

RECEIVED
05-30-2023
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP2105-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

MICHAEL GENE WISKOWSKI,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

INTRODUCTION

Michael Gene Wiskowski fell asleep behind the wheel of his truck in a McDonalds drive-thru lane. An employee knocked on Wiskowski's window to wake him up, and someone called the police. (R. 24:4; 32:7.) An officer arrived just as the truck was pulling out of the parking lot onto the road. (R. 32:8.) The officer pulled the truck over for "[a] welfare check." (R. 32:8.) After Wiskowski had difficulty producing his driver's license and insurance card (R. 32:8–9), and the officers learned that he had prior convictions for operating while under the influence of an intoxicant (OWI) (R. 69:13–14), they had Wiskowski get out of the truck (R. 32:9). Officers observed a "stumbling walk" and the odor of intoxicants on Wiskowski's breath. (R. 32:9.) Wiskowski admitted that he had consumed a couple beers a few hours before the stop. (R. 32:9–10.) After field sobriety tests and a preliminary breath test which gave a result of .187 (R. 32:10–11; 3:3), an officer arrested Wiskowski for OWI (R. 32:11). Officers obtained a search warrant for a blood test, which revealed an alcohol concentration of .167. (R. 21:2; 102:14.)

The circuit court denied Wiskowski's motion to suppress his blood test result after a hearing, concluding that the officers' actions in pulling the truck over and having Wiskowski get out of the truck were justified under the police community caretaker function. (R. 46:16; 69:36.) The court of appeals summarily affirmed. *State v. Michael Gene Wiskowski*, No. 2021AP2105-CR, 2023 WL 2518260 (Wis. Ct. App. March 15, 2023) (unpublished). The court of appeals concluded that police were acting in their community caretaker role when they checked on Wiskowski after he fell asleep behind the wheel and that when they saw the truck pull out onto the road, they "still had an objectively reasonable basis to be concerned that the driver needed assistance or might not be able to safely drive the truck." *Id.* at 2. The court concluded that the officers were justified in

stopping the truck because even if the driver was merely tired or experiencing medical issues rather than drunk, he posed a risk to himself and the public. *Id.* at 2–3. And the court concluded that in order to check on the driver, the police had no reasonable alternative to stopping the truck. *Id.* at 3. Wiskowski now petitions this Court for review.

REVIEW OF THE COURT OF APPEALS' OPINION IS UNWARRANTED

Wiskowski petitions this Court for review on two issues: (1) “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?” and (2) “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?” (Pet. 3.)

Review is not warranted on either issue.

A. This case does not satisfy the criteria for this Court’s review.

Wiskowski argues that this case presents a question of law that is likely to recur. (Pet. 3.) But the issues Wiskowski raises concern whether under the specific facts of his case, a traffic stop was justified under the community caretaker doctrine. These issues are likely to recur only when drunk drivers pass out in a drive thru lane, but then wake up before police arrive and drive a short distance before being pulled over. A decision on those specific facts would not have statewide impact. And it would not clarify or guide courts on application of the community caretaker doctrine because that doctrine is well-established and clear.

As the court of appeals recognized, the community caretaker exception applies if: (1) a seizure under the Fourth Amendment has occurred; (2) the officer was acting as a bona fide community caretaker; and (3) the public's needs and interests outweigh the intrusion upon the privacy of the individual. *Wiskowski*, 2023 WL 2518260, at 2 (citing *State v. Kramer*, 2009 WI 14, ¶ 21, 315 Wis. 2d 414, 759 N.W.2d 598). The third part of the test depends on (1) "the degree of the public interest and the exigency of the situation"; (2) "the attendant circumstances surrounding the seizure"; (3) "whether an automobile is involved"; and (4) "the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." *Id.* at 2 (citing *Kramer*, 315 Wis. 2d 414, ¶ 41. Wiskowski's argument is only that the circuit court and the court of appeals erred in applying this standard to the specific facts of his case. It is factual in nature and does not warrant this Court's review.

B. The issues Wiskowski raises are not presented on the facts of this case.

The issues Wiskowski raises are fact-specific but *counterfactual* to Wiskowski's case. He asks this Court to grant review to decide whether there is reasonable suspicion "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." (Pet. 3.) But the report of Wiskowski asleep in his truck in a drive thru lane was not "contradicted" by officers' finding that he had awoken and begun to drive away. Wiskowski has never disputed that he was asleep behind the wheel of his truck in the drive thru lane about a minute before the police arrived and stopped his truck. The fact that the police observed him driving away did not "contradict" the earlier report that he had been sleeping in his truck in the drive thru. To the contrary, it created reasonable concern that

Wiskowski was a danger to himself and others when the two facts were taken together.

Wiskowski also asks this Court to grant review to decide whether the community caretaker doctrine justifies police extending a traffic stop for field sobriety tests if the person has given “a reasonable explanation.” (Pet. 3.) But the police did not request field sobriety tests until they made observations that were easily sufficient for reasonable suspicion that Wiskowski was under the influence of an intoxicant.

The officers were justified in asking Wiskowski to get out of the car. As the circuit court recognized, the officers asked Wiskowski to get out of his car to make sure they were not missing anything, and that he was okay to drive. (R. 69:35.) The court noted that Wiskowski might not be able to drive safely “due to alcohol but it could also be sleepiness.” (R. 69:35.) The court noted that since Wiskowski had been asleep at the wheel only a few minutes before, his driving did not mean “that the defendant is not going to fall asleep as he’s driving.” (R. 69:35.) The court concluded that “under a totality of the circumstances here the officer is justified in not only stopping the vehicle” but in “continuing to investigate the community caretaker function” by asking Wiskowski to get out of his truck. (R. 69:35–36.)

The “reasonable explanation” Wiskowski gave for falling asleep at the wheel in a drive thru lane—that he had been working for 24 hours as a welder and was tired (R.32:24)—did not dispel the belief that he needed assistance. Putting aside that Wiskowski’s statement was seemingly untruthful (unless he was welding while intoxicated), Wiskowski’s explanation did not mean that he did not need assistance. Instead, with information that Wiskowski had fallen asleep at the wheel only a few minutes before, and that he had been awake for 24 hours, the officers had even more reason to ask him to get out of the car so they could make sure

that he was not so tired that he would be unable to drive safely. As the circuit court recognized, the officers were therefore justified in having Wiskowski step out of his truck. (R. 69:35–36.)

And the officers' observations once he was out of his truck—including his “stumbling walk” (R. 32:9), odor of intoxicants on his breath (R. 32:9), admission to consuming a couple beers (R. 32:9–10), and prior OWI convictions (R. 69:13–14)—were easily sufficient to justify having him perform field sobriety tests.

C. Wiskowski seeks review for error correction, but there is no error to correct.

Wiskowski seeks review for this Court to assess the determinations of the circuit court and the court of appeals that there was reasonable suspicion to stop his truck, have him get out, and then request field sobriety tests. Even if error correction were an appropriate reason for review, there is no error to correct because the officers' actions were plainly justified.

As the court of appeals recognized, when the officer saw Wiskowski drive out of the parking lot about a minute after he had been asleep at the wheel in a drive thru lane, he “had an objectively reasonable basis to be concerned that the driver needed assistance or might not be able to safely drive the truck.” *Wiskowski*, 2023 WL 2518260, at 2. The court recognized that Wiskowski's falling asleep at the wheel created an exigency that continued once Wiskowski awoke and pulled out onto the road, and that “By immediately stopping Wiskowski, [the officer] was able to check on Wiskowski's condition and mitigate a risk to public safety.” *Id.* at 2. The court recognized that the stop did not “show the use of a high degree of overt authority and force or an extensive intrusion into a private space” *id.* at 3, and that there was no “feasible and effective alternative” to stopping

the truck to check on the driver, so the officer “acted reasonably under the circumstances by stopping Wiskowski immediately.” *Id.* at 3.

The circuit court properly denied Wiskowski’s suppression motion, and the court of appeals properly affirmed. There is no error to correct, and no need for this Court’s review.

CONCLUSION

This Court should deny the petition for review.

Dated: May 26, 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1675 words.



MICHAEL C. SANDERS
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. §§ (RULES) 809.19(12) and
809.62(4)(b) (2019-20)**

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 26th day of May 2023.



MICHAEL C. SANDERS
Assistant Attorney General

