STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2020AP002017 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEITH J. DRESSER,

Defendant-Appellant.

REPLY BRIEF 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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ARGUMENT

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

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

The State correctly asserts that there is no bright line rule stating that when squad lights are activated, a seizure automatically occurs, citing State v. Powers, 2004 WI App 143, ¶ 8, 275 Wis. 2d

456, 685 N.W.2d 869. In that case, Wisconsin's Court of Appeals reiterated the doctrine set forth in California v. Hodari D., 499 U.S. 621 (1991), that a show of authority alone is insufficient to effect a seizure – the suspect must also submit to that show of authority. Of course, in the present case, Mr. Dresser offered no resistance to the officer's show of authority. The exception highlighted by the State simply has no applicability in this case.

The State attempts to mitigate the strength of Officer Schafer's show of authority by pointing out that he did not position his squad car in such a way that Mr. Dresser would have been unable to leave the parking lot. Were that a compelling argument, virtually no routine traffic stop would be considered a seizure within the meaning of the 4th Amendment. The overwhelming majority of traffic stops involve an officer pulling over a moving vehicle and parking behind it. In nearly all such cases, the positioning of the officer's car would not prevent the driving from driving away.

As the trial court concluded, Officer Schafer's actions constituted a sufficient show of authority to effect a seizure.

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

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. The State argues that Deputy Schafer's observations upon approaching Mr. Dresser's vehicle support the conclusion that he was engaged in bona fide community caretaker activity. While Mr. Dresser does not agree with this claim regardless, the fact that a seizure had already occurred by the time these observations were made render them irrelevant to the Court's determination.

C. 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 State v. Kramer, 2009 WI 14, 759 N.W.2d 598, 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 supporting Deputy

Schafer's actions. The State contends that "the public has a substantial interest in ensuring that police assist unconscious vehicle occupants who may be in need [of] medical attention." The notion that Mr. Dresser was, in fact, in need of medical attention was pure conjecture, unsupported by Deputy Schafer's observations at the time the seizure occurred.

With regards to the severity of the intrusion, Mr. Dresser reiterates the points argued in his brief-in-chief. The circumstances surrounding Mr. Dresser's seizure did not implicate any safety concerns that would necessitate activation of Deputy Schafer's emergency lights. It was the parking lot of a closed fast food restaurant with no traffic and a single, seemingly sleeping, vehicle occupant.

For the same reason, if Deputy Schafer was, in fact, engaging in community caretaker activity, there were clearly less intrusive means available, feasible, and effective. As previously stated, he could have simply initiated voluntary, consensual contact with Mr. Dresser without activating his emergency lights. There is no factual basis from which to conclude, or even suspect, that Deputy Schafer's interaction with Mr. Dresser would have unfolded in any way different from how it actually did. In other words, the activation of emergency lights was gratuitous and a violation of Mr. Dresser's 4th

Amendment rights.

II. CONCLUSION

For the reasons stated above and in Mr. Dresser's brief-in-chief, 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, May 13, 2021.

Respectfully submitted,

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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 773 words.

_____
JOHN C. ORTH