COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1122-CR **Cir. Ct. No. 2013CT328**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID C. MARKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LLOYD CARTER, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] David C. Marker appeals from his conviction for operating his vehicle while intoxicated with children under age sixteen as

[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.

passengers and denial of his motion for postconviction relief. Marker contends that the circuit court erred when it determined that the community caretaker function justified a police officer's warrantless stop of Marker's vehicle, based upon Marker's former wife's report that Marker was driving while intoxicated with their children in his vehicle.

¶2 Upon Marker's motion for reconsideration, we have withdrawn our prior opinion that affirmed the judgment on grounds that the former wife's tip created reasonable suspicion justifying the stop. Some of the facts supporting reasonable suspicion were merely described in the criminal complaint and not put into evidence at the motion hearing in question. We now determine that although an argument remains that reasonable suspicion existed to justify the stop, the evidence is stronger to support the circuit court's conclusion that the community caretaker doctrine justified the stop. We affirm the circuit court's determination that in view of the report that Marker was driving while intoxicated with children as passengers, the stop of his vehicle was a bona fide exercise of the police officer's community caretaking function.

Facts

¶3 The relevant facts are undisputed. A little after 6 p.m. on February 22, 2013, a Brookfield police officer received a dispatch to watch for Marker's Chevy pickup truck because Marker's former wife had called to report that Marker had just picked up his two children and that "she believed, based on her observations, that the ex-husband was intoxicated at that time." Marker and his former wife had met at a park and ride to exchange the children, and the former wife called to report that he was driving while intoxicated with the children as his passengers, heading in the direction of Brown Deer.

¶4 The police officer was monitoring traffic eastbound on Capitol Drive at the time he received the dispatch. He noticed a Chevy pickup truck pass by and determined that the vehicle was registered to Marker. The officer then stopped the vehicle. Later Marker was charged with operating while intoxicated and with a prohibited blood alcohol concentration, and with a minor child as passenger, which triggered enhanced penalties. WIS. STAT. § 346.63(1)(a) and (b); WIS. STAT. § 343.30(1q)(b)4m.

¶5 Marker moved to suppress evidence on the grounds that the arresting officer lacked reasonable suspicion to stop Marker's truck. The circuit court denied the motion. The court disputed Marker's argument that the tip was unreliable due to the fact that it was offered by a former spouse. The court stated that because of the fact that children were in the car, the stop was a reasonable exercise of the officer's "community caretaker function," in order to "preserve the status quo" and investigate the children's safety.

¶6 Marker pled guilty to operating while intoxicated with minor children in the vehicle. He filed a postconviction motion arguing that the court erred in concluding that the community caretaker doctrine justified the stop. The circuit court denied the motion and Marker appeals.

Discussion

¶7 On review of a motion to suppress evidence, we will defer to the circuit court's findings of fact unless they are clearly erroneous, but we review the constitutionality of a search or seizure de novo. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990). Whether an officer's exercise of the community caretaker function was constitutional is a question of law we review de novo. ***State v. Kramer***, 2009 WI 14, ¶16, 315 Wis. 2d 414, 759 N.W.2d 598.

¶8 The community caretaker exception to the warrant requirement applies when three elements are met: (1) a seizure took place, (2) the police conduct was a bona fide community caretaker activity, and (3) the public need and interest outweighed the intrusion on individual privacy. ***Id.***, ¶21. The first element is met because a seizure took place when the officer stopped Marker's truck. *See* ***State v. Harris***, 206 Wis. 2d 243, 255-56, 557 N.W.2d 245 (1996).

¶9 As for the second element, whether the conduct was a "bona fide" caretaker activity, we consider whether the police conduct was divorced from detection or investigation of evidence of a criminal violation. ***Kramer***, 315 Wis. 2d 414, ¶23. We look to the totality of the circumstances as they existed at the time of the police conduct in question. ***Id.***, ¶30. Where the circumstances otherwise created an objectively reasonable basis for the community caretaker function, the officer's subjective law enforcement concerns do not negate the caretaking justification.[2] ***Id.***

¶10 Turning to the case at hand, the totality of the circumstances supported a community caretaking function. Here, the circumstances that led to the stop—the mother of Marker's children having phoned police to report that Marker was intoxicated when he drove away with them moments earlier—

[2] The State "concedes" in its appellate brief that the officer "did not articulate an objectively reasonable basis" for stopping Marker's vehicle "in a community caretaker function." In fact, the record reflects that the information dispatched to the officer was that Marker "had just picked up two children, [and was] heading back to Brown Deer, [and] was believed to be intoxicated." That was the situation he was "investigat[ing]" when he followed and stopped Marker. So, the State's concession is not warranted by the officer's testimony.

More importantly, "[w]e are not bound by the parties' concessions of law, … particularly a concession based on an erroneous interpretation of the law." ***Lloyd Frank Logging v. Healy***, 2007 WI App 249, ¶15 n.5, 306 Wis. 2d 385, 742 N.W.2d 337.

provided an objectively reasonable basis to fear for the children's safety. There were over 5,000 alcohol-related traffic crashes on Wisconsin roads in 2012. WISCONSIN DOT, 2012 WISCONSIN CRASH FACTS at 79 (2014), available at http://www.dot.wisconsin.gov/safety/motorist/crashfacts/docs/crash-alcohol.pdf. Those accidents caused 223 deaths. ***Id.*** If Marker was allegedly driving his children while drunk, the children were in danger, so the officer was justified in stopping the vehicle to investigate the report.

¶11 The last element, whether the officer's exercise of the caretaking function was reasonable, requires us to balance the community interest that the officer was addressing against the intrusion on the individual's privacy interest. ***Kramer***, 315 Wis. 2d 414, ¶40. Relevant factors include the degree of the public interest and the exigency; the time, location, and degree of overt authority and force displayed; whether an automobile is involved; and the availability of feasible alternatives to the intrusion that was used. ***Id.***, ¶41. Obviously, the safety of children is of great public interest, and because the threat to the children was the car itself, there was really no feasible alternative to a simple investigatory stop to, as the circuit court stated, "preserve the status quo" and check on the children's welfare. The officer did not use a great degree of authority or force, but simply conducted a traffic stop and spoke to the driver. On balance, this was a reasonable exercise of community caretaking under the circumstances.

¶12 We reject Marker's claim that approving this stop is tantamount to a blanket exception for stops based on drunk driving tips. Marker attempts to liken his former wife to an anonymous informant because "complaints made by ex-significant others … at times … are fabricated." The comparison is ludicrous. The tip about Marker's drunk driving was nothing like the tip in ***Florida v. J.L.***, 529 U.S. 266, 271 (2000), which was completely anonymous and offered no

predictive information. Here, the caller identified herself as the former wife of a named individual, thus exposing herself to potential legal consequences had she been lying to the authorities about her observations. *See* ***State v. Rutzinski***, 2001 WI 22 , ¶32, 241 Wis. 2d 729, 623 N.W.2d 516. While it may be true that former spouses sometimes fabricate claims against one another, fabrication as opposed to veracity is determined on a case-by-case basis, not on a pretentious generalization about the character traits of former spouses. The facts in this very case demonstrate how readily the veracity of such a tip may be determined.

¶13 In view of the totality of the circumstances, the stop was a valid exercise of the community caretaking function.

By the Court.—Judgment and order affirmed.

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