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STATE OF WISCONSIN
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DISTRICT IV

Appeal No. 2020AP002017 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEITH J. DRESSER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR
DANE COUNTY, BRANCH XIV, THE HONORABLE
JOHN D. HYLAND, PRESIDING

Respectfully submitted,

KEITH J. DRESSER,
Defendant-Appellant

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ISSUES PRESENTED

A. Was the Defendant-Appellant seized when Deputy Schafer activated his squad car emergency lights?

Trial court. Yes. The trial court concluded that the Defendant-Appellant was seized under the "reasonable person" standard when the deputy activated his emergency lights, regardless of whether or not he was conscious at the time.

C. Was the seizure of the Defendant-Appellant lawful under the community caretaker doctrine?

Trial court. Yes. The trial court concluded that the seizure of the Defendant-Appellant was justified under the community caretaker doctrine.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant does not request that the opinion in this appeal be published, nor does he request oral argument of the issues presented in this case, but stands ready to so provide if this Court believes that oral argument would be useful in the exposition of the legal arguments presented herein.

STATEMENT OF THE CASE

By a criminal complaint filed in the Dane County Circuit Court on October 30, 2019, the defendant-appellant, Keith J. Dresser (hereinafter Mr. Dresser), was charged in Dane County case number 19CT731 with operating a motor vehicle while intoxicated (OWI) as a third offense, contrary to Wis. Stat. § 346.63(1)(a), and operating while having a prohibited alcohol concentration (PAC) as a third offense, contrary to Wis. Stat. § 346.63(1)(b).

On January 2, 2020, Mr. Dresser filed a Motion to Suppress – Unlawful Detention and Arrest. Following a June 1, 2020 motion hearing the Honorable John D. Hyland denied the defendant's motion

by a June 3, 2020, written decision.

The defendant entered a guilty plea to the OWI charge on October 5, 2020, and was sentenced on that date.

By Notice of Appeal filed on December 4, 2020, Mr. Dresser appeals the trial court's denial of his motion to supress and the judgment in this matter in its entirety.

FACTS

On October 5, 2019, Dane County Deputy Trent Schafer was traveling on Broadway near Monona Drive in the City of Monona. Shortly after 5:00 a.m., he observed a vehicle in the parking lot of a closed Taco Bell (39, p. 6). He observed a person in the vehicle who appeared to be either passed out or sleeping. (39, p. 7). He then pulled into the parking lot. Deputy Schafer then activated his emergency lights, parked and approached the vehicle (39, p. 8).

ARGUMENT

I. MR. DRESSER'S SEIZURE WAS NOT JUSTIFIED BY THE COMMUNITY CARETAKER DOCTRINE.

A. Burden of Proof and Standard of Review

The State bears the burden of "proving that the officer's conduct fell within the scope of a reasonable community caretaker function." State v. Kramer, 2009 WI 14, ¶17, 759 N.W.2d 598 (citing State v. Ziedonis, 2005 WI App. 249, ¶15, 287 Wis. 2d 831).

Whether the actions of police constitute a constitutional violation is a question of constitutional fact reviewed independently by the appellate courts. Kramer, 2009 WI 14, ¶16. Thus, the appellate courts independently review, "whether an officer's community caretaker function satisfies the requirements of the Fourth Amendment and Article I, section 11 of the federal and state constitutions." Id.

B. The Community Caretaker Test.

The Wisconsin Supreme Court addressed the community caretaker doctrine in relation to vehicle seizures in the case of State v. Kramer, explicitly adopting the 3 part "Anderson I" test utilized in State v. Kelsey C.R., 2001 WI 54, ¶35 243 Wis. 2d 422, 626 N.W.2d 777. Kramer, 2009 WI 14, ¶21, fn. 8. In order to evaluate the constitutionality of a seizure of a person under the community caretaker doctrine, the trial court must 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. at ¶21 (quoting State v. Anderson, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987), rev'd on other grounds, 155 Wis. 2d 77, 454 N.W.2d 763 (1990)).

Courts must evaluate whether police action constitutes a bona fide community caretaker action under the totality of the circumstances. Kramer, 2009 WI 14, ¶30. Accordingly, "when under the totality of the circumstances an objectively reasonable basis for a community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns," rather the officer's subjective intent is one factor that may be considered in the totality of circumstances. Id. at ¶30-31. The Court in Kramer concluded that, "if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, [the officer] has met the standard of acting as a bona fide community caretaker." Id. at ¶36.

The third part of the community caretaker test is a balancing test which requires consideration of four factors set out in Kelsey C.R.:

> (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 of alternatives to the type of intrusion actually accomplished.
> Kramer, 2009 WI 14, ¶41 (citations omitted).

i. The Defendant-Appellant Was Seized When Deputy Schaefer Activated His Emergency Lights.

The first step of a community caretaker analysis is to determine whether a seizure has occurred. When Deputy Schafer activated his lights, a seizure within the meaning of the Fourth Amendment was effected. State v. Young, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729; California v. Hodari D., 499 U.S. 621 (1991). The trial court so concluded.

ii. Law Enforcement Was Not Engaged in a Bona Fide Community Caretaker Action.

Looking to the second element of the Anderson test, the seizure of Mr. Dresser was not a *bona fide* community caretaker activity. The totality of the circumstances do not demonstrate an objectively reasonable basis for community caretaker activity. At the time Mr. Dresser was seized, there was no reason to believe that anything more distressing was occurring than an individual sleeping in his car – hardly a remarkable occurrence, especially given the time of day.

iii. The Public Need Did Not Outweigh the Privacy Intrusion.

With regard to the third element, even assuming that this was *bona fide* community caretaker activity, the public need did not outweigh the intrusion on Mr. Dresser's privacy interest. In Kramer, Wisconsin's Supreme Court stated:

> The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable. In balancing these interests, we consider the following factors:
>
> (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.

There was virtually no public interest or exigency demanding action in this case. With regards to the severity of the intrusion, Mr. Dresser would point to the second and fourth prongs of the balancing test stated above, specifically the level of overt authority displayed and the availability and feasibility of alternative means. In Kramer, the defendant was parked on the crest of a hill on a rural highway at approximately 8:45 p.m., during hours of darkness, with his hazard lights on. A deputy passed his vehicle, performed a U-turn, activated his emergency lights and parked behind Kramer's vehicle. Kramer argued that the activation of the officer's emergency lights was an excessive show of authority under the circumstances. The Court disagreed, stating that "although [Deputy] Wagner's activation of his police cruiser's emergency lights may be interpreted as a show of authority, the activation of the lights was also a safety precaution because Kramer had stopped in an unlighted area after dark on a two-lane county highway near the crest of a hill." ¶ 43. The

location of Mr. Dresser's detention was not one that would necessitate the activation of emergency light lights for officer safety. It was the parking lot of a closed fast food restaurant with no traffic. For the same reason, if Deputy Schafer was, in fact, engaging in community caretaker activity, there were clearly less intrusive means both available and feasible. He could have initiated voluntary, consensual contact with Mr. Dresser by doing precisely what he did, but without activating his emergency lights.

II. CONCLUSION

For the reasons stated above, the conviction of the appellant must be reversed and this action remanded to the trial court with directions to grant the appellant's Motion to Suppress.

Dated at Middleton, Wisconsin, February 22, 2021.

Respectfully submitted,

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Defendant-Appellant

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 100 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and 60 characters per line. I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief. The length of the brief is 2048 words.

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JOHN C. ORTH