limited to warrantless intrusions into a home and affirmed the circuit court's denial of the suppression motion. *State v. Promer*, No. 2020AP1715-CR, unpublished slip op. (Wis. Ct. App. December 21, 2021)(App. 3-21).

CRITERIA FOR REVIEW

This court should accept review and decide that in light of the recent United States Supreme Court decision in *Caniglia v. Strom*, 141 S.Ct. 1596 (2021), the community caretaker doctrine is not a standalone exception to the Fourth Amendment warrant requirement for vehicle seizures.

In *Caniglia*, the United States Supreme Court eliminated the community caretaker doctrine as a standalone exception to the Fourth Amendment warrant requirement for home entries. *Caniglia* invalidated this court's decisions in *State v. Pinkard*, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592 and *State v. Matalonis*, 2016 WI 7, 366 Wis. 2d 443, 875 N.W.2d 567, both of which permitted entries to residences on community caretaker grounds.

The reasoning in *Caniglia* clearly suggests that community caretaking was never intended to be a warrant exception; instead it merely reflected a "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." *Caniglia*, 141 S.Ct. at 1600.

Mr. Promer's case involves a warrantless seizure of vehicle solely based on the community caretaker exception. This court should accept review and apply the reasoning in *Caniglia* and eliminate the community caretaker doctrine as it applies to vehicles.

This issue presents a significant question of state and federal constitutional law. Wis. Stat. § (Rule) 809.62(1r)(a).

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 learned the car was a blue Volkswagen Jetta and dispatch provided him 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 low. 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 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 Mr. Promer's motion to suppress, referencing the claims raised in the

suppression motion as it made its findings. (55:44; App. 26). 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. 27-28).

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; App. 28). 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. *Id.*

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 concurrently. (49:19-19).

The court of appeals affirmed the circuit court's denial of the motion to suppress in a December 21, 2021, opinion. *State v. Promer*, No. 2020AP1715-CR, unpublished slip op. (Wis. Ct. App. December 21, 2021)(App. 3-21). The court of appeals first rejected Mr. Promer's argument that *Caniglia* eliminated the community caretaker doctrine as a standalone justification for warrantless seizures effectuated without probable cause or reasonable suspicion.[1] The court held "we conclude *Caniglia* merely held that the community caretaker doctrine cannot be used to justify a warrantless intrusion into a home. As this case involves an automobile, *Caniglia* in inapplicable." *Promer*, slip op. ¶2 (App. 4).

Next, the court of appeals concluded that the officers engaged in bona fide community caretaker activity when they stopped Mr. Promer's car and that all of the steps in the community caretaker analysis were met. *Promer*, slip op. ¶23 (App. 11).

Mr. Promer petitions from that decision.

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[1] Because the state did not argue that the initial stop of Mr. Promer's car was based on probable cause or reasonable suspicion, the court of appeals did not address these arguments. *Promer*, slip op., ¶16 (App. 8).

ARGUMENT

I. This court should accept review and hold that *Caniglia v. Strom* eliminated the community caretaker doctrine as a standalone justification for warrantless seizures effectuated without probable cause or reasonable suspicion.

A. The state conceded that there was neither reasonable suspicion nor probable cause for the seizure.

As the court of appeals acknowledged, the state did not argue either reasonable suspicion or probable cause to support the stop. *Promer*, slip op. at ¶16 (App. 8). By failing to argue either reasonable suspicion or probable cause, the state has conceded those issues. *See Charolais Breeding Ranches, Lts. v. FPC Sec. Corp*. 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

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. Applying that standard, the state's concession makes sense, as 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. (55: 5-8).

The facts in Mr. Promer's case simply do not support a finding of reasonable suspicion because there was no objectively reasonable evidence of wrongful conduct. Without reasonable suspicion or probable cause, the only articulated justification for this stop was the community caretaker doctrine.

B. Warrantless searches are presumptively unreasonable and no exception to the warrant requirement existed in this case.

1. Standard of review

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.

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.

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).

2. Pursuant to *Caniglia v. Strom*, the community caretaker doctrine is not a standalone exception to the Fourth Amendment warrant requirement.

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

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), 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 alone support the seizure in Mr. Promer's case.

3. The state failed to meet its burden of proving the officers' conduct fell within the scope of the community caretaking function.

Even if the community caretaker doctrine applied, there was no justification to seize Mr. Promer.

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, 348 Wis. 2d 179, 831 N.W.2d 778.

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.

The state did not dispute that Mr. Promer was seized when the squad cars stopped him in the parking lot. The circuit court's ruling clearly implied that police seized Mr. Promer in the parking lot. (55). Likewise, the court of appeals agreed that a seizure took place. *Promer*, slip op. ¶23 (App. 11).

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).

This conclusion that Mr. Promer was seized 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.

Next, 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, the court rejected the community caretaker justification that the officers were motivated by concern for the driver's wellbeing 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 had 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.

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 grant the petition for review.

Dated this 18th day of January, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,859.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 18th day of January, 2022.

Signed:

SUSAN E. ALESIA
Assistant State Public Defender