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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

APPEAL NO. 2021 AP 002105-CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

MICHAEL GENE WISKOWSKI,

Defendant – Appellant.

REPLY BRIEF OF DEFENDANT–APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION

ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY
THE HONORABLE KENT HOFFMANN PRESIDING

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ARGUMENT

I. Officer Simon unlawfully seized Mr. Wiskowski under the police community caretaker function.

A. Officer Simon was not engaging in bona fide community caretaker activity when he seized Mr. Wiskowski.

To lawfully engage in bona fide community caretaker activity, an officer must have an objectively reasonable basis to believe there was a member of the public who needed assistance. *State v. Maddix*, 2013 WI 64, 348 Wis. 2d 179, ¶ 20, 831 N.W.2d 778. When analyzing whether community caretaker activity is lawful, courts must consider 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. 433, 441 (1973).

In this case, Officer Simon had no objectively reasonable basis for seizing Mr. Wiskowski. While Officer Simon was dispatched to a McDonalds to address a person sleeping in a car in the drive thru, Officer Simon observed no such conduct. Approximately one minute after receiving the dispatch call, Officer Simon arrived at the McDonalds. (R. 32 at 6-7). What he did observe was the suspect vehicle appropriately navigate through the drive thru window toward the exit of the parking lot. (*Id.* at 8). He further observed the vehicle make a proper, safe, and legal turn onto the roadway and into the correct lane of travel. (*Id.* at 17-18). Any concerns reported to dispatch were negated by Officer Simon’s personal observations. In other words, there was no need for a welfare check and any concern that Mr. Wiskowski would fall back asleep while driving is unfounded.

Despite these facts, the State attempts to argue that there was reason to believe Mr. Wiskowski needed assistance. In doing so, the State attempts to differentiate the present facts from those in *State v. Ultsch*, 2011 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505. According to the State, while the defendant in *Ultsch* did not need assistance as he had stopped driving and gone home, Mr. Wiskowski may have needed assistance as he was still driving. (State's Br. 12-13). The State, however, fails to identify why there was reason to believe Mr. Wiskowski might need assistance. Simply put, the State provides no justification as to why Officer Simon might still reasonably believe Mr. Wiskowski needed assistance when his observed driving was safe, appropriate, and legal. Here, the totality of the circumstances indicate that Mr. Wiskowski was not in need of any assistance and that the public did not need protecting from his safe and legal driving. Again, Officer Simon observed Mr. Wiskowski to be awake and safely operating his vehicle while committing no traffic violations. Mr. Wiskowski was not displaying any indicator that he would have needed assistance.

The State is asking this Court to analogize this case to an unpublished case, *State v. Promer*, 2020AP1715-CR, 2021 WL 6015858 (Ct. App. Dec. 21, 2021) (unpublished). (State's Br. 13, State's App. 3-21). The present facts are distinct from those in *Promer*. In *Promer*, at around 9:30 p.m., the defendant was asleep in his vehicle which was parked in a bar parking lot. (*Id.* at ¶ 3, 4). Before arriving on scene, the officer learned from dispatch that the registered owner of the suspect vehicle was Promer who was on probation and had six prior convictions for operating a motor vehicle while intoxicated. (*Id.*) When the officer arrived approximately ten minutes later, he observed Promer's vehicle traveling northbound on the road on which the bar was located. (*Id.* at ¶ 3-4, 4-5). As the officer pulled into the bar's parking lot, Promer slowed his vehicle down and turned into the lot behind the officer. (*Id.* at ¶ 4, 5). The officer observed that Promer was "traveling kind of at a slower speed through the middle of the parking lot" which is "kind of

concerning” to the officer. (*Id.*) Accordingly, the officer initiated the stop. (*Id.* at ¶ 5, 5).

While the totality of the circumstances in *Promer* may have provided an objectively reasonable basis for community caretaker activity, that is not the present case. Here, there was a call to dispatch advising someone was asleep in the McDonald’s drive thru. (R. 32 at 6-7). Approximately one minute later – not ten minutes – Officer Simon arrived and observed nobody sleeping in the drive-thru. (*Id.* at 6-8). Rather, Officer Simon observed the suspect vehicle safely navigate through the drive thru window toward the exit of the parking lot. (*Id.* at 8). Officer Simon further observed the vehicle safely maneuver through the parking lot and correctly turn onto the road and into the appropriate lane of travel. (*Id.* at 17-18). Additionally, prior to initiating the stop on Mr. Wiskowski’s vehicle, Officer Simon did not have any information as to who the registered owner of the vehicle was or whether that person had any prior operating while intoxicated convictions. (*Id.* at 8, 18). Therefore, unlike *Promer*, the totality of the circumstances in this case does not provide an objectively reasonable basis for any community caretaker activity.

B. Mr. Wiskowski’s privacy interests were not outweighed by the public’s interest.

In this case, the public need to be protected was minimal and certainly did not outweigh Mr. Wiskowski’s privacy interests. The State argues that the Circuit Court was to correct to recognize that “there was a high degree of public interest to ensure that the defendant was safe in operating the motor vehicle.” (State’s Br. 15). This assurance, however, was provided to Officer Simon via his own personal observations prior to him initiating a seizure. At the time of the seizure, the only indication that Mr. Wiskowski may have posed a public safety concern was the dispatch call. Any potential concerns associated with this call were eliminated when Officer Simon

observed the suspect vehicle being safely operated just one minute after the call was received.

Unlike the State's assertion and Circuit Court's belief, there was no reason to think Mr. Wiskowski would fall asleep while driving. This is especially true because Officer Simon did not even observe Mr. Wiskowski sleeping behind the wheel and never confirmed that he had been. What Officer Simon observed was Mr. Wiskowski safely navigating the drive thru and properly turning on to the roadway. (R. 32 at 8, 17-18). There was no observation of the drive thru line being impeded, no observation of traffic being interrupted, and no observation of the public being placed in harms way.

Importantly, there were obvious alternatives to Officer Simon seizing Mr. Wiskowski. In addition to moving on after observing no violations or concerns, Officer Simon could have chosen to follow Mr. Wiskowski's vehicle. Instead, he chose to seize Mr. Wiskowski while relying on a possibility that Mr. Wiskowski could fall asleep while driving. This decision was made without ever confirming Mr. Wiskowski had been asleep and is not enough to overcome Mr. Wiskowski's privacy interests that are constitutionally guaranteed.

If Officer Simon was legitimately concerned that Mr. Wiskowski was going to fall asleep while driving, Officer Simon was able to dispose of that concern simply by observing the vehicle and speaking with and visually observing Mr. Wiskowski. There simply was no need for Officer Simon to order Mr. Wiskowski to step out of his vehicle. Mr. Wiskowski was able to appropriately converse with Officer Simon and answer all his questions. (R. 32) Further, Mr. Wiskowski provided his driver's license and proof of insurance without exhibiting signs of impairment. (*Id.* at 8). If, after speaking with Mr. Wiskowski, Officer Simon believed he was at risk of falling asleep, Officer Simon should have had Mr. Wiskowski call for a ride. He should not have had Mr. Wiskowski step out of his vehicle. Doing so was nothing less than a violation of Mr. Wiskowski's constitutionally protected rights.

CONCLUSION

It is respectfully requested that this Court reverse the circuit court's denial of the motion to suppress in this matter and remand with directions that the circuit court issue an order suppressing all evidence obtained consequent to the unlawful extension of the traffic stop.

Dated this 29th day of July 2022.

Respectfully Submitted,

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CERTIFICATION OF FORM AND LENGTH

I, Kirk B. Obear, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b), (bm) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,333 words.

Dated this 29th day of July 2022.

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