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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2022AP001802 - CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

NOAH D. HARTWIG,

Defendant-Respondent

BRIEF OF DEFENDANT-RESPONDENT

Respectfully submitted,

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STATEMENT OF THE ISSUES

Whether there was reasonable suspicion to initiate a seizure.

The circuit court answered no.

Whether there was reasonable suspicion to extend the seizure.

The circuit court answered no.

Whether the "community caretaker doctrine" remedies that.

The circuit court answered no.

This Court should affirm the circuit court in all regards.

STATEMENT ON PUBLICATION

The Respondent has moved for a three-judge panel along with the submission of this brief, and believes that publication would be appropriate under the criteria outlined in Wis. Stat. § 809.23 given the recent changes to the doctrines involved as discussed herein.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

Deputy Heggie was in the parking lot of a DNR boat launch at about 6:20 P.M. on January 15, 2020. R. 18 (Evidentiary Hearing, September 9, 2022, hereinafter "Transcript."). There was an empty vehicle parked in the lot. *Id.* A Jeep drove into the lot and pulled next to the parked vehicle. *Id.* A young woman exited the passenger side of a Jeep, looked at Deputy Heggie, and quickly got into the parked vehicle. *Id.* Deputy Heggie found this suspicious, and so activated her lights, detaining both the young woman and driver of the Jeep, Noah Hartwig. *Id.*

Deputy Heggie asked for and received identification from Mr. Hartwig, along with an accounting of his activities which coincided with the account of the separately questioned young woman. *Id.* Deputy Heggie nonetheless detained Mr. Hartwig for an additional 20 minutes so that a dog could be summoned to perform a sniff of their vehicles. *Id.*

Mr. Hartwig was charged and moved to suppress evidence. After an evidentiary hearing on the issue, his suppression motion was granted. *Id.*

STANDARD OF REVIEW

The State's Brief accurately states the Standard of Review for this case.

ARGUMENT

The State's contention is that a person can be seized for an investigation because *someone they were with* looked at a cop funny. If the courts were to condone this seizure, it's hard to imagine a seizure that wouldn't be permissible. There is no set of facts when considered with great imagination in the most incriminating possible light that won't be sufficient to provide a *post hoc* justification of reasonable suspicion. The State includes many superfluous assertions of fact before and after what we have described in our summary of the facts above, but they are of no relevance to the totality of the circumstances analysis here. There was not reasonable suspicion to initiate a seizure, let alone to prolong it, and the "community caretaker doctrine" doesn't fix that for the State.

I. There was No Reasonable Suspicion to Initiate, Let Alone Extend, the Seizure.

The State mistakes the circuit court's findings. The circuit court did not find "that Deputy Heggie was allowed to ask Mr. Hartwig for his identification and run his information. . ." State's Brief at 15. What the court actually said was:

> It was certainly within Deputy Heggie's purview, given her investigation, to approach Ms. Wagner. At this point, *the analysis could stop because I don't think she had any reasonable suspicion at this point to detain or question Mr. Hartwig or to even approach his vehicle.*

Transcript at 54 (emphasis added).

But adopting defense counsel's for-the-sake-of-argument concession that Wis. Stat. § 968.24[1] would apply to ascertain the outer limits of how long a stop can last, the Judge continued

> . . . *To the extent I'm wrong about that* and to the extent that things changed upon Deputy Heggie approaching Ms. Wagner's vehicle. . . The deputy continued her investigation in asking Mr. Hartwig for his identification and his name and address. That is lawful, as conceded by the Defense. He provided that information. . . *Here, at the very least, this encounter should have ended*. Certainly, Deputy Heggie is entitled to run the license, see if it's valid or if there's any warrants for Mr. Hartwig or anything like that, so she's entitled to go back to her vehicle and do that and if there's nothing to it, to bring the license back to Mr. Hartwig and tell him to "have a nice night and go on your way," but that didn't happen here.

Transcript at 55-56 (emphasis added).

The Judge clearly found that the Deputy was not entitled to detain or question or even approach the vehicle of Mr. Hartwig at all, because there was no reasonable suspicion that would have permitted her to even temporarily seize Mr. Hartwig under Wis. Stat. § 968.24. He then went on to describe how those limits would have been exceeded long before the State argued.

There are no additional facts that change that analysis. Any attempt to posit as much reveals how absurd the proposition must be.

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[1] Temporary questioning without arrest. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time *when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime*, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped. Wis. Stat. § 968.24 (emphasis added).

> On a cold winter night, Deputy Heggie encountered a vehicle parked in a remote area and observed a purse inside the vehicle. While investigating, another vehicle pulled up next to the parked car. A young female exited the vehicle and got into the parked vehicle. Given the time, season, location and circumstances, Deputy Heggie had reason to be concerned for the female subject.

State's Brief at 13.

But the State ends its analysis there and doesn't tell us why the Deputy had reason to be concerned, which is exactly their job. Because it was a cold winter night, someone exiting a car and immediately entering another may have had hypothermia? Because the vehicle was parked in a remote area, a person getting into it may be lost? Because it was a young female who left her purse behind, maybe she was kidnapped but was now being released? All of these are utter nonsense. If the Deputy had a reason—if the State has a reason—it is incumbent upon them to say it. A requirement of these seizures, after all, is that there is a reasonable *articulable* suspicion. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968); *State v. Kramer*, 2009 WI 14, ¶ 36, 315 Wis. 2d 414, 435, 759 N.W.2d 598, 609.

The time for that articulation would have been at the evidentiary hearing on the matter. The State has not offered any reason, and a Reply Brief is too late to do so.

II. The Community Caretaker Doctrine does not fix that.

The so-called "community caretaker doctrine" was originally used to sanction the warrantless search of an impounded vehicle for an unsecured firearm that might otherwise fall into untrained or perhaps malicious hands. *Cady v. Dombrowski*, 413 U.S. 433, 443 (1973). Since then, the State has zealously capitalized on this "exception" to the Fourth Amendment to expand it to all manner of unconstitutional intrusions, including to warrantless searches and seizures in the home. *See e.g. State v. Pinkard*, 2010 WI 81, 785 N.W.2d 592, 327 Wis. 2d 346. The U.S. Supreme Court has recently begun, at least, to put a stop to this insidious erosion of the Fourth Amendment. *Caniglia v. Strom*, 141 S.Ct. 1596, 593 U.S.___, 209 L. Ed. 2d 604 (2021).

The so-called community caretaker doctrine has been used to deny suppression of evidence despite that it was obtained in a manner that would otherwise violate the Fourth Amendment when officers happen upon that evidence while performing a "community caretaking" function "totally divorced from detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady* at 441. While originally applied to evidence from vehicles, it has expanded to seizures, and evidence and seizures from not only vehicles but also from the home. *See, e.g., State v. Pinkard.*

But the notion of a free standing "community caretaker exception" to the Fourth Amendment was explicitly dispelled by our U.S. Supreme Court. *Caniglia v. Strom* at 1598-99; See also concurrence by Justice Alito.

When asserted as the justification for the seizure of a person, as here, courts must ascertain (1) whether a seizure has occurred, if so (2) whether the police conduct was a *bona fide* community caretaker activity, and if that then (3) whether the public need and interest outweigh the intrusion upon the individual's privacy. *State v. Kramer*, 2009 WI 14, ¶ 35, 315 Wis. 2d 414, 435, 759 N.W.2d 598, 609.[2]

Deputy Hegge's own admissions take this case out of the so-called "community caretaker exception" to the Fourth Amendment. She stopped the young woman and Mr. Hartwig because she was suspicious, not because she was acting in any community caretaker capacity. As explained in the section above, the State has not articulated any reason that the Deputy might be engaged in some community caretaking acts.

The State's argument that Mr. Hartwig was lawfully seized under the Community Caretaker Exception fails even on its own

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[2] Counsel does not suppose that the tests outlined in *Kramer* survive *Caniglia* any more than its conclusion does (that the "community caretaker doctrine" authorizes intrusions into the home). Even if it does, though, this case necessarily fails those tests.

terms. All prongs of the three prong test to determine whether a seizure was reasonable mitigate against such a finding. Had a seizure within the meaning of the fourth amendment occurred? Absolutely: The State concedes it (State's Brief at 13). Were the police acting in a *bona fide* community caretaker activity? Absolutely not: Any pretense to that effect ended when the officer saw a young woman who was fine, but thought it suspicious that she got in her car so quickly after seeing the officer. The officer was no longer concerned for someone who might be out in the cold without her purse. She was no longer acting in a community caretaker capacity, but rather, by her own admission, investigating suspicious activity. As the judge found, she told the defendant he was stopped for "suspicious activity." Transcript at 54. The State articulates no public interest that was served by the seizure.

Deputy Hegge took no actions prior to being suspicious that were violative of the Fourth Amendment, and so no exception or analysis need apply. All of the actions she took after becoming suspicious were by her own admission taken because she was suspicious, not because she was community caretaking. The question then becomes whether a young woman looking at Deputy Hegge and quickly getting into her car provides reasonable suspicion that a crime is afoot. It most certainly does not.

As the circuit court found, even if it did provide such suspicion, the outer confines of a detention relative to such suspicion would be to get the name and address and an explanation of activities from the accused. Once that was accomplished, and provided no additional reasonable suspicion, the seizure became illegal.

The sole basis for the Deputy seizing these two individuals was that she thought it suspicious when the young woman got into her car quickly after seeing the Deputy. That was unreasonable, and the resulting seizure was unreasonable and unconstitutional.

CONCLUSION

For the reasons stated herein, this Court should affirm the circuit court.

Dated at Madison, Wisconsin, February 7, 2023.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8) (b), (bm), and (c) for a brief. The length of the brief is 2,362 words.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: February 7, 2023.

Signed,

BY: Electronically signed by Anthony J. Jurek
ANTHONY J. JUREK