COURT OF APPEALS
District IV
Appeal No.: 2015AP1211-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMMY K. MILLER,

Defendant-Appellant.

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DEFENDANT-APPELLANT'S
REPLY BRIEF

On Appeal From a Decision Entered
on November 30, 2012, in the Columbia County Circuit
Court, the Honorable Allan J. White, Presiding,
Case No. 2012 CT 259

Respectfully Submitted,

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I. INTRODUCTION

It is clear after reading the State's brief that there is one issue which is not in dispute: Deputy Kaschinske had no reasonable suspicion of any wrongdoing at the time he seized and detained Mr. Miller. The State is arguing that the seizure of Mr. Miller was justified only because Deputy Kaschinske was exercising a bonafide community caretaker function. (Plaintiff-Respondent's Brief at 4). In order to uphold the seizure in this case, this court would have to make a de novo finding that a reasonable police officer would have had a basis to believe the passenger was in need of medical assistance. A review of the uncontroverted evidence establishes that Deputy Kaschinske had no objectively reasonable basis to believe the passenger was ill and needed his help.

The State also argues that once Deputy Kaschinske knew that the passenger was not in need of assistance, he simultaneously became aware of information which provided the reasonable suspicion necessary to continue the detention. Once again, contrary to Deputy Kaschinske's testimony, the uncontroverted evidence established that a reasonable police officer would have known the passenger was fine before he exited his squad car and well before he was actually in a position to become aware of new information warranting further investigation.

Finally, the State argues that Deputy Kaschinske had the probable cause required by Wis. Stats. §343.303 to administer a PBT to Mr. Miller. The uncontroverted evidence establishes that Deputy Kaschinske did not have sufficient evidence to administer the PBT under Wisconsin law.

II. THE DETENTION IN THIS CASE CANNOT BE UPHELD BASED UPON THE COMMUNITY CARETAKER DOCTRINE

The State has the burden of establishing that Deputy Kaschinske's warrantless seizure and detention was reasonable and lawful as a community caretaker activity. *McDonald v. United States*, 335 U.S. 451,456 (1984). The State acknowledges that it must meet the three prong test established by *State v. Anderson*, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987) (reversed on other grounds, 155 Wis. 2d 77, 454 N.W.2d 763 (1990), as discussed in Mr. Miller's brief to establish that the seizure of Mr. Miller was reasonable under the Fourth Amendment.

A. Mr. Miller Was Seized By Deputy Kaschinske.

The State "does not concede" that Mr. Miller was seized when Deputy Kaschinske activated his lights, pulled up behind him, and Mr. Miller acquiesced to the seizure and remained on the scene. (Plaintiff-Respondent's Brief at 11). The State's reliance on *State v. Kramer,* 315 Wis.2d 414, 759

N.W.2d 598 (2009), on this issue is misplaced. In *Kramer,* the suspect vehicle was parked in the distress lane on a county highway during early evening hours with his hazard lights activated. Kramer testified he had activated his hazard lights because he was concerned about other vehicles being able to see him. *Id.* at 419. The officer testified that hazard lights mean "there {are] typically vehicle problems". The officer in *Kramer* testified he activated his lights "out of safety considerations so other traffic could see me". *Id.* at 420

The stop in this case occurred during the early morning hours on a deserted residential street. The video establishes that only one car drove by during the twenty four minutes Deputy Kaschinske was on the scene. Mr. Miller's vehicle was easily seen where it was parked on the street – Deputy Kaschinske had watched it from a position at the stop sign a block away.

The detention in this case is no different than any other traffic stop involving a curbed vehicle which the United States Supreme Court has determined constitutes a "seizure" within the meaning of the Fourth Amendment. *Berkemer v. McCarty*, 486 U.S. 420, 436-437 (1984). Deputy Kaschinske made a show of authority by activating his lights and Mr. Miller yielded to that show of authority. *In re Kelsey C. R.,* 243 Wis.2d 422, 444, 626 N.W.2d 777, 789 (2001). Mr. Miller would not have felt free to ignore the police presence and go about his business. *Kaup v. Texas*, 538 U.S. 626, 630 (2003). Mr. Miller was seized by Deputy Kaschinske.

B. Deputy Kaschinske's Seizure of Mr. Miller Was Not a Bonafide Community Caretaker Function.

The State correctly states that the second prong of the *Anderson* test requires that Deputy Kaschinske's decision to seize Mr. Miller be a "bonafide community caretaker function", *State v. Anderson*, 142 Wis2d. at 169, and that function describes those actions by police in conducting investigations that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed. 706 (1973).

The State cites heavily from *Kramer* on the issue of what constitutes a "bonifide community caretaker function" that is "totally divorced" from the investigation of criminal activity. The officer in *Kramer* testified that he was not sure if anything illegal was being done in the car when he approached thereby acknowledging that he was motivated at least in part by law enforcement concerns. The Court in *Kramer* held that the officers subjective concerns did not preclude a finding that the police conduct was "totally divorced" from the investigation of criminal statutes when "under the totality of the circumstances an objectively reasonable basis for the community caretaker function" is shown. *Kramer*, 315 Wis2d. at 435.

Deputy Kaschinske's own testimony established that he had no law enforcement concerns and that he stopped the

defendant's vehicle only to see if the passenger was in need of assistance. The issue here is whether Deputy Kaschinske's concern for the passenger, whether he actually believed she was need of assistance or not, was objectively reasonable given the record of the hearing. The State argues in their brief:

> At the time Deputy Kaschinske pulled in behind the vehicle and activated his emergency lights, he knew that there was a woman outside of a vehicle who appeared to be sick, late at night, in a city, but it was a rural city, and he did not see anyone with her, so he chose to pull in to see if she needed assistance".

(Plaintiff-Respondent's Brief at 17).

The video showed that the passenger had not opened her door and was not yet observable as Deputy Kaschinske approached the stop sign and first sees Mr. Miller's vehicle parked down the block. Fifteen seconds later he pulls away from the stop sign and for the next minute the passenger can be seen standing outside the vehicle, walking around the passenger side of the vehicle and bending over into the passenger compartment. At no time is she seen doing anything to suggest "she was going to be sick". Mr. Miller is seen standing on the driver's side moving to the rear of the vehicle. There was simply not enough time during the few seconds she is off camera while Deputy Kaschinske is parked at the stop sign for the passenger to do what Deputy Kaschinske testified he observed her do: open the door, not

immediately exit the vehicle, "eventually" get out of the vehicle, and stare at the ground facing away from the vehicle looking like she was going to get sick. (R:24:6). Any reasonable officer viewing what is shown on the video of her movements and behavior before Deputy Kaschinske exits his squad could not have reasonably believed the passenger was sick or in need of assistance.

The video evidence undermines the reasonableness of Deputy Kaschinske's purported belief the passenger may have been sick. The record established that any reasonable police officer would have known the passenger was not in need of assistance at the time Deputy Kaschinske exited his vehicle and confronted Mr. Miller and his passenger.

The State also asserts that Deputy Kaschinske did not see Mr. Miller and believed the passenger may have been alone. (Plaintiff-Respondent's Brief at 17). To suggest that the concern for the passenger's condition was somehow furthered by a suggestion she may have been alone is simply ridiculous and indicative of how weak the State's position is here. The video establishes that the moment Deputy Kaschinske turned the corner to perform the stop Mr. Miller was standing in the area of the driver's door. Deputy Kaschinske knew Mr. Miller was with the passenger at the time of the seizure.

Deputy Kaschinske's testimony that he was motivated purely by a desire to assist the passenger is not supported by the evidence, not credible and unreasonable. The video

evidence is clear and dispositive. We know exactly what Deputy Kaschinske observed during the minute he pulled in behind the vehicle and sat in his squad prior to exiting. Any reasonable police officer would have seen that the passenger was showing no signs of needing assistance. This court should find that Deputy Kaschinske's conduct was not lawful as a bonafide community caretaker function.

C. Deputy Kaschinske's Seizure of Mr. Miller Was Not Reasonable

The State correctly asserts that the third prong of the *Anderson* test requires that the public need and interest in the community caretaker activity outweigh the intrusion of the privacy of the individual. *Anderson,* 142 Wis. 2d at 169-70. The State barely addresses this necessary prong of the analysis, ignoring Mr. Miller's assertions regarding the minimal public need and interest in the alleged community caretaker activity at issue in this case. The seizure of the defendant in this case occurred as he was legally parked on the side of the roadway. The degree of public interest in this factual circumstance was minimal at best. Investigating non-criminal behavior "necessarily falls at the low end of the 'public interest' and exigency scale." *State v. Anderson,* 149 Wis. 2d 663, 681, 439 N.W.2d 840 (Ct. App. 1989).

The State does in passing suggest there was no alternative to the intrusion that occurred:

> Deputy Kaschinske could have driven past the vehicle. Came back later to see if they were still there, but that may have been too late, if the woman was really sick.

(Plaintiff-Respondent's Brief at 17). Deputy Kaschinske had obvious alternatives to seizing Mr. Miller. Deputy Kaschinske could have simply pulled up next to Mr. Miller's vehicle and asked without activating lights or even exiting whether he and his passenger were OK. He did not need to activate lights and approach as he would in any traffic stop based on a suspicion of criminal activity.

The circumstances of this case did not require that Deputy Kaschinske seize the defendant. The seizure of Mr. Miller in this case was not reasonable as the public interest in the police activity here did not outweigh the intrusion on his privacy. The seizure of Miller by Deputy Kaschinske cannot be justified under the Community Caretaker Doctrine and was a violation of the Fourth Amendment.

II. DEPUTY KASCHINSKE'S SEIZURE OF MR. MILLER EXCEEDED THE SCOPE OF THE ORIGINAL JUSTIFICATION FOR THE STOP

The State acknowledges that, even if at its inception the seizure was a valid community caretaker function, the continued detention of Mr. Miller would not be legal after Deputy Kaschinske learned no emergency existed without having additional justification to conduct further investigation. Under the Fourth Amendment, lawful police

conduct can become unlawful when the scope and justification for the original stop is exceeded. *Berkemer*, 468 U.S. at 429. Deputy Kaschinske's extension of the detention here was illegal.

The State argues that Deputy Kaschinske's extension of the stop after he learned no community caretaker action was necessary did not violate the Fourth Amendment because he simultaneously was presented with evidence of criminal activity that warranted further investigation. The State argues that:

> ...by the time Deputy Kaschinske had learned that everything was Okay, Deputy Kaschinske already had more information, the odor of intoxicants, and then the Appellant's denial of consuming alcohol two times, which justified deputy Kaschinske's continued investigation in this matter.

(Plaintiff-Respondent's Brief at 18).

The uncontroverted evidence of the video establishes that nothing the passenger did as she was observed after Deputy Kaschinske pulled away from the stop sign supported a belief that she was in need of assistance. Deputy Kaschinske observed the passenger for one full minute after the few seconds she is off video. The evidence clearly establishes that a reasonable police officer would have known no bonafide community caretaker concern existed at the moment Deputy Kaschinske pulled in behind Mr. Miller's vehicle and at the time he exited his vehicle to confront Mr. Miller.

Deputy Kaschinske did not have the right after illegally seizing Mr. Miller to exit his squad and interrogate

him and his passenger and to be in a position to observe the odor of alcohol. Deputy Kaschinske did not have any reason to further the investigation after it was clear the passenger was not in need of assistance.

Even if Deputy Kaschinske did not know the passenger was not in need of assistance when he exited his squad, it is clear from the video that Deputy Kaschinske was not in a position to observe an odor of alcohol about Mr. Miller at the time he asked him "if everything was OK?" and was told "everything is fine". Deputy Kaschinske testified that he was just a couple feet away from Mr. Miller when he asked that question and was close enough to observe an odor of alcohol about Mr. Miller. (R:24:10, 11). The video clearly establishes that Deputy Kaschinske was some twenty feet away from Mr. Miller when he was told "everything is fine". Deputy Kaschinske was not in a position to have smelled an odor of alcohol or observed any bloodshot eyes when he was advised by Mr. Miller and the passenger there was no need for assistance.

Deputy Kaschinske had no basis to approach Mr. Miller and to detain him pursuant to the Community Caretaker doctrine at the moment a reasonable police officer would have known the passenger was not in need of assistance prior to exiting his squad. The Fourth Amendment would necessarily prohibit extending a community caretaker detention under these circumstances when Deputy Kaschinske's original justification for the stop had been

eliminated without additional information surfacing simultaneously which created a reasonable suspicion that would warrant furthering the detention under the Fourth Amendment.

IV. DEPUTY KASCHINSKE DID NOT HAVE THE PROBABLE CAUSE NECESSARY TO ADMINISTER THE PBT.

The State correctly asserts that to request a preliminary breath test (PBT), a law enforcement officer must have "probable cause to believe" a suspect was operating a motor vehicle while intoxicated. See. Wis. Stats. §343.303. Deputy Kaschinske did not have the probable cause necessary to request that Mr. Miller submit to a PBT.

The State argues that the record does not establish that the HGN test was improperly administered as argued by Mr. Miller in his brief. The State points out that the Court held it did not have evidence to find how the results of the tests would be impacted by Deputy Kaschinske deviating from the standard procedures all officers are taught to utilize when administering the tests. Mr. Miller disagrees. It is the State that has the burden of proof and Deputy Kaschinske himself testified that the accuracy of the tests is dependent on them being administered according to standard procedures. (R:24:25).

The uncontroverted evidence of the video was that Deputy Kaschinske did not perform the tests as he was

trained to do. His testimony at the hearing established that he didn't remember his training on how to move the stimulus during any of the three phases of the HGN test (R:24:26): how many passes he was trained to make with the stimulus, the rate he was trained to move the stimulus during the first phase of the test, how long he was trained to hold the stimulus during the second phase of the test, and the rate at which he was trained to move the stimulus during the third part of the test. (R:24:28). The record of the video, taken together with Deputy Kaschinske's testimony, clearly established that the results of the HGN test were not reliable and should not have been considered in the analysis of the existence of probable cause to request the PBT.

Contrary to the State's suggestion that Mr. Miller's speech was "slightly slurred", the video establishes that Mr. Miller was speaking clearly with no slurring. (R:24:12). The video also establishes that Mr. Miller had no balance issues or other indications of impairment. The results of the field tests did not support a finding that Mr. Miller was impaired. The State failed to meet its burden to establish that probable cause existed to support administering a PBT. Mr. Miller's arrest was illegal.

CONCLUSION

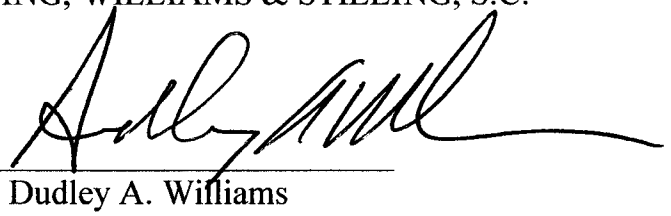
The record of this case clearly established that Deputy Kaschinske had no reason to be concerned about the passenger's welfare and the seizure was not, therefore, a

reasonable and lawful community caretaker activity. Continuation of the investigation after it had become obvious that the initial justification for the stop was unfounded was unlawful. The record establishes that Deputy Kaschinske did not have enough reliable evidence to establish the probable cause necessary to administer a PBT to Mr. Miller. The stop of the vehicle, the seizure and arrest of the defendant were all illegal and all evidence obtained as a result of that illegality should have been be suppressed.

Dated this 23rd day of October, 2015.

Respectfully submitted,

BUTING, WILLIAMS & STILLING, S.C.

By: 

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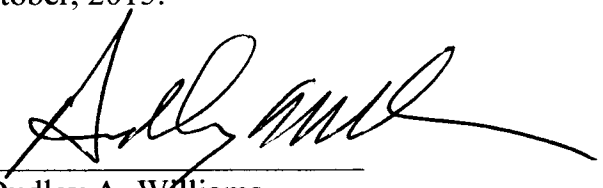
CERTIFICATION

I hereby certify that this document conforms to the rules contained in '809.19(8), Wis. Stats., for a reply brief produced with a proportional serif font. The length of this document is 2,900 words.

Dated this 23rd day of October, 2015.



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Defendant-Appellant.

CERTIFICATION

I hereby certify that on October 23, 2015, pursuant to Wis. Stats. §809(19), I filed an electronic copy of Defendant-Appellant's Reply Brief. I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy.

Dated this 23rd day of October, 2015.

Respectfully submitted,

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CERTIFICATION OF MAILING

Pursuant to Wis. Stat. ' 809.80(3)(b), I hereby certify that on the 23rd day of October, 2015, I mailed in a properly enclosed postage-paid box the original and nine copies of the Defendant-Appellant's Reply Brief addressed to the following named person(s) at the proper post office address, to-wit:

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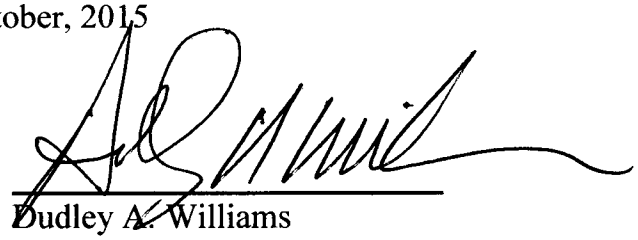

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