STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2021AP2105 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL GENE WISKOWSKI,

Defendant-Appellant-Petitioner.

ON REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING THE CIRCUIT COURT'S JUDGMENT OF CONVICTION ENTERED IN THE SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE KENT R. HOFFMANN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

A self-identified McDonald's employee notified the police that a driver—Michael Gene Wiskowski—had fallen asleep at the wheel of his red truck in the drive-through lane at 1:00 p.m. and that she awoke him by knocking on his window. A police officer arrived at the McDonald's about a minute after being dispatched and saw the red truck exiting the drive-through. He stopped Wiskowski and had him exit his truck to ensure that he could drive safely without falling asleep. Wiskowski was intoxicated. The circuit court denied Wiskowski's motion to suppress evidence gathered after the traffic stop, and the court of appeals affirmed. This Court can affirm for two reasons.

First, although not addressed by the courts below, the officer had reasonable suspicion to stop Wiskowski for driving while intoxicated. The report was reliable because it came from a named informant with eyewitness knowledge, the officer personally verified that a red truck was in the drive-through lane, and spontaneously falling asleep is a hallmark of intoxication. These circumstances provided reasonable suspicion.

Second, both the circuit court and court of appeals correctly concluded that the community caretaker doctrine justified the stop. The officer advanced the public interest by acting to ensure that Wiskowski would not endanger other drivers or pedestrians by falling asleep while driving, he secured that interest with an ordinary traffic stop of Wiskowski's truck where Wiskowski had a reduced expectation of privacy, and he lacked a reasonable alternative.

This Court should therefore affirm the judgment convicting Wiskowski of operating a motor vehicle while under the influence of an intoxicant (OWI) as a fourth offense.

STATEMENT OF THE ISSUES

1. Did a report from a named informant that a driver fell asleep at the wheel in a drive-through lane at 1:00 p.m. provide reasonable suspicion that the driver was operating a vehicle while intoxicated?

Not answered by the circuit court or the court of appeals.

This Court should answer: Yes.

2. Did the community caretaker doctrine justify the stop of this driver who fell asleep in a drive-through lane?

The circuit court answered: Yes.

The court of appeals answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for January 24, 2024. This Court typically publishes its opinions.

STATEMENT OF THE CASE

A McDonald's employee called the police at 1:00 p.m. on a Friday to report that a driver in a red Cadillac truck in the drive-through lane was asleep. (R. 32:6–7.) Wiskowski was the driver. (R. 32:8–9.) The employee had personally woken up Wiskowski by knocking on the truck's window. (R. 24:4; 69:10.) The employee provided the police her name and was willing to give a statement. (R. 32:7, 10.)[1]

City of Plymouth Officer Devin Simon arrived at the McDonald's about one minute after being dispatched in response to the "named complainant wanting to make a

[1] Although this employee is identified as a "named complainant," her name is not in the record. (R. 32:7.)

statement." (R. 32:7.) Upon arrival, he noticed that Wiskowski's red truck was leaving the drive-through and returning to the road. (R. 32:8.) Officer Simon allowed Wiskowski to turn left and then initiated a traffic stop. (R. 32:8.) He stopped Wiskowski to perform a "welfare check" (R. 32:8), because falling asleep at the wheel was "not a normal driving behavior." (R. 32:22).

Officer Simon asked Wiskowski for his driver's license and proof of insurance. (R. 32:8.) Wiskowski provided his license but the wrong insurance card. (R. 32:9.) Twenty seconds later, Wiskowski pulled out the correct insurance card and handed it to Officer Simon. (R. 32:9.) Wiskowski admitted that he had fallen asleep in the drive-through lane but claimed that he had just finished a 24-hour shift as a welder. (R. 32:24.)

Officer Simon checked Wiskowski's documentation in his squad car. (R. 32:9; 69:13.) He also spoke with a more experienced officer who arrived shortly after the stop began about what to do next. (R. 69:12–14.) The officers discovered that Wiskowski had three prior OWI convictions. (R. 69:13–14, 21.) After talking with the more senior officer, Officer Simon decided that he had lingering concern about Wiskowski's ability to drive because he had just fallen asleep in the drive-through, reported having just completed a 24-hour shift, had three prior OWIs, and struggled to provide the correct insurance card. (R. 32:9; 67:5:35–5:47;[2] 69:13, 18, 21.) Consequently, he asked Wiskowski to step out of his truck to see if he could stand. (R. 32:9; 69:21.)

[2] Record Item 67 is the eight-minute-long body-worn camera video introduced by Wiskowski at the hearing on his motion for reconsideration and admitted into evidence by the circuit court. (R. 69:6, 25–26.) The pin cites refer to the minute and second mark of the video.

Wiskowski exited and engaged in what Officer Simon called a "stumbling walk" toward his rear bumper. (R. 32:9.) Officer Simon smelled alcohol on his breath. (R. 32:9.) Wiskowski admitted that he had consumed two beers. (R. 32:9–10.) Officer Simon then took Wiskowski to the police station to administer sobriety tests. (R. 32:10–11.) Based on Wiskowski's performance on those tests, Officer Simon arrested him for OWI. (R. 32:11.) Wiskowski subsequently completed a preliminary breath test which returned a result of .187. (R. 3:3; 102:14.) After Wiskowski declined to consent to a blood draw, officers obtained a search warrant to test his blood, which revealed a blood alcohol content of .167. (R. 3:3; 21:3; 102:14.)

The State charged Wiskowski with OWI and operating with a prohibited alcohol concentration (PAC), both as fourth offenses. (R. 21:1–2; 22.) Wiskowski moved to suppress all evidence gathered after Officer Simon initiated the traffic stop, claiming that the stop was illegal. (R. 23; 32:3–4.)

The circuit court held a hearing on Wiskowski's motion to suppress. Officer Simon was the sole witness to testify. After reviewing post-hearing briefs from both parties, the circuit court denied the motion to suppress. (R. 46:16.) It found Officer Simon credible. (R. 46:10, 16.) It concluded that the community caretaker exception to the warrant requirement justified the traffic stop. (R. 46:8–16.)

Wiskowski then moved for reconsideration to supplement the record with body-worn camera footage from the stop. (R. 62.) The circuit court held an additional hearing in which the body-worn camera footage was played. (R. 69:6–7, 25–26.) Officer Simon testified again. He confirmed that, as the body-worn camera footage showed, he consulted with a more experienced officer before ordering Wiskowski out of the car. (R. 69:13–15.) He explained that he asked Wiskowski to exit his truck to see if he was "missing" anything impairing Wiskowski's ability to drive in light of his slumber in the

drive-through lane, his recently completed 24-hour shift, his three prior OWI convictions, and his struggle with his insurance cards. (R. 69:18–21.)

Based on this evidence, Wiskowski argued that the officers had not engaged in legitimate caretaking activity but, rather, "already ha[d] an investigation in mind" and used community caretaking as a "ruse." (R. 69:26.) He maintained: "If they think he might be driving drunk, there should be reasonable suspicion or probable cause depending upon what the violation observed is." (R. 69:27.)

The circuit court again denied Wiskowski's motion to suppress based on the community caretaker doctrine. (R. 69:34–36.) It concluded that it was consistent with the community caretaking doctrine for Officer Simon to order Wiskowski out of the car to verify that he was not "missing anything" that might be impairing Wiskowski's ability to drive safely. (R. 69:35.)

Wiskowski pleaded no contest to OWI as a fourth offense, and the PAC charge was dismissed. (R. 83; 85; 102:3, 5, 12–13.) He was sentenced to 120 days in jail with work-release privileges and subjected to driving-related collateral consequences. (R. 102:26–27.) The circuit court stayed his sentence pending appeal. (R. 102:29, 36.)

Wiskowski appealed, challenging only the circuit court's order denying his motion to suppress. (R. 103.) The court of appeals affirmed in a summary disposition, agreeing with the circuit court's application of the community caretaker doctrine. *State v. Wiskowski*, No. 2021AP2105-CR, 2023 WL 2518260, at *2–3 (Wis. Ct. App. Mar. 15, 2023) (unpublished).

Wiskowski petitioned this Court for review, which this Court granted.

STANDARD OF REVIEW

Whether evidence should be suppressed is a question of constitutional fact with a mixed standard of review. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. The circuit court's factual findings are upheld unless clearly erroneous, while the application of constitutional principles to those facts is reviewed independently. *Id.*

ARGUMENT

I. Reasonable suspicion supported the traffic stop.

Wiskowski argues that Officer Simon lacked reasonable suspicion to pull him over. (Wiskowski's Br. 12–13.)[3] Neither the circuit court nor the court of appeals addressed the issue in denying Wiskowski's motion to suppress. The State did not brief the issue at the court of appeals.

Nevertheless, the order denying Wiskowski's motion to suppress can be affirmed on that basis. The issue is properly before this Court because Wiskowski raised it below and in his petition for review. (Wiskowski's Pet. 1); *see* Wis. Stat. § (Rule) 809.62(6). Moreover, as the Respondent, the State is free to "defend the court of appeals' ultimate result or outcome based on any ground, whether or not that ground was ruled upon by the lower courts, as long as the supreme court's acceptance of that ground would not change the result or outcome below." Wis. Stat. § (Rule) 809.62(3m)(b); *see State v. Delap*, 2018 WI 64, ¶ 5 & n.2, 382 Wis. 2d 92, 913 N.W.2d 175. Here, this Court can determine from the record that Officer Simon had reasonable suspicion to stop Wiskowski and affirm the denial of Wiskowski's motion to suppress on that basis.

[3] For citations to Wiskowski's brief and petition for review, the State cites to the electronic page number found at the top, and not to the page listed at the bottom.

The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution protects against "unreasonable searches and seizures." *Post*, 301 Wis. 2d 1, ¶ 10. A police officer may initiate an investigatory or *Terry*[4] stop based on "reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *State v. Genous*, 2021 WI 50, ¶ 7, 397 Wis. 2d 293, 961 N.W.2d 41 (citation omitted). Accordingly, an officer may stop a driver "based on reasonable suspicion that a person is driving while intoxicated." *Post*, 301 Wis. 2d 1, ¶ 15.

Reasonable suspicion presents a "low bar." *Genous*, 397 Wis. 2d 293, ¶ 8. The standard "'falls considerably short' of 51% accuracy." *Kansas v. Glover*, 140 S. Ct. 1183, 1188 (2020) (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)). Reasonable suspicion exists if there are "specific and articulable facts which, taken together with rational inferences from those facts," would lead a reasonable officer to believe that unlawful activity might be afoot. *Post*, 301 Wis. 2d 1, ¶ 10 (citation omitted). "The question is, 'What would a reasonable police officer reasonably suspect in light of his or her training and experience?'" *Genous*, 397 Wis. 2d 293, ¶ 8 (citation omitted). This question focuses on the objective perception of a reasonable police officer and "is by no means dependent upon the subjective belief of the officer." *In re Refusal of Anagnos*, 2012 WI 64, ¶ 60, 341 Wis. 2d 576, 815 N.W.2d 675. "[O]fficers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Genous*, 397 Wis. 2d 293, ¶ 8 (citation omitted).

The reasonable suspicion inquiry is also highly fact specific, turning on the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶¶ 13, 26. "[B]oth the content of [the] information possessed by police and its degree of reliability. . . . are

[4] *Terry v. Ohio*, 392 U.S. 1 (1968).

considered in the 'totality of the circumstances.'" *State v. Williams*, 2001 WI 21, ¶ 22, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)). "The totality-of-the-circumstances approach views the quantity and the quality of the information as inversely proportional to each other." *Id.* A limited amount of information may still establish reasonable suspicion if the information is highly reliable. *Id.*

"In some circumstances, information contained in an informant's tip may justify an investigative stop." *State v. Rutzinski*, 2001 WI 22, ¶ 17, 241 Wis. 2d 729, 623 N.W.2d 516. In conducting the reasonable suspicion inquiry, courts should consider "(1) the informant's veracity; and (2) the informant's basis of knowledge." *Id.* ¶ 18. However, these two factors are merely part of the totality of the circumstances, not "discrete elements of a more rigid test." *Id.* Several other factors bear on an informant's reliability. "[P]olice corroboration of innocent, although significant, details of an informant's tip lend reliability to the informant's allegations of criminal activity." *State v. Robinson*, 2010 WI 80, ¶ 27, 327 Wis. 2d 302, 786 N.W.2d 463. An informant similarly increases his or her reliability by sharing self-identifying information or purporting to be an eyewitness. *Williams*, 241 Wis. 2d 631, ¶¶ 33–36. In addition, "exigency can in some circumstances supplement the reliability of an informant's tip in order to form the basis for an investigative stop." *Rutzinski*, 241 Wis. 2d 729, ¶ 26.

In this case, it is undisputed that Officer Simon seized Wiskowski and that he did not observe Wiskowski commit a traffic violation. (R. 32:18.) He stopped Wiskowski because a McDonald's employee reported that Wiskowski had fallen asleep at the wheel while in the drive-through lane. (R. 32:8.) This report provided Officer Simon reasonable suspicion that Wiskowski was operating his vehicle while intoxicated to

justify the traffic stop. Two cases—one from this Court and one from the U.S. Supreme Court—compel this conclusion.

In *Rutzinski*, this Court determined that an informant's report of erratic driving by a black pickup truck established reasonable suspicion of driving while intoxicated. *Rutzinski*, 241 Wis. 2d 729, ¶¶ 1–4, 38. Two factors supported the Court's conclusion that the informant's tip supported a traffic stop, even though the police did not personally observe any suspicious driving and the informant did not provide his or her name. *Id.* ¶¶ 7, 38.

First, this Court determined that the informant was reliable even without providing a name because he or she still provided self-identifying information. The informant explained that he or she knew of the defendant's erratic driving because he or she occupied the car directly in front of the defendant's truck. *Id.* ¶¶ 6, 32. The officers could, thus, infer the informant's identity if they wanted—such as if the tip turned out to be false. *Id.* ¶ 32. Because the informant risked identification—and, thus, criminal consequences for conveying false information—the police could reasonably rely on the informant's report. *Id.*; *see also Williams*, 241 Wis. 2d 631, ¶ 34 (determining that anonymous informant provided self-identifying information by sharing her home address).

Second, the informant's reliability was enhanced because she was an eyewitness to the erratic driving. She provided "personal observations of [the defendant's] contemporaneous actions" that included marking the time that the defendant passed certain landmarks. *Rutzinski*, 241 Wis. 2d 729, ¶ 33. Based on those reports, the police were able to accurately intercept the black pickup truck further down the road. *Id.* "[O]nly a person contemporaneously observing the vehicle or possessing 'inside information' . . . would have been able to indicate where the vehicle was located and the setting surrounding the vehicle at the given time." *Id.* The officers could reasonably rely on the informant's report

because it clearly came from an eyewitness. *Id.*; *see also Williams*, 241 Wis. 2d 631, ¶ 47 (endorsing reliability of anonymous tip, in part, because it was a "contemporaneous eyewitness account accompanied by details promptly verified by the police").

Since the informant was reliable, the only issue that remained was whether a report of "erratic driving" established reasonable suspicion. *Rutzinski*, 241 Wis. 2d 729, ¶¶ 7, 34. This Court had no difficulty accepting that it did because "[e]rratic driving is one possible sign of intoxicated use of a motor vehicle." *Id.* ¶ 34. Moreover, the danger posed by an intoxicated driver created an exigency that "further justified" a stop. *Id.* ¶ 35. Accordingly, the unnamed informant's report of erratic driving established reasonable suspicion. *Id.* ¶ 38.

Thirteen years after *Rutzinski*, the U.S. Supreme Court reached the same conclusion in similar circumstances based on the same considerations in *Navarette v. California*, 572 U.S. 393 (2014). The police officers in *Navarette* responded to an anonymous 9-1-1 caller, who reported the license plate of a pickup truck that had run her off the road at a particular mile marker of a state highway. *Navarette*, 572 U.S. at 395. The officers found the truck further down the highway 13 minutes after receiving the dispatch. *Id.* The officers followed the truck for five minutes, during which time the pickup truck complied with all traffic laws. *Id.* at 395, 403. The officers stopped the car anyway. *Id.* at 395. It turned out that the driver was not intoxicated, but the truck contained 30 pounds of marijuana. *Id.*

The Supreme Court held that the anonymous 9-1-1 call established reasonable suspicion of driving while intoxicated. *Id.* Even though the 9-1-1 caller was anonymous and offered no self-identifying information, the Court found her reliable because she provided an eyewitness account by identifying a particular truck with a particular license plate, because she

utilized the 9-1-1 emergency system that can trace its callers, and because the police were able to intercept the pickup truck further down the highway based on her "contemporaneous report." *Id.* at 398–400. The report established reasonable suspicion because "running another car off the highway. . . . bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness." *Id.* at 403. "[T]he absence of additional suspicious conduct" after police officers began following the truck did not "dispel the reasonable suspicion of drunk driving." *Id.* Officers were not obligated to give "a drunk driver a second chance for dangerous conduct." *Id.* at 404.

Rutzinski and *Navarette* illustrate that the circumstances in the present case provided an objectively reasonable basis for suspecting that Wiskowski was driving while intoxicated.

First, the McDonald's employee was not anonymous: she actually provided her name. Officer Simon knew that he was responding to a "named complainant wanting to make a statement" and that she worked at the McDonald's. (R. 24:4; 32:7; 69:10.) She was therefore more reliable than the unnamed, but sufficiently reliable, informants in *Rutzinski* and *Navarette*. Further, like the informant in *Navarette*, she called 9-1-1, providing the police another means to find her if desired. (R. 32:7.) *See Navarette*, 572 U.S. at 400. The employee's willingness to share her identity made it reasonable for Officer Simon to trust the report since he "could reasonably have concluded that the informant knew that [she] potentially could be arrested if the tip proved to be fabricated." *Rutzinski*, 241 Wis. 2d 729, ¶ 32.

Second, not only did the McDonald's employee identify herself, but she also established her base of knowledge as an eyewitness that included facts verified by Officer Simon. She told police that, in her capacity as a McDonald's employee, she personally awoke Wiskowski in the drive-through lane by

knocking on the window of his red Cadillac truck. (R. 24:4; 32:7; 69:10.) One minute after being dispatched, Officer Simon verified her report by observing a red Cadillac truck departing the drive-through lane. (R. 32:8.) Thus, Officer Simon, like the officers in *Rutzinski* and *Navarette*, confirmed that the informant was an eyewitness based on details he could personally confirm.

This reliable report from the McDonald's employee had sufficient information to establish reasonable suspicion. Spontaneously falling asleep is an unmistakable sign of significant intoxication. *See State v. Giese*, 2014 WI App 92, ¶ 4, 356 Wis. 2d 796, 854 N.W.2d 687 (observing that intoxicated defendant had crashed his vehicle, started walking home, and then fallen asleep in the road). Moreover, falling asleep at the wheel of a running vehicle is a "paradigmatic manifestatio[n] of drunk driving." *Navarette*, 572 U.S. at 403; *see State v. Wortman*, 2017 WI App 61, ¶ 2, 378 Wis. 2d 105, 902 N.W.2d 561 (recounting how the intoxicated defendant fell asleep while driving and crashed his truck into a ditch). The fact that Wiskowski fell asleep at the wheel at 1:00 p.m. increased the likelihood that alcohol, rather than ordinary drowsiness, caused him to fall asleep.

The exigency created by the threat of a drunk driver "further justified" an investigatory stop. *Rutzinski*, 241 Wis. 2d 729, ¶ 35. Indeed, the midday time increased the already considerable risk posed by an intoxicated driver. Many more people are driving at 1:00 p.m. on a Friday than in the wee morning hours when taverns close.

In sum, a self-identified informant's eyewitness report that she personally awoke a man at the wheel of a red Cadillac truck in the drive-through lane at 1:00 p.m., combined with Officer Simon's observation of a red Cadillac truck departing the drive-through lane one minute after being dispatched, provided reasonable suspicion that Wiskowski was driving while intoxicated.

Wiskowski's argument to the contrary depends entirely on the fact that Officer Simon did not personally observe him violate traffic laws or drive unsafely. (Wiskowski's Br. 12–13.) *Rutzinksi* and *Navarette* show that this argument is unavailing. Informants can establish reasonable suspicion. *Rutzinski*, 241 Wis. 2d 729, ¶ 17. "[T]he Fourth Amendment and Article I, § 11 do not require the police to idly stand by in hopes that their observations reveal suspicious behavior before the imminent threat comes to its fruition." *Id.* ¶ 26. *Navarette* deemed five minutes of lawful driving insufficient to dispel reasonable suspicion, *Navarette*, 572 U.S. at 403–04, and declined to require police officers to give suspected drunk drivers "a second chance for dangerous conduct," *id.* at 404. Here, a single successful left turn did not dispel the reasonable suspicion established by informant's report.

Although Wiskowski challenged only the legality of the stop below, he also briefly argues that, to the extent the stop was lawful, it was no longer lawful after he answered Officer Simon's initial questions and before Officer Simon ordered him to exit his car. (Wiskowski's Br. 16.) To the extent he advances such an argument now, the presence of reasonable suspicion conclusively defeats it. It is well established that an officer can order a car's driver out of the car during a valid traffic stop. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (per curiam); *State v. Brown*, 2020 WI 63, ¶ 20, 392 Wis. 2d 454, 945 N.W.2d 584. Because Officer Simon lawfully stopped Wiskowski based on reasonable suspicion of driving while intoxicated, he was free to order Wiskowski out of the car.

Because the stop was lawfully supported by reasonable suspicion, the circuit court properly denied Wiskowski's motion to suppress the evidence that followed it.

II. The traffic stop was valid pursuant to the community caretaker doctrine.

The circuit court and court of appeals properly determined that Officer Simon's stop of Wiskowski did not run afoul of the Fourth Amendment or Article I, § 11 because it fell within the ambit of the community caretaker doctrine. A police officer may lawfully perform a seizure without a warrant, probable cause, or reasonable suspicion if the seizure is predicated on the community caretaker doctrine. *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592.

A court determines whether an officer reasonably performed a search or seizure in his community caretaker role by balancing the public interest furthered by the police conduct against the degree and nature of the intrusion upon the citizen's privacy. *State v. Kramer*, 2009 WI 14, ¶ 40, 315 Wis. 2d 414, 759 N.W.2d 598. For the community caretaker doctrine to apply, the trial court must conclude that (1) a seizure under the Fourth Amendment occurred; (2) the police engaged in "bona fide community caretaker activity"; and (3) "the public need and interest outweigh[ed] the intrusion upon the privacy of the individual." *Id.* ¶ 21 (quoting *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)).

It is undisputed that Officer Simon seized Wiskowski when he stopped him. The parties dispute only elements two and three. The circuit court correctly determined that Officer Simon was a "bona fide" community caretaker and that the public interest outweighed the intrusion upon Wiskowski's privacy.

A. The officer was engaged in bona fide community caretaker activity when he stopped Wiskowski's truck.

An officer's community caretaker function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Kramer*, 315 Wis. 2d 414, ¶¶ 19, 23, (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). "The 'totally divorced' language from *Cady* does not mean that if the police officer has any subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function." *Id.* ¶ 30. Rather, if "the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function," then the officer "has met the standard of acting as a bona fide community caretaker." *Id.* ¶ 36. A determination that an officer acted as a bona fide community caretaker "is not negated by the officer's subjective law enforcement concerns." *Id.* ¶ 30.

The circuit court did not err in recognizing that Officer Simon had an objectively reasonable basis to stop Wiskowski in the interest of community caretaking. Officer Simon testified that he stopped Wiskowski to perform a "welfare check" (R. 32:8), because falling asleep at the wheel was "not a normal driving behavior" (R. 32:22). He wanted to ensure that Wiskowski was fit to drive and recognized that alcohol, medication, or a medical condition all could have caused him to fall asleep. (R. 32:8; 69:18, 21.) The circuit court credited this testimony and reasonably noted that the public had a legitimate concern that whatever caused Wiskowski to fall asleep at the wheel in the drive-through would cause him to fall asleep again while driving, thereby endangering himself, other drivers, and pedestrians. (R. 46:10, 13–14.) This objectively reasonable concern established Officer Simon as a bona fide caretaker. *See State v. Truax*, 2009 WI App 60, ¶ 16, 318 Wis. 2d 113, 767 N.W.2d 369 (concluding that officer's

concern for driver's wellbeing after he abruptly drove off the road constituted bona fide community caretaking).

Wiskowski argues that the basis for community caretaking dissipated once Officer Simon saw him drive out of the McDonald's parking lot. (Wiskowski's Br. 15–16.) In so arguing, Wiskowski ignores Officer Simon's stated rationale that the circuit court found credible—the risk that Wiskowski would *fall asleep again*. (R. 46:13–14.) That risk was legitimate since Wiskowski had been asleep in the driver's seat of a running vehicle just moments earlier.

Wiskowski also argues that the basis for community caretaking dissipated before Officer Simon ordered him out of the car. (Wiskowski's Br. 16.) He claims that Officer Simon's caretaking role ended after he reviewed his driving credentials, learned that he had just completed a 24-hour shift, and failed to notice any signs of intoxication. (Wiskowski's Br. 16.)[5]

The circuit court properly rejected that argument as well. At that point, Wiskowski had not yet assured Officer Simon that he could drive safely, and Officer Simon believed that he was "missing" something. (R. 69:21.) Wiskowski had just fallen asleep at the wheel in the drive-through lane. (R. 32:22; 69:18.) He had initially provided the wrong insurance card. (R. 32:9; 69:21.) Officer Simon had learned that Wiskowski had three prior OWIs. (R. 69:13–14, 21.) And even if the reason Wiskowski had fallen asleep was because he had just completed a 24-hour shift, the risk that he was overtired and would fall asleep again while driving remained. (R. 67:5:41–5:42; 69:18, 21.) The body-worn camera video

[5] Wiskowski does not dispute that once he was out of his truck, the officers were justified in having him perform field sobriety tests, requesting a preliminary breath test, arresting him, requesting a blood sample, and obtaining a search warrant for a blood sample.

shows Officer Simon explaining how all these concerns nagged at him. (R. 67:5:35–5:47.) In this light, it was objectively reasonable for Officer Simon to see if Wiskowski could stand and whether he was "missing" something that impaired Wiskowski's ability to drive. (R. 32:9; 69:21.)

Wiskowski maintains that *State v. Ultsch*, 2011 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505, commands a contrary result. (Wiskowski's Br. 15–16.) But his circumstances do not resemble those in *Ultscsh*.

In *Ultsch*, a car driven by Ultsch hit a building and then drove to a house two to three miles away. *Ultsch*, 331 Wis. 2d 242, ¶¶ 2–3, 19. Officers came to the house and learned from Ultsch's boyfriend that Ultsch was inside and asleep. *Id.* ¶ 3. After the boyfriend departed, the officers entered the house uninvited. *Id.* ¶ 4. The court of appeals concluded that the officers were not acting in their community caretaker role because they lacked "an 'objectively reasonable basis' to believe that Ultsch was in need of assistance." *Id.* ¶ 22 (citation omitted). "[N]o person had given officers information that would indicate that Ultsch was in a vulnerable situation, nor did they observe anything that would indicate she was injured." *Id.* ¶ 20.

In this case, in contrast, a McDonald's employee told police that Wiskowski had just minutes earlier been in a vulnerable position—asleep at the wheel in the drive-through. (R. 32:7.) It was objectively reasonable for Officer Simon to conclude that the vulnerable situation persisted because he arrived only one minute after being dispatched and saw Wiskowski's red Cadillac truck pulling out of the drive-through. (R. 32:7.) In contrast with *Ultsch*, Wiskowski cannot point to any circumstances that changed in the brief time between when the McDonald's employee woke up Wiskowski and when Officer Simon arrived. Officer Simon still had a legitimate concern that Wiskowski would fall asleep while driving.

Wiskowski contends further that Officer Simon could not have acted as a caretaker because he considered it possible that Wiskowski was intoxicated. (Wiskowski's Br. 16.) But the community caretaker doctrine and an officer's law enforcement concerns are not mutually exclusive. As this Court stated in *Kramer*, the objective basis articulated by Officer Simon for his caretaking was "not negated by [his] subjective law enforcement concerns." *Kramer*, 315 Wis. 2d 414, ¶ 30. In *Kramer*, the officer acted as a bona fide caretaker when approaching a disabled vehicle on the side of the road, even though he also kept a hand on his holstered gun for safety and had concerns that a crime was occurring. *Id.* ¶¶ 6, 37–39. In *Truax*, the officer acted as a bona fide caretaker when investigating whether a driver abruptly exited the road due to medical emergency or mechanical failure, even though he admitted that his job duties included patrolling for intoxicated drivers. *Truax*, 318 Wis. 2d 113, ¶¶ 14–16.

Similarly here, Officer Simon acted as a bona fide caretaker when checking on Wiskowski's ability to drive without falling asleep, even though he wondered whether alcohol caused Wiskowski to fall asleep in the drive-through. The "multifaceted nature of police work" means that the investigative and caretaking roles "are not mutually exclusive." *Kramer*, 315 Wis. 2d 414, ¶ 39.

For these reasons, the circuit court did not err in determining that Officer Simon acted as a bona fide caretaker when he stopped Wiskowski.

B. The public interest outweighed the intrusion upon Wiskowski's privacy.

The final step in determining whether the traffic stop was justified as a bona fide community caretaker function is whether the exercise of that function was reasonable. *Kramer*, 315 Wis. 2d 414, ¶ 40. In making this determination, a reviewing court considers four 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.

Id. ¶ 41 (quoting *State v. Kelsey C.R.*, 2001 WI 54, ¶ 36, 243 Wis. 2d 422, 626 N.W.2d 777). Here, the circuit court correctly concluded that all four considerations weighed in favor of applying the community caretaker doctrine.

First, the circuit court correctly determined that "there was a high degree of public interest to ensure that the defendant was safe in operating the motor vehicle." (R. 46:15.) The public had an interest in Officer Simon verifying Wiskowski's capacity to drive to protect drivers, pedestrians, and Wiskowski, himself. Officer Simon had reason to doubt Wiskowski's capacity to drive because Wiskowski had just been asleep in the driver's seat while operating his truck. The circuit court aptly noted that it was "unknown whether [Wiskowski] could fall back asleep and that is certainly a huge risk." (R. 46:13.) A driver asleep at the wheel obviously runs counter to the public interest.

These circumstances demanded immediate action, creating an exigency. Without additional information, Officer Simon could not know whether Wiskowski would fall asleep again or whether he had just purchased a coffee from McDonald's to keep him awake. It was possible, and true as it turns out, that Wiskowski was intoxicated, which is its own exigency. *See Rutzinski*, 241 Wis. 2d 729, ¶ 35. Waiting without verifying Wiskowski's capacity to drive only increased the risk of public endangerment. Therefore, the public interest favored stopping Wiskowski.

Second, the attendant circumstances show that only a minor intrusion on Wiskowski's privacy interests was required to secure the significant public interest in safe roads. A single squad car stopped Wiskowski's truck, Officer Simon approached Wiskowski alone, and no officer threatened or used force. (R. 32:9–10.) The entire encounter took place at 1:00 p.m. in broad daylight. (R. 32:7.) And Wiskowski knew that he had just fallen asleep at the wheel of a running car in a drive-through lane. A reasonable person would not have been surprised when, after being awakened by a McDonald's employee, the police expressed concern about his ability to drive.

Third, the seizure occurred in a car. As the U.S. Supreme Court has stated, "What is reasonable for vehicles is different from what is reasonable for homes." *Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021). The seizure of a car increased the public interest in the stop, making it more reasonable, and also diminished Wiskowski's expectation of privacy, mitigating the intrusion on his privacy.

Fourth, Officer Simon lacked reasonable alternatives. As the circuit court put it, there "weren't any available alternatives to what the officer did." (R. 46:15.) "[O]bviously the officer had to react quickly and didn't have much time to make his decision." (R. 46:15.) The officer could either stop Wiskowski's truck, or do nothing and hope he could drive safely, even though he had been asleep at the wheel just minutes earlier. If Wiskowski had again fallen asleep while driving, for any reason, "it may have been too late for effective assistance." *Kramer*, 315 Wis. 2d 414, ¶ 45.

Wiskowski claims that the public need was actually minimal because there was no evidence that his truck "impeded the line" in the drive-through lane. (Wiskowski's Br. 17.) The circuit court reasonably determined that the public interest extended beyond the wait-time in the drive-through

of a McDonald's and included the risk that Wiskowski would again fall asleep while driving on public roads. (R. 46:13–15.)

In a similar vein, Wiskowski contends that no exigencies existed in this situation. (Wiskowski's Br. 17.) Again though, the risk of exigencies extended beyond the drive-through lane. The possibility that he might fall asleep again and cause injury or death presented an exigency because Officer Simon would not be able to rectify that potential tragedy after it occurred.

Wiskowski also argues that the attendant circumstances favor his position. However, he claims only that a reasonable person who just completed a 24-hour shift would be "alarmed" by a traffic stop. (Wiskowski's Br. 17.) It is unclear how Wiskowski's unverified allegation that he had just completed a 24-hour shift turned a prototypical traffic stop into something so alarming that an officer could not investigate a credible report that the driver had just fallen asleep at the wheel.

Finally, Wiskowski asserts that Officer Simon should have opted for the "obvious" alternative and just "moved on" after he saw Wiskowski depart the drive-through lane and make one successful left turn. (Wiskowski's Br. 17.) He offers no authority for the proposition that simply ignoring the issue that triggered an officer's community caretaker role is a viable "alternative." If such an alternative exists, it does not apply to this case. It would have been unreasonable for Officer Simon to ignore a credible report that a driver had fallen asleep just minutes earlier without verifying that the driver could safely drive home. If Wiskowski had fallen asleep again, it would have been too late for Officer Simon to engage as a community caretaker. Moreover, as the circuit court recognized, it would be "risky" to follow the truck to see how Wiskowski was driving. (R. 46:15.) If Wiskowski was "inclined to fall back asleep," he would "put everyone at risk." (R. 46:15.) Officer Simon had no other viable options.

In total, all four factors demonstrate that the officer's exercise of community caretaker function was reasonable.

CONCLUSION

This Court should affirm the circuit court's order denying Wiskowski's motion to suppress and his judgment of conviction.

Dated: November 8, 2023

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6182 words.

Dated: November 8, 2023

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated: November 8, 2023

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