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STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

MICHAEL GENE WISKOWSKI,

Defendant – Appellant.

PETITION FOR REVIEW

Petition for Review of a Decision of the Court of Appeals, District II,
Appellate Case No. 2021AP2105-CR, Dated March 15, 2023,
Affirming the Judgment of the Circuit Court for Sheboygan County,
The Honorable Kent R. Hoffmann Presiding
Trial Court Case No. 2019 CF 628

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STATEMENT OF THE ISSUES

When the report of a person sleeping in a car while waiting in line at a drive thru is contradicted by the officer's observation of the car driving on the road without any traffic violations, is there reasonable suspicion to stop the car or can police justify the stop based on the community caretaker doctrine?

Circuit Court answered: Yes.

Court of Appeals answered: Yes.

After the stop, when the driver provides a reasonable explanation, can the officer use the community caretaker doctrine to extend the stop to perform field sobriety tests?

Circuit Court answered: Yes.

Court of Appeals answered: Yes.

STATEMENT OF REASONS FOR REVIEW

This case presents a question of law that is likely to recur unless resolved by this Court. The trial court below, and the Court of Appeals, held that the traffic stop was lawful pursuant to the community caretaker doctrine despite the officer's observations of safe and appropriate driving. This Court's decision would provide guidance to courts below and the law enforcement community in determining when a traffic stop is lawful under the community caretaker doctrine. Such a question has a statewide impact and needs to be addressed by this Court.

STATEMENT OF FACTS AND CASE

On September 9, 2019, the State of Wisconsin filed a *Criminal Complaint* which charged the Defendant-Appellant, Michael Gene Wiskowski, with one count of Operating a Motor Vehicle While Under the Influence – 4th Offense with a General Alcohol Concentration, contrary to Wis. Stat. §§ 346.63(1)(a) and 346.65(2)(g). (R. 3). On October 25, 2019, an

Amended Criminal Complaint was filed, wherein one count of Operating with Prohibited Alcohol Concentration – 4th Offense, contrary to Wis. Stat. § 346.63(1)(b) was added. (R. 21).

Defendant-Appellant filed a motion to suppress evidence on November 8, 2019. (R. 23; App. 12). The motion alleged that there was no reasonable basis for the officer to conduct the traffic stop and that no probable cause existed to arrest Defendant-Appellant. *Id.* As to the relief sought, the motion requested an order suppressing all evidence gathered by the arresting officer after the unlawful administration of the preliminary breath test. *Id.*

An evidentiary motion hearing was held on January 10, 2020. (R. 32; App. 18). The only witness to testify was Officer Devin Simon. (*Id.* at 2). Officer Simon, employed as a road officer with the City of Plymouth, testified that on September 6, 2019, he was on duty in the City of Plymouth. (*Id.* at 6). At approximately 1:00 p.m., Officer Simon was advised by dispatch that there was an individual in a red Cadillac truck who had fallen asleep in the McDonald's drive thru parking lot. (*Id.* at 6-7). Based on that information, Officer Simon travelled to the McDonald's and arrived approximately one minute later. (*Id.*)

Upon arrival, Officer Simon observed the vehicle navigate through the drive thru window toward the exit of the parking lot. (*Id.* at 8). He further observed the vehicle to have made a correct, proper, and legal left turn onto the road and into the correct lane of travel. (*Id.* at 17-18). Officer Simon initiated a traffic stop of the vehicle. (*Id.* at 9). While behind the vehicle, Officer Simon observed no traffic violations. (*Id.* at 17). According to Officer Simon, the stop was a welfare check based on the complainant reporting somebody fell asleep behind the wheel of a vehicle. (*Id.* at 18). Officer Simon admitted that he had no probable cause to stop the vehicle for any kind of actual traffic violation. (*Id.*). Upon approach of the vehicle, Officer Simon asked the driver for his license and

proof of insurance. (*Id.* at 8). Based off the license provided, the driver was identified as Mr. Wiskowski. (*Id.*). When told of the complaint of Mr. Wiskowski sleeping, Mr. Wiskowski told Officer Simon that he was a welder and had been awake for approximately the last 24-hours working. (*Id.* at 24). At no point during this first contact did Officer Simon detect an odor of intoxicants. (*Id.* at 20).

Upon second contact, Officer Simon ordered Mr. Wiskowski out of his vehicle. (*Id.* at 9). Officer Simon noted Mr. Wiskowski had a stumbling walk and was able to smell the odor of intoxicants on his breath. (*Id.*). Upon being asked how much he had to drink, Mr. Wiskowski stated he had a couple of beers a couple of hours ago. (*Id.* at 10). At that point, Officer Simon transported Mr. Wiskowski to the police station. (*Id.*) At the police station, Officer Simon conducted field sobriety tests. (*Id.* at 11).

Following conclusion of the testimony at the January 10, 2020, evidentiary hearing, the circuit court set a briefing schedule. (*Id.* at 25). On January 31, 2020, the State filed a *Response Letter to Motion Hearing*. (R. 33; App. 45). The State argued that the traffic stop and subsequent arrest were justified under the community caretaker doctrine. (*Id.*) Specifically, the State argued that the three-stop test set forth in *State v. Kramer,* 2009 WI 14, ¶ 36, 315 Wis. 2d 414, 759 N.W.2d 598, were all present. (*Id.*)

On February 7, 2020, Mr. Wiskowski submitted a brief in support of his motion to suppress. (R. 34; App. 49). Mr. Wiskowski argued that the traffic stop and subsequent arrest were not justified under the community caretaker. (*Id.*) Therefore, all evidence gathered by the arresting officer after the unlawful stop should be suppressed. (*Id.*)

On February 17, 2020, the circuit court issued an oral ruling denying Mr. Wiskowski's motion to suppress. (R. 46; App. 54). In doing so, Judge Hoffmann agreed that the analysis was whether this was a lawfully conducted stop pursuant to the

community caretaker doctrine. (*Id.*) Judge Hoffmann concluded that the three-step test set forth in *Kramer* had been met. (*Id.*) For that reason, Judge Hoffmann denied Defendant-Appellant's motion to suppress evidence. (*Id.*)

On February 9, 2021, Defendant-Appellant submitted a letter to the court submitting body camera footage and requested a subsequent motion hearing re-raising the same issues. (R. 61; App. 72). A second evidentiary motion hearing was held on February 18, 2021. (R. 69; App. 74). Again, the only witness to testify was Officer Simon. (*Id.*)

Officer Simon testified that, when driving to the scene, he was unaware of whether the driver had any OWI convictions. (*Id.* at 11). Officer Simon reiterated that when he arrived on scene, he observed the vehicle appropriately navigate the drive thru, pay for and receive his food, safely make a turn, lawfully stop at a stop sign, and properly turn onto the road. (*Id.*). Once the stop was initiated, the vehicle safely turned into a golf course parking lot without any issue. (*Id.*).

At this hearing, the body camera footage of the assisting officer, Officer Cobalt, was received into evidence. (*Id.* at 7). Officer Simon testified that on the day in question, he was looking to Officer Cobalt for guidance. (*Id.* at 12). The recording showed a conversation between the officers wherein they discussed whether Mr. Wiskowski should be removed from his vehicle. (*Id.* at 13). That conversation took approximately eight minutes. (*Id.*). Officer Simon testified that he did not smell alcohol and did not see alcohol. (*Id.*). At some point during that conversation, the officers pulled up Mr. Wiskowski's past driving record and discovered he had prior OWI convictions. (*Id.* at 13-14).

Officer Simon admitted that he was not sure whether he had authority pursuant to the community caretaker doctrine to remove Mr. Wiskowski from his vehicle. (*Id.* at 14). Officer Simon further admitted that he did not have reasonable suspicion that Mr. Wiskowski was driving while impaired

other than Mr. Wiskowski at first handing him the wrong insurance card and the report of him sleeping in the drive thru. (*Id.* at 15). Up until Mr. Wiskowski was pulled out of the vehicle, neither officer detected any odor of alcohol, slurred speech, or any unusual behavior other than Mr. Wiskowski at first handing the wrong insurance card to Officer Simon. (*Id.* at 16). Importantly, Officer Simon testified that Mr. Wiskowski did not appear to be sleeping and did not appear to be dozing off in any manner. (*Id.*).

At the close of testimony and after hearing argument, the circuit court denied Defendant-Appellant's motion for reconsideration. (*Id.* at 36). In doing so, Judge Hoffmann again concluded that the three-step test set forth in *Kramer* had been met. (*Id.*)

On September 1, 2021, Defendant-Appellant entered a plea of 'no contest' to one count of Operating While Intoxicated – 4th Offense. (R. 85; App. 10-11). After finding that Defendant-Appellant knowingly, voluntarily, and intelligently entered such pleas, Judge Hoffmann adjudicated him guilty. (R. 102). Judge Hoffmann imposed a sentence of 120-days jail, 24-month ignition interlock device, lifetime driver's license revocation, a forfeiture and costs, and an AODA Assessment. *Id.* A *Judgment of Conviction* was entered on September 2, 2021. (R. 85; App. 10-11). *A Motion for Stay of Sentence Pursuant to Sec. 809.31* was filed on September 1, 2021. (R. 80). At the plea/sentencing hearing on September 1, 2021, Judge Hoffmann granted Defendant-Appellant's *Motion for Stay of Sentence*. (R. 102). Judge Hoffmann signed *an Order Staying Sentence* on September 3, 2021. (R. 89). A timely *Notice of Intent to Pursue Postconviction Relief* was filed on September 1, 2021. (R. 81). A timely *Notice of Appeal* was filed on December 7, 2021. (R. 103). A timely *Statement on Transcript* was filed on December 7, 2021. (R. 104).

On March 15, 2023, the Court of Appeals issued a summary disposition order affirming the trial court's ruling. In doing so, the Court of Appeals reasoned that the stop of

Defendant-Appellant's vehicle was permissible under the community caretaker doctrine. (App. 2-9). This appeals follows.

ARGUMENT

I. There was no reasonable suspicion for the traffic stop because the officer could not confirm that Mr. Wiskowski had been sleeping, and the officer did not observe any behavior that would lead to a reasonable belief that a crime had occurred, was in progress, or would be committed.

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, 292 Wis. 2d 1, 717 N.W.2d 729. 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. *Id.* at ¶ 20. Reasonable suspicion requires more than a mere hunch. *Id.* at ¶ 21. An officer must possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. *Id.*

In this case, reasonable suspicion did not exist as there were no specific and articulable facts that a crime had been, was being, or would be committed by Mr. Wiskowski. An officer does not have reasonable suspicion to stop any driver simply because someone said the driver had been sleeping while waiting in a drive thru especially when that officer never witnessed the driver sleeping and the car was operating in a perfectly safe manner. More is required.

Reasonable suspicion may exist where an officer was aware of prior OWIs and there are additional facts that give rise to reasonable suspicion. But in Mr. Wiskowski's case, there were no traffic violations, Mr. Wiskowski was driving

appropriately, his car had no equipment violations, there was no assertion that he was not wearing a seatbelt or didn't have his headlights on. (R. 69 at 16). There was no evidence of impaired driving. (*Id.*) To the contrary, there was evidence of unimpaired driving. Mr. Wiskowski drove safely on the road, executed a safe turn into the parking lot and drove carefully through the parking lot. (*Id.* at 11). The facts simply do not support a finding of reasonable suspicion because there was no objectively reasonable evidence of wrongful conduct.

II. The officer was not acting in a community caretaking function when, instead of finding Mr. Wiskowski asleep in his car in the middle of the drive thru, he watched him drive his car on the road and turn into a parking lot without any traffic violations or any indication that he was in distress.

A. Community Caretaker Test

An investigative stop that is not supported by reasonable suspicion may nonetheless be justified as an exercise of the officer's duties as a community caretaker. *State v. Maddix*, 2013 WI App 64, ¶ 14, 348 Wis. 2d 179, 831 N.W.2d 778. 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).

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. The state has the burden of proving the officer's conduct falls within the scope of the community caretaker function. *Kramer* at ¶ 21.

B. Mr. Wiskowski was seized when Officer Simon initiated the traffic stop.

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 generally occurs 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).

The parties and the circuit court appeared to agree that a seizure took place. The state did not argue against seizure. The circuit court's ruling clearly implied that Officer Simon seized Mr. Wiskowski in the golf course parking lot. This conclusion makes sense based on the facts elicited at the suppression hearings. Mr. Simon's squad pulled behind Mr. Wiskowski in the parking lot. Officer Simon approached Mr. Wiskowski and questioned him while he sat in his car. A reasonable person in this situation would not have felt free to leave. This was a seizure. (R. 32, 69).

C. Officer Simon's conduct was not bona fide community caretaker activity because police were unable to verify that Mr. Wiskowski ever needed assistance. Instead, Officer Simon only saw Mr. Wiskowski safely operate his vehicle on the road and in the parking lot.

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. During the analysis of this step in the *Kramer* 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 this case, Officer Simon was dispatched to a McDonald's to address a person sleeping in his car in the drive thru. Had he found a person in that situation, it would have been reasonable to believe the person may need assistance and the community caretaker function arguably would be in play. But Officer Simon did not find a person sleeping in the drive thru. To the contrary, Officer Simon found the car driving safely on the road and observed the car safely execute a turn into a parking lot. (R. 32, 69). Just because dispatch may have triggered a community caretaker function does not mean that the community caretaker function continued after the initial safety concern dissipated.

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 the driveway and entered the unlocked home.

On appeal, this court rejected the community caretaker justification that the officers were motivated by concern for the driver's well-being 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 reason to believe that Ultsch needed assistance. *Id.* at ¶¶ 19-21.

While home entry is more scrutinized than the seizure in Mr. Wiskowski's case, the reasoning in *Ultsch* is useful. Once the deputies discovered that Mr. Wiskowski was awake and driving safely, there was no longer an objectively reasonable basis to believe that Mr. Wiskowski, like Ultsch, required assistance. (R. 32, 69). After the deputies saw Mr. Wiskowski awake and safely driving, this case pivoted from a community caretaker action into a criminal investigation. Officer Simon's conduct was no longer "totally divorced from the detection, investigation, or acquisition of evidence relating to violation of a criminal statute." *Dombrowski*, 413 U.S. at 441.

If contrary to his 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. Wiskowski's position that the community caretaker exception terminated once Officer Simon spoke with Mr. Wiskowski. During that conversation it became clear that he did not require assistance. He did not provide a mumbled, nonsensical response to Officer Simon's questions. He explained that he had been awake for approximately 24-hours working. (R. 32, 69). This explanation, coupled with an absence of erratic driving, odor of alcohol, and other standard observations of an impaired driver, eliminated the community caretaker justification.

D. The public need and interest did not outweigh the intrusion upon Mr. Wiskowski's privacy.

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 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 drive thru with the state presenting no evidence suggesting that the vehicle impeded the line. No traffic was interrupted, there was no evidence that needed to be preserved and there was no risk to the public due to a damages or disabled car blocking traffic or causing a dangerous diversion.

Further, this situation did not present exigencies. Officer Simon did not find Mr. Wiskowski sleeping behind the wheel. Mr. Wiskowski drove appropriately and turned into a parking lot when Officer Simon initiated the traffic stop. (R. 32, 69). Nothing indicated a risk to the public, or to Mr. Wiskowski, if Officer Simon failed to act quickly.

Despite the lack of exigency and public need, the attendant circumstances surrounding the search were instructive. After 1:00 p.m., Mr. Wiskowski legally operated his car on the road and in a parking lot when suddenly he was being pulled over. At least one officer approached his car and questioned him as they stood next to his window. (R. 32, 69). A reasonable person, who by his own admission had worked

the last 24-hours, would be alarmed by the squad car and officer.

Finally, there were obvious alternatives to this aggressive approach. Where Mr. Wiskowski 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 Officer Simon to simply move on.

All 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 arrest. 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 Officer Simon fail to corroborate the claim that Mr. Wiskowski was sleeping in the drive thru, when Officer Simon saw he was driving his car with no traffic violations the report was contraindicated. Finally, once Officer Simon spoke to Mr. Wiskowski and he provided an 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.

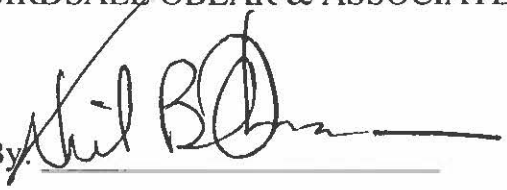
CONCLUSION

For the foregoing reasons, the defendant-appellant respectfully requests that this Court reverse the trial court's and Court of Appeal's denial of the motion, and remand the case for further proceedings consistent with this Court's opinion.

Dated this 11th day of April 2023.

Respectfully Submitted,

BIRDSALL, OBEAR & ASSOCIATES

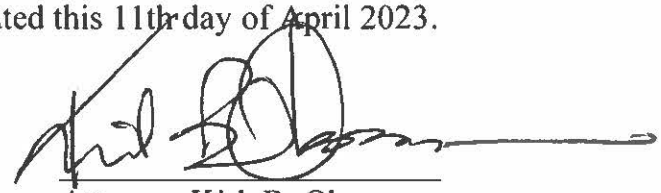
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CERTIFICATION OF FORM AND LENGTH

I, Kirk B. Obear, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,628 words.

Dated this 11th day of April 2023.

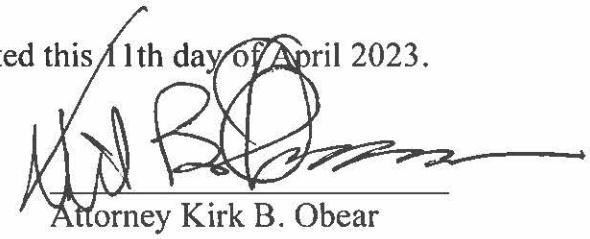


Attorney Kirk B. Obear
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CERTIFICATION OF ELECTRONIC BRIEF

I, Kirk B. Obear, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, including the appendix, if any, which is identical to this paper copy.

Dated this 11th day of April 2023.



Attorney Kirk B. Obear
State Bar No.: 1023993

STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

MICHAEL GENE WISKOWSKI,

Defendant – Appellant.

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)

)ss

SHEBOYGAN COUNTY)

I, Maria Brusse, being first duly sworn, under oath, states:

1. That I am a Paralegal at Birdsall Obear & Associates.

2. That on April 11, 2023, I sent via Priority Mail, ten (10) copies the *Petition for Review and Appendix*, relative to the above-entitled matter to the Wisconsin Supreme Court.

3. That on the same day, I also sent via Priority Mail, three (3) service copies of the *Petition for Review and Appendix* to the Wisconsin Attorney General's Office.

Dated: April 11, 2023.

Maria Brusse
Paralegal

Subscribed and sworn to before
me this 11 April, 2023:

Stephanie M. Rock, Notary Public

Sheboygan County, State of Wisconsin

My Commission Does Not Expire.