COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP374 **Cir. Ct. No. 2013CV313**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CITY OF LA CROSSE,

PLAINTIFF-RESPONDENT,

V.

CORINA DUCHARME,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] Corina Ducharme appeals an order of the circuit court affirming a judgment of the municipal court of the City of La Crosse, finding her guilty of first-offense operating while intoxicated (OWI). Ducharme

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

argues that the stop of her vehicle was neither supported by reasonable suspicion, nor justified by the community caretaker exception. For the reasons that follow, I affirm the circuit court's order.

BACKGROUND

¶2 At approximately 2:41 a.m. on August 1, 2012, Jovanna Randall, a police officer for the City of La Crosse, issued a citation to Ducharme for operating while intoxicated. At the trial before the City of La Crosse municipal court, Ducharme's counsel began by making a motion to suppress evidence based on an unlawful stop. It appears that a written motion had previously been filed, but a copy of the motion is not part of the record on appeal. The municipal court heard the testimony relating to the motion to suppress, which consisted solely of Officer Randall's testimony. What follows is a summary of Randall's testimony regarding the stop of Ducharme's vehicle.[2]

¶3 Randall was on patrol the morning of August 1, 2012. Randall was patrolling "in the vicinity of the boat landing." Randall had been "asked to follow … any kind of criminal activity in the area" because there had been "criminal activity in the vicinity of [the] boat landing." Randall testified, "[e]very year we have multiple entries into the boat houses that are … stationed" in the area, and "[p]eople would enter the boats that are … docked there, [and] steal belongings."

¶4 Randall saw a car parked in the parking lot near the boat landing. There were boat houses approximately fifty yards to the west of where the car was

[2] Ducharme's arguments relate only to whether the stop was reasonable. Accordingly, I do not discuss facts relating to what occurred after the stop.

parked. When asked whether she noticed anything unusual about the car, Randall testified: "[T]he parking lights were on and the right turn signal on, indicating it was going to make a right turn toward the river, if it were to move."[3] Randall explained that she was "concerned for the driver" because the driver "might possibl[y] be intoxicated or impaired or need medical attention." Randall further explained:

> [I]t's 2:41 a.m. …. That's an unusual time for anyone to be in that boat landing unless they're gaining access to a boat or have a trailer attached to the boat. [I]t's unusual to be parked with just your running lights and the turn signal on and I feared that somebody had passed out or was not aware of where they were.

¶5 Randall drove up behind the car and "was going to step out" of her squad car, but the car "moved forward approximately two feet." Randall shined a spotlight on the car and activated her squad's red and blue emergency lights. Randall testified that she felt that the driver of the car was "trying to leave the area before [Randall] could make contact with them." The car stopped and Randall made contact with the car's driver, who identified herself as Ducharme.

¶6 Before the municipal court, Ducharme's counsel argued that the stop was not supported by reasonable suspicion, and that the stop did not fall within the community caretaker exception. The municipal court rejected these arguments and denied the suppression motion. The municipal court subsequently found Ducharme guilty of operating while intoxicated.

¶7 Ducharme appealed to the circuit court, requesting "a record review" of the municipal court's decision pursuant to WIS. STAT. § 800.14(5). The circuit

[3] The City of La Crosse is situated along the Mississippi River.

court affirmed the decision of the municipal court, and Ducharme now appeals to this court.

STANDARD OF REVIEW

¶8 As noted, Ducharme appealed the municipal court's decision to the circuit court pursuant to WIS. STAT. § 800.14(5). An appeal under § 800.14(5) "shall be based upon a review of the proceedings in the municipal court." As this court has explained, "'an appeal ... based upon a review of a transcript of the proceedings' under sec. 800.14(5), Stats., does not permit the circuit court to review the record *de novo* and to substitute its judgment for that of the municipal court." ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 361, 369 N.W.2d 186 (Ct. App. 1985). Review under § 800.14(5) is limited "to an examination of the transcript to determine whether the evidence supports the municipal court decision." ***Metzl***, 124 Wis. 2d at 361.

¶9 Ducharme has now appealed to this court. We review the decision of the municipal court and not that of the circuit court. ***Id.*** When reviewing the municipal court's decision, "[t]he court of appeals applies the same standard of review as the circuit court." ***Id.*** at 362. Accordingly, we uphold the municipal court's factual findings unless they are clearly erroneous, and "[w]e search the record for facts to support the municipal court's findings of fact." ***Id.*** at 361-62.

¶10 While we uphold the municipal court's factual findings unless they are clearly erroneous, "[w]hether evidence should be suppressed is a question of constitutional fact." ***State v. Truax***, 2009 WI App 60, ¶8, 318 Wis. 2d 113, 767 N.W.2d 369. The application of constitutional principles to the facts is a question of law that we review de novo. ***State v. Pinkard***, 2010 WI 81, ¶12, 327 Wis. 2d 346, 785 N.W.2d 592.

DISCUSSION

¶11 In this appeal, Ducharme renews her argument that the stop of her vehicle was unlawful. Specifically, Ducharme argues that the stop was unlawful because: (1) it was not supported by reasonable suspicion, and (2) it was not justified by the community caretaker exception. As I explain below, I conclude that the stop was lawful because Randall was acting in a community caretaker capacity when she stopped Ducharme's vehicle. I therefore do not address whether Randall also had reasonable suspicion to stop Ducharme's vehicle. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (if a decision on one issue disposes of an appeal, we will not generally decide other issues raised).

¶12 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. An investigative stop is a seizure within the meaning of these constitutional provisions. ***State v. Harris***, 206 Wis. 2d 243, 258-59, 557 N.W.2d 245 (1996). To execute a valid investigatory stop, a law enforcement officer must have reasonable suspicion to believe that a crime or traffic violation has been or will be committed. ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. However, an investigatory stop not supported by reasonable suspicion may nonetheless be justified as an exercise of the officer's duties as a community caretaker. *See* ***State v. Maddix***, 2013 WI App 64, ¶14, 348 Wis. 2d 179, 831 N.W.2d 778. One of an officer's functions when acting as a community caretaker is to determine if a stopped motorist is in need of assistance. *See* ***State v. Kramer***, 2008 WI App 62, ¶19, 311 Wis. 2d 468, 750 N.W.2d 941, *aff'd*, 2009 WI 14, ¶39, 315 Wis. 2d 414, 759 N.W.2d 598.

¶13 "Wisconsin courts use a three-part test to determine whether an officer's conduct properly falls within the scope of the community caretaker exception." ***Maddix***, 348 Wis. 2d 179, ¶16. The court must determine:

> "(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."

Kramer, 315 Wis. 2d 414, ¶21 (quoted source and footnote omitted). I address each of these three elements in turn.

¶14 As to the first element, the parties do not dispute that Ducharme was seized when Randall pulled behind Ducharme's vehicle and activated her squad car's red and blue emergency lights. Therefore, the first element of the community caretaker exception's three-part test is met, and I continue to the second element.

¶15 The second element is whether the officer was engaged in a bona fide community caretaker function. "This requires [the court] to determine whether there is 'an objectively reasonable basis' to believe [that] there is 'a member of the public who is in need of assistance.'" ***Maddix***, 348 Wis. 2d 179, ¶20 (quoted sources omitted). In making this determination, we examine the totality of the circumstances. ***Id.***

¶16 Ducharme contends that Randall was not engaged in a bona fide community caretaker activity because "what was subjectively paramount for Officer Randall was her hunch [that] Ducharme might be burglarizing the boathouse or operating while intoxicated." Ducharme appears to argue that this court must examine Randall's subjective intent to determine whether the

community caretaker function was *paramount*. Ducharme bases this argument on language in ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973), stating that an officer's community caretaker functions are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," and also on language in ***Kramer***, 315 Wis. 2d 414, ¶35, stating:

> *Cady* was merely observing that community caretaker functions are "totally divorced" from an officer's law enforcement function because a different facet of police work is paramount in a community caretaker function than is paramount in a law enforcement function.

(Emphasis omitted.) However, as the City notes, our supreme court has rejected the argument that "the 'totally divorced' language" from ***Cady*** means "that if the police officer has any subjective law enforcement concerns, he [or she] cannot be engaging in a valid community caretaker function." ***Kramer***, 315 Wis. 2d 414, ¶30. Rather, the supreme court has explained:

> [A] court may consider an officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker; however, if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he [or she] has met the standard of acting as a bona fide community caretaker.

Id., ¶36.

¶17 The City argues that Randall was engaged in a bona fide community caretaker activity based on Randall's testimony that she was "concerned for the driver, that they might possibl[y] be intoxicated or impaired or need medical attention," and Randall's testimony that she "feared that [the driver] had passed out or was not aware of where they were." The City also makes the following argument as to why Randall's concerns were objectively reasonable:

> The time was … after 2 AM. The car was parked in a dark parking lot. As the officer approached the car, she noticed that its lights were on and its right turn blinker was on. Had the car turned in the direction indicated by the blinker, it would have driven towards the river, putting the driver in danger.

(Citations omitted.) Based on the totality of the circumstances, including the facts highlighted by the City, I agree with the City that Randall had an objectively reasonable basis to believe that a member of the public was in need of assistance. I therefore conclude that Randall was engaged in a bona fide community caretaker function. Because the second element is met, I continue to the third element.

¶18 The third element "calls for a determination [of] whether the officer[']s] conduct was reasonable," and requires this court to "'balance the public interest or need that is furthered by the officer[']s] conduct against the degree and nature of the intrusion on the citizen's constitutional interest.'" ***Maddix***, 348 Wis. 2d 179, ¶31 (quoted source omitted). In balancing these interests, we consider four factors:

> "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."

Kramer, 315 Wis. 2d 414, ¶41 (quoted sources omitted).

¶19 The City argues that the public need and interest outweighed the intrusion on Ducharme's privacy because "the intrusion into ... Ducharme's privacy … is … slight," in comparison to "[t]he danger posed by a disoriented person alone in the vicinity of a river" and "[t]he possible injury of a disoriented

person driving a vehicle." Based on consideration of the four factors stated above, I agree.

¶20 As to the first factor, this court has explained that "[t]he public has a substantial interest in encouraging police officers to be on the look-out for and offer aid to motorists who may be stranded or otherwise in need of assistance." ***Kramer***, 311 Wis. 2d 468, ¶19. These sorts of contacts "'are not only authorized, but constitute an important duty of law enforcement officers.'" ***Id.*** (quoted source omitted). Accordingly, the first factor weighs in favor of the reasonableness of Randall's actions.

¶21 As to the second factor, while Randall made a display of authority by activating her squad's red and blue emergency lights and shining the spotlight on Ducharme's vehicle, this was a reasonable measure under the circumstances. Randall indicated that she activated the emergency lights and the spotlight in response to Ducharme's vehicle starting to move. This limited show of authority, taken in response to Ducharme's own actions, weighs in favor of the reasonableness of Randall's actions.

¶22 As to the third factor, this case involved an automobile. As this court has explained, "'a citizen has a lesser expectation of privacy in an automobile.'" ***State v. Ziedonis***, 2005 WI App 249, ¶31, 287 Wis. 2d 831, 707 N.W.2d 565 (quoted source omitted). Because Ducharme was in her vehicle when Randall stopped her, this factor weighs in favor of the reasonableness of Randall's actions.

¶23 As to the fourth factor, Ducharme appears to suggest that Randall had feasible and effective alternatives to the type of intrusion that occurred here. Specifically, Ducharme asserts: "Had Officer Randall truly been acting in a bona

fide caretaker function, she would have pulled her vehicle alongside Ducharme's vehicle to see if she was okay, rather than immediately behind it with the emergency lights engaged." Ducharme's argument fails to take into account Randall's testimony indicating that that officer had planned to pull behind Ducharme's vehicle, exit her squad, and check on the driver, but that she instead activated her emergency lights because Ducharme's vehicle started to move forward. I conclude that Randall's response (pulling behind Ducharme's vehicle, activating the squad's emergency lights, and approaching Ducharme's vehicle) was a more reasonable and effective way for Randall to confirm that the driver of the vehicle did not need assistance, and I reject Ducharme's argument to the contrary. *See* ***Kramer***, 311 Wis. 2d 468, ¶25 (rejecting alternatives as less reasonable than "the one chosen by the officer," where the officer observed a vehicle stopped on a roadside after dark with its hazard lights flashing, pulled behind the vehicle, and activated his red and blue emergency lights to see if there was a need for help).

¶24 Considering all four factors as discussed above, I conclude that the public need and interest in this case outweigh the limited intrusion into Ducharme's privacy. Therefore, the third element of the three-part community caretaker test is met.

¶25 In sum, I conclude that: (1) a seizure occurred when Officer Randall pulled behind Ducharme's vehicle with her red and blue emergency lights flashing; (2) Randall was engaged in a bona fide community caretaker function; and (3) the community caretaker function was reasonably exercised under the totality of the circumstances. Officer Randall's conduct therefore fell within the scope of the community caretaker exception.

CONCLUSION

¶26 For the reasons set forth above, I reject Ducharme's argument that the stop in this case was unreasonable, and I therefore affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.