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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2020AP002017-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEITH JAMEISON DRESSER,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 14, THE HONORABLE JOHN D.HYLAND, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument or publication.

INTRODUCTION

This is a case about a law enforcement officer, operating under procedures to make safe contact, checking on the wellbeing of an unconscious subject as a community caretaker. This Court should uphold the trial court's order denying Mr. Dresser's motion to suppress for the following reasons: (1) Mr. Dresser was not seized when Deputy Schafer activated his emergency lights and (2) even if Mr. Dresser was seized when Deputy Schafer activated his emergency lights, Deputy Schafer was acting as a bona fide community caretaker determining whether an unconscious subject needed medical assistance, thereby legally seizing Mr. Dresser under the community caretaker function.

STATEMENT OF FACTS

As respondent, the State exercises its option not to present a full statement of the case. See Wis. Stat. § 809.19(3)(a)2 (2019-2020). However, the State presents the following facts to supplement the facts provided at page 3 of the Brief of Defendant-Appellant. At the motion hearing, Deputy Schafer testified that at approximately

5:00 AM, he observed a lone vehicle parked in a closed business's parking lot. (32:6-7). As he pulled into the parking lot, Deputy Schafer testified that he observed Mr. Dresser, unconscious in the driver's seat. (32:8). The Deputy testified that Mr. Dresser looked to be either "sleeping or passed out." (32:8). As shown on the Deputy's squad video, the Deputy then parked his squad a distance behind and to the side of Dresser's vehicle and activated his emergency lights (26:Exhibit 1 at 0:30). Deputy Schafer testified that he did this as a part of his training to make contact in a safe manner (32:8-9).

The Deputy then approached the vehicle from the passenger side (32:9). As he approached the vehicle on foot, Deputy Schafer testified that observed Mr. Dresser with his head straight down, with snot or vomit in his hand and coming from his face area (32:9). The Deputy shone his flashlight into the window, knocked on the window, and attempted to speak to Dresser(32:11; 26:Exhibit 1 at 0:47-0:56). Deputy Schafer testified that it was at this time that Mr. Dresser became conscious and was confused. (32:12-13). The Deputy further testified that Mr. Dresser reached over to attempt to open the passenger door. (32:12-13). When the door was opened, the Deputy noted a strong odor of

intoxicants. (32: 10-11; 26:Exhibit 1 at 0:58-1:27). Upon noting the strong odor of intoxicants, and based on his training and experience, the Deputy began his OWI investigation (32:12).

The trial court denied the motion to suppress, holding that while Mr. Dresser was seized when Deputy Schafer activated his overhead emergency lights, Deputy Schafer was acting as a bona fide community caretaker. (27:5).

ARGUMENT

I. DEPUTY SCHAFFER ACTIVATING THE EMERGENCY LIGHTS DID NOT CONSTITUTE AN UNLAWFUL SEIZURE UNDER THE FOURTH AMENDMENT.

A. Standard of Review and Burden of Proof

In reviewing a motion to suppress, the appellate court applies a two-step analysis. State v. Easton, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625. First, the appellate court reviews the circuit court's findings of fact under the clearly erroneous standard. Id.; State v. Felix, 2012 WI 36, ¶ 22, 339 Wis. 2d 670, 811 N.W.2d 775. Second, the appellate court reviews the application of constitutional principles to those facts de novo. Felix, 2012 WI 36, ¶ 22.

The same two-step analysis applies in determining whether a seizure occurred. County of Grant v. Vogt, 2014

WI 76, ¶ 17, 356 Wis. 2d 343, 850 N.W.2d 253. As such, whether and when a seizure occurred is reviewed de novo. Id. If the appellate court determines that a seizure occurred, whether an officer's community caretaker function satisfies the requirements under Article I, Section 11 of the Wisconsin Constitution and the Fourth Amendment of the United States Constitution is reviewed independently. State v. Kramer, 2009 WI 14, ¶ 16, 315 Wis. 2d 414, 759 N.W.2d 598; In re Kelsey C.R., 2001 WI 54, ¶ 34, 243 Wis.2d 422, 626 N.W.2d; 777 U.S. Const. amend. IV; Wis. Const. Art. 1, § 11.

If a seizure occurred, the State bears the burden of proving that law enforcement's conduct fell within the scope of a reasonable community caretaker function. Kramer, 2009 WI 14, ¶ 17; State v. Ziedonis, 2005 WI App 249, ¶ 15, 287 Wis. 2d 831, 707 N.W.2d 565.

B. Deputy Schafer did not seize Dresser when he activated the emergency lights in view of all the circumstances.

Not all personal interactions between law enforcement officers and people constitute a seizure. State v. Young, 2006 WI 98, ¶¶ 18, 23, 294 Wis. 2d 1, 717 N.W.2d 729; Terry v. Ohio, 392 U.S. 1, n. 16 (1968). A seizure occurs "[o]nly

when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." United States v. Mendenhall, 446 U.S. 544, 552 (1980). "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Vogt, 2014 WI 76, ¶ 20 (quoting Mendenhall, 446 U.S. at 554 (footnote omitted)). "'[T]he 'reasonable person' test presupposes an innocent person.'" State v. Williams, 2002 WI 94, ¶ 23, 255 Wis. 2d 1, 646 N.W.2d 834 (quoting Florida v. Bostick, 501 U.S. 429, 438 (1991)).

It is not the law in Wisconsin that an officer's activation of emergency lights automatically constitutes a seizure. State v. Powers, 2004 WI App 143, ¶ 8, 275 Wis. 2d 456, 685 N.W.2d 869. In Powers, the court noted that Powers was not seized when the officer activated his emergency lights, rather, "the seizure did not occur until Powers pulled off the public street, into a parking lot and parked in front of the restaurant." Id. This is because "[i]n order to effect a seizure, an officer must make a show of authority, and the citizen must actually yield to that show

of authority." Id. (quoting In re Kelsey C.R., 2001 WI 54, ¶ 33.

Further, the court has "expressed reluctance to determine that pulling behind a car and 'present[ing] indicia of police authority' automatically constitutes a seizure." Vogt, 2014 WI 76, ¶ 32, 356 Wis. 2d 343, 850 N.W.2d 253 (quoting Young, 2006 WI 98, ¶¶ 65, 69). In Young, the court was reluctant to determine that the officer's conduct was a seizure, highlighting that the defendant's car was already parked and that the officer did not activate the red and blue emergency lights.

Here, Deputy Schafer activated the emergency lights, yet Dresser's vehicle was already parked. Further, the Deputy's vehicle was parked a distance away from Dresser's parked vehicle, not directly up to Dresser's vehicle and not in a position to prevent Dresser from leaving. (26: Exhibit 1 at 0:30). As shown in the squad video, Deputy Schafer's lone squad was positioned in a way where he could continue to exit the parking lot. Id. Dresser did not yield to a show of authority by pulling over like in Powers and his car vehicle was already parked, like in Young. These circumstances do not constitute such a show of authority that a reasonable person would not feel free to leave.

Therefore, Dresser was not seized when Deputy Schafer activated the emergency lights.

- C. Even if Mr. Dresser was seized when Deputy Schafer activated the emergency lights, the Deputy was acting as a bona fide community caretaker serving a public need that outweighed privacy intrusion.

When the Deputy activated the emergency lights, he was acting as a community caretaker. The community caretaker function, "while perhaps lacking in some respects to the urgency of criminal investigation, is nevertheless an important and essential part of the police role." Bies v. State, 76 Wis. 2d 457, 471, 251 N.W.2d 461 (1977). As the Court established in Cady, a warrantless search and seizure of a vehicle was permitted because the police were engaged in "what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

The community caretaker function analysis "require[s] a balancing of 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." State v.

Anderson, 142 Wis. 2d 162, 168, 417 N.W.2d 411,413 (1987).

It is an "objective analysis of the circumstances confronted by the police officer" and an "objective assessment of the intrusion upon the privacy of the citizen." Id.

The court of appeals established a three-step test for evaluating the community caretaker function in Anderson:

[W]hen a community caretaker function is asserted as justification for the seizure of a person, 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.

Anderson, 142 Wis.2d at 169.

Even if this Court finds that a seizure occurred when Deputy Schafer activated his emergency lights, he was acting as a bona fide community caretaker. The Deputy was addressing a public need by checking on the health and safety of someone unconscious in the driver's seat of a vehicle in a closed business's parking lot. The public expects officers in their community caretaker function to check on unconscious drivers for need of medical assistance and this interest outweighed Dresser's privacy interest in

his vehicle parked in a closed business's parking lot at 5:00 AM.

- i. Deputy Schafer was engaged in a bona fide community caretaker function when he activated the emergency lights.

A law enforcement officer acts as a bona fide community caretaker when "there is an 'objectively reasonable basis' to believe that there is 'a member of the public who is in need of assistance.'" State v. Ultsch, 2011 WI App 17, ¶ 15, 331 Wis. 2d. 242, 793 N.W.2d 505 (quoting Kramer, 2009 WI 14, ¶¶ 30, 32). "[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." Kramer, 2009 WI 14, ¶ 36.

From the moment he observed Mr. Dresser unconscious to the moment he noted the odor of intoxication, Deputy Schafer had an objectively reasonable basis under the totality of the circumstances to check if Mr. Dresser needed medical assistance. As Deputy Schafer pulled into the parking lot, he observed an individual in the driver's

seat of vehicle, located in a closed business's parking lot at 5:00 AM, who appeared to either be sleeping or passed out.(32:8). He then pulled into an area behind the vehicle and activated his emergency lights, based on "procedures used whenever making contact with somebody in a safe manner." (32:8-9).

Based on the totality of the circumstances, including time of day, location, posture of Mr. Dresser, Deputy Schafer had an objectively reasonable basis under these circumstances to check whether Mr. Dresser was either merely sleeping or passed out and in need of medical assistance. With Mr. Dresser being visibly unconscious in the driver's seat of his vehicle at a late night to early morning hour in a public business parking lot, Deputy Schafer's actions were consistent with concern for Mr. Dresser's wellbeing. In fact, the Deputy's further observations in approaching Mr. Dresser's vehicle on foot confirmed his concern for Mr. Dresser's physical wellbeing, as he observed the driver's head down, with snot or vomit in his hands. (32: 9). See State v. Myer, No. 2016AP490, 2016 WL 7437661, ¶ 13 (WI App Dec. 22, 2016) (unpublished but authored).

- ii. Public need for law enforcement to check for medical assistance outweighed the privacy intrusion.

Whether the officer's exercise of a bona fide community caretaker is reasonable requires a balancing of "the public interest or need that is furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen." Kramer, 2009 WI 14, ¶ 40 (citations omitted). "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". Id. at ¶ 41. The court considers the following factors in balancing these interests:

(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.

Anderson, 142 Wis. 2d at 169.

Turning to the first factor, the public has a substantial interest in ensuring that police assist unconscious vehicle occupants who may be in need medical assistance. See State v. Blatterman, 2015 WI 46, ¶¶ 50, 52,

362 Wis. 2d 138, 864 N.W.2d 26 (unconscious home occupants). "An individual's physical and mental health status is an issue of public interest and presents an exigency when an officer reasonably determines that physical or mental health could be in jeopardy." Id. at ¶ 49; See State v. Pinkard, 2010 WI 81, ¶¶ 47-48, 327 Wis. 2d 346, 785 N.W.2d 592.

Here, Deputy Schafer observed an individual who appeared to either be sleeping or passed out in the driver's seat of a vehicle parked at approximately 5:00 AM in what he knew to be a closed business's parking lot.(32:8). He reasonably determined that the situation could be an emergency, as the Deputy did not know whether Mr. Dresser, in his unconscious state, was in need of medical assistance due to potential overdose or intoxication. Since Mr. Dresser's physical health could have been in jeopardy, the Deputy proceeded as a community caretaker accordingly. Therefore, the first factor weighs in favor of Deputy Schafer's community caretaker function being reasonable, having acting in the public's interest to check for medical assistance.

Second, considering the time, location, and degree of authority and force displayed, Deputy Schafer's actions

were reasonable under the circumstances. As articulated in Kramer, while the activation of the emergency lights can be seen as show of authority, it is also a safety precaution. Kramer, 2009 WI 14, ¶ 43. In Kramer, the safety precaution was to alert passing traffic that vehicles were on the shoulder. Id. Here, the safety precaution alerted the observed unconscious subject, if roused, that an officer was approaching. See United States v. Clements, 522 F.3d 790, 796 (7th Cir. 2008) (emergency lights used for identification and safety purposes, otherwise officers would have put themselves at risk in approaching a parked car late at night).

Deputy Schafer activated his emergency lights a distance behind a parked vehicle, located in closed business's parking lot at approximately 5:00 AM. (26: Exhibit 1 at 0:30). In approaching the vehicle, the Deputy flashed his flashlight through the passenger window, knocked on the window, and attempted to speak to Mr. Dresser before the door was opened. (32:11; 26: Exhibit 1 at 0:47-0:56). Under the circumstances here, the late to early morning hours, the closed business's parking lot, and Mr. Dresser's unconscious state in the driver's seat of his vehicle, the Deputy's actions were the least intrusive

means of safely approaching an unconscious subject to check for medical assistance.

Third, Mr. Dresser was located in his vehicle. This factor is considered in the Anderson test because a citizen has a lesser expectation of privacy in an automobile. Anderson, 142 Wis. 2d at 170. Further, Deputy Schafer observed an unconscious subject who could need medical assistance from overdose or other intoxicant in the driver's seat of a vehicle. If Mr. Dresser were to gain consciousness and drive, he could cause harm to other drivers. See Blatterman, 2015 WI 46, ¶ 56 (reasonable community caretaker function because driver might have had a heart condition or be intoxicated and could harm other drivers). With these considerations, Deputy Schafer's actions in parking a distance behind the vehicle and activating his emergency lights, and further approaching the vehicle and knocking on the window, were reasonable.

Fourth, the court considers the availability, feasibility, and effectiveness of alternatives to the type of intrusion actually accomplished. Mr. Dresser asserts that Deputy Schafer just shouldn't have activated the emergency lights. (App. Brief 8). As noted, the Deputy's activation of the emergency lights functioned as a safety

precaution to alert unconscious subject that an officer was approaching. Alternatively, approaching the vehicle without the emergency lights activated would require the Deputy to approach an unconscious person without any safety precaution or notice. While not activating the emergency lights is an option that would be available and feasible, it would not be effective in safely checking on the unconscious subject under the circumstances.

Deputy Schafer actions, including activating the emergency lights, addressed the public interest in law enforcement checking on an unconscious person who could need medical assistance. Particularly when the unconscious individual is in the driver's seat of a vehicle, parked in on closed business's parking lot at 5:00 in the morning. At this location and time, and upon observing someone unconscious in their vehicle, the activation of the emergency lights served as a safety precaution to alert the unconscious driver, if roused, that a law enforcement officer was approaching. Given these circumstances, Deputy Schafer's actions were reasonable, addressing a strong public need with minimal intrusion on Mr. Dressers privacy interest.

Therefore, if Mr. Dresser was seized under the Fourth Amendment when the emergency lights were activated, the seizure was pursuant to Deputy Schafer acting as a bona fide community caretaker whose actions were reasonable under a totality of the circumstances and in the public's interest.

CONCLUSION

For the reasons discussed above, the State of Wisconsin requests this Court to affirm the trial court's decision to deny the motion to suppress.

Dated this 23rd day of April, 2021.



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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

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inch margin on left side and 1
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is 17 pages.

Dated: April 23, 2021.

Signed,



Colleen Lennon
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 23rd day of April, 2021.



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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been reproduced to preserve confidentiality and with appropriate references to the record.

Dated: April 23, 2021



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