COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1211-CR **Cir. Ct. No. 2012CT259**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMMY K. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Tommy Miller appeals a judgment of conviction for operating a motor vehicle while intoxicated, second offense, and the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

circuit court's order denying his motion to suppress evidence obtained by a sheriff's deputy after an encounter with Miller resulting in Miller's arrest. In making the motion, Miller argued that the encounter was a seizure for constitutional purposes, and that the State failed to prove that: the seizure was justified by the community caretaker doctrine; the deputy possessed the requisite level of suspicion to continue to detain Miller to administer field sobriety tests; and the deputy had "probable cause to believe" that Miller had been operating a vehicle in violation of a statute related to drunk driving, justifying a preliminary breath test (PBT). For the reasons set forth below, I affirm.

BACKGROUND

¶2 Miller filed a motion to suppress all evidence obtained as a result of what Miller argued was "an unlawful detention, search and seizure by a law enforcement officer" in violation of the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution. Miller argued that the deputy did not have reasonable suspicion or probable cause that Miller had committed, was committing, or was about to commit a crime or a traffic violation, did not have a valid arrest warrant, and was not lawfully acting as a community caretaker when the deputy seized, detained, and arrested Miller.

¶3 The deputy who arrested Miller gave testimony that included the following at the suppression hearing. One morning at about 2:08 a.m., while stopped in a squad car at a stop sign, the deputy observed a car parked by the side of a road that was adjacent to the one on which the deputy was travelling. The deputy saw a woman sitting in the car with the passenger side door open, but she was not getting out of the car. "[E]ventually she got out and looked like she was going to be sick." "She was standing just outside the passenger side door and was

looking at the ground, and I thought maybe she was going to puke or something was wrong." The deputy turned onto the adjacent street and pulled up behind the parked vehicle, with his squad car's red and blue overhead emergency lights activated.

¶4 The deputy exited his squad car and approached the parked car and the woman. As the deputy approached, the deputy noticed for the first time that there was someone with the woman, namely, Miller, who was standing at the rear of the parked car. The deputy asked, "Is everything all right?" Miller responded, "[E]verything is fine." Miller's eyes were glassy and bloodshot, and he smelled of intoxicants. Additionally, Miller's speech was slurred. When asked whether he had had anything to drink that night, Miller twice refused to answer the deputy. The woman with Miller responded that Miller had been drinking. The deputy asked if Miller had driven to his current location, and Miller responded that he had. The deputy asked Miller to perform field sobriety tests, and this occurred. Following the field sobriety tests, the deputy asked Miller to submit to a PBT, and Miller agreed. After the PBT, the deputy placed Miller under arrest.

¶5 Additional evidence at the suppression hearing included the playing of a video recording, containing images and audio taken by the deputy's squad car recording system on the night of the arrest. The parties differed, in arguments to the court, as to whether the police video corroborated or undermined the deputy's account.

¶6 The court found that the video was of little value in corroborating or undermining the deputy's testimony. The court found that the video failed to reveal "exact, precise details," to such an extent that "it's difficult to say that [the

images] prove anything other than … that the people were out of the vehicle and that eventually there were some tests that were given."

¶7 The court found that the deputy's testimony was credible, and not undermined by the video, in part because "[t]here's no way ... that you can tell from" the video whether Miller emitted an odor of alcohol, whether Miller had bloodshot eyes, or whether the field sobriety tests were properly administered.

¶8 In denying Miller's suppression motion, the court determined that under "the totality of the circumstances," the deputy was justified in making the initial contact with Miller, and that the deputy had the requisite levels of suspicion to administer the field sobriety tests and then the PBT. Miller later entered a guilty plea. Miller appeals.

DISCUSSION

¶9 Miller argues that the circuit court should have granted his motion to suppress because: (1) the officer seized Miller before detecting any signs of impairment, and the State failed to meet its burden of establishing that the deputy had reasonable grounds to do so, as a community caretaker or otherwise; (2) even if the community caretaker function justified the seizure, the deputy had insufficient reason to continue to detain Miller to administer field sobriety tests; and (3) the deputy lacked the requisite "probable cause to believe" required to administer the PBT, because the deputy "had no information" suggesting that Miller had violated any laws at the time of the seizure and because the deputy improperly administered the field sobriety tests.

¶10 "Whether evidence should be suppressed is a question of constitutional fact." ***State v. Samuel***, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643

N.W.2d 423. "When reviewing questions of constitutional fact, we apply a two-step standard of review. First, we will uphold a trial court's findings of historical fact unless they are clearly erroneous. Second, based on the historical facts, we review de novo whether" the facts meet the constitutional standard. ***State v. Walli***, 2011 WI App 86, ¶10, 334 Wis. 2d 402, 799 N.W.2d 898 (citations omitted).

Seizure

¶11 As the State points out, the deputy's activation of his squad car's red and blue overhead emergency lights and pulling up behind Miller's legally parked vehicle might not have constituted a seizure under precedent of our supreme court. *See* ***State v. Kramer***, 2009 WI 14, ¶22, 315 Wis. 2d 414, 759 N.W.2d 598. However, the State concedes the point for purposes of resolving this appeal, and I assume without deciding that a seizure occurred for constitutional purposes by the time the deputy observed signs that Miller was intoxicated. Based on this assumption only and for ease of reference, I use the word "seizure" for the rest of this opinion.

Circuit Court Findings of Fact

¶12 For the most part, Miller's arguments on appeal rest on attempts to refute the circuit court's findings of fact, but without providing an adequate basis to show clear error by the court in fact finding. Therefore, to clarify the facts that apply to the analysis, I first address Miller's argument that the circuit court clearly erred in failing to find that the police video refutes pertinent aspects of the deputy's testimony. For the following reasons, I reject Miller's arguments based on the video.

¶13 Miller argues that the video contradicts the deputy's testimony that he observed the woman seeming to make a delayed exit from the car and then looking as though she was in physical distress. Miller also contends that the video shows that the deputy was too far from Miller to detect an odor of intoxicants, that the video shows that Miller's eyes were not bloodshot, and that the audio portion of the video reflects that Miller's speech was not slurred. Miller further contends that the video shows that the clues to impairment to which the deputy testified during the field sobriety tests did not occur.

¶14 As referenced above, the circuit court found that the video does not shed light on whether the deputy was too far from Miller to smell intoxicants at the time the deputy testified that he could smell the odor, whether Miller's eyes were bloodshot, or whether the clues to impairment observed by the deputy during the field sobriety tests were present. As to the slurring issue, the court implicitly found that the audio is also of no help on this topic. In sum, the court essentially found that the video evidence added nothing of value to fact finding on any pertinent issue.

¶15 Having considered the record in its entirety and having viewed and listened to the video, I have no basis to conclude that the circuit court clearly erred in making its findings, including its findings that the video evidence does not add to fact finding on any pertinent issue. *See* ***Walli***, 334 Wis. 2d 402, ¶17 ("when evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the trial court's findings of fact based on that recording."). On each of the topics that Miller raises, nothing reflected on the recording necessarily undermines the deputy's testimony, which the court found to be credible. For these reasons, I conclude that the circuit court's findings of fact were not clearly erroneous.

Community Caretaker Function

¶16 Having upheld the circuit court's findings of fact crediting the deputy's testimony, I now address whether the facts meet the constitutional standards. Miller argues that the State failed to meet its burden of establishing that the deputy had legitimate grounds, acting as a community caretaker, to seize Miller, based on the possible physical distress of the woman because the deputy "could not have reasonably believed that anyone was in need of assistance."

¶17 When, as here, the State asserts a community caretaker function as justification for a seizure, the circuit court must first determine whether a seizure occurred under the Fourth Amendment, *see* ***State v. Blatterman***, 2015 WI 46, ¶42, 362 Wis. 2d 138, 864 N.W.2d 26, but as explained above that is not contested in this appeal. The next question is whether the police conduct was a bona fide community caretaker activity. ***Id.*** The final question is whether the public need for and interest in the police conduct outweighed the intrusion upon the privacy of the individual. ***Id.***

¶18 If the deputy here was not acting in a community caretaker capacity at the time of the seizure, based on these standards, then the seizure was unlawful and the evidence of intoxication must be suppressed.

¶19 Miller points to the second step of the test, arguing that the seizure was not bona fide community caretaker activity. Miller argues that the deputy's "only real motivation … would have been a desire to investigate mere hunches related to potential criminal activity." Relying on a statement by the United States Supreme Court that an officer's motivation in creating the Fourth Amendment event at issue must be "totally divorced" from any motivation to investigate a potential criminal violation, Miller argues that it is fatal to the State's argument

that, according to Miller, the deputy here appeared to have a subjective intent to investigate potential criminal activity. *See* ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973).[2]

¶20 Miller's argument is flawed, because the "totally divorced" statement from ***Cady*** has been interpreted by our supreme court to allow for subjective law enforcement interests in the community caretaker context. *See* ***Kramer***, 2009 WI 14, ¶30, 315 Wis. 2d 414, 759 N.W.2d 598. Whatever the precise meaning of "totally divorced," it cannot "mean ... that an officer must have subjectively ruled out all possibility of criminal activity in order to act in a community caretaker capacity." ***Id.***, ¶13. Therefore, "when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns." ***Id.***, ¶30

¶21 Moreover, Miller bases his argument about subjective law enforcement interests on speculation only, without providing direct support from evidence in the record. Indeed, the deputy's testimony appears to reflect only reasonable inferences to the contrary. To briefly recap, the deputy saw a woman, perhaps by herself, sitting with the passenger door of a car open, late at night. After a delayed exit from the car, she stood outside the car, looking as though she were in physical distress. The deputy testified that he had no law enforcement concerns, because the car was legally parked and the deputy observed no wrongdoing. The deputy's testimony that, at the time he activated his emergency

[2] As part of his argument that the seizure was not bona fide community caretaker activity, Miller contends that the deputy's testimony was proven unreliable through the video evidence, but I have already rejected this category of arguments. As stated in the text, my analysis rests on the facts as the circuit court found them, crediting the deputy's testimony.

lights, pulled in behind the car, and got out to investigate, he believed that the woman might be in need of assistance appears entirely reasonable on these facts. For these reasons, I conclude that the circuit court properly found the deputy's actions to be bona fide community caretaker activity.

¶22 Turning now to the third step of the test, whether the intrusion outweighs public interest in the community caretaker activity, a four-factor test applies:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, [and] 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.

Blatterman, 362 Wis. 2d 138, ¶48 (quoting ***Kramer***, 315 Wis. 2d 414, ¶41). Miller argues that his seizure by the deputy was not reasonable under this test.

¶23 I will be brief in addressing these factors, because Miller raises no substantial argument regarding any factor. As to the first factor, there is a clear public interest in having police check, at least briefly and unaggressively, on a person in the apparent circumstances of the woman here. The deputy could not have known whether an exigency existed without checking on her, and his actions in doing so were minimally intrusive.

¶24 As to the attendant circumstances factor, Miller argues that Miller and the woman appeared to be "in the process of going about their lawful business" at the time of the seizure, but the late hour, the street location, and the minimal display of overt authority and force all support the State's argument. *See* ***State v. Kramer***, 2008 WI App 62, ¶22, 311 Wis. 2d 468, 750 N.W.2d 941, *aff'd*,

2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598 (observing that, although pulling up behind a vehicle with overhead emergency lights activated is a display of authority, "[i]n particular, the red and blue emergency lights minimize the danger created by passing motorists who may not be attentive, a danger inherent in roadside stops along highways.").

¶25 Regarding the third factor, Miller acknowledges that this case involves a check on a person associated with an automobile.

¶26 Finally, regarding alternatives, Miller argues that the deputy should have pulled up alongside Miller's vehicle and initiated the conversation from there. However, this argument mirrors an argument that this court rejected in ***Kramer***, on the grounds that the alternative responses "are not the most effective responses under the circumstances because they would have required that the officer allow additional time to pass or would have required the officer to stop in the middle of the roadway." *See* ***id.***, ¶¶26-27. Precisely the same reasoning applies here. Moreover, given the fact that the woman was standing on the curb side of the parked car, it would have made little sense, so far as I can see, for the deputy to have pulled up on the opposite side of the parked car from the woman (*i.e.*, pulled up on the driver's side of the parked car) in order to check on the woman.

¶27 The public has a substantial interest in encouraging police to offer help in situations of the type presented here. *See* ***id.*** at ¶29 ("In many such situations, citizens would *want* an officer to stop and offer assistance."). For these reasons, I conclude that the public interest in a police officer making a seizure such as this, again assuming without deciding that this was a seizure, outweighs

the minimal intrusion to privacy, and that the seizure here was reasonable under the community caretaker function.

Continued Detention and Administration of Field Sobriety Tests

¶28 Miller challenges the circuit court's conclusion that the deputy had the requisite level of suspicion sufficient to justify continuing his detention for purposes of administering field sobriety tests, after the deputy had apparently learned enough to conclude that the woman was not in need of assistance, thereby eliminating the deputy's only justification for the continued detention. I reject this argument under the applicable legal standard.

¶29 Although it was primarily addressing the requisite level of suspicion to request a PBT, our supreme court in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 309-10, 603 N.W.2d 541 (1999), suggested that, in order to lawfully request that a driver perform field sobriety tests, an officer must have made some specific observations of impairment that support a reasonable suspicion that the driver is impaired. Reasonable suspicion that an individual is impaired rests on "specific and articulable facts which, taken together with rational inferences from those facts," suggest impairment. *See* ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting ***Terry v. Ohio***, 392 U.S. 1, 21 (1968)).

¶30 I conclude that the deputy here was presented with multiple specific and articulable facts suggesting impairment. As referenced above, the deputy smelled an odor of intoxicants coming from Miller. In addition, Miller's eyes were bloodshot and glassy, and he slurred his speech. Beyond those facts, Miller showed consciousness of guilt by being evasive on the question of his drinking, while the woman volunteered that Miller had been drinking. Under these

circumstances, the deputy was justified in administering field sobriety tests to Miller.

Preliminary Breath Test

¶31 Miller's challenge to the circuit court's decision regarding the PBT primarily looks back to the field sobriety tests. Miller contends that the deputy did not have the requisite level of suspicion to administer a PBT because the deputy had administered the field sobriety tests improperly, Miller did fine on some aspects of the field sobriety tests, and the deputy had "no information" that "Miller had operated a motor vehicle under the influence ...."

¶32 The deputy testified to the following. He administered three standardized field sobriety tests to Miller, namely, the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test. While performing the first test, the deputy observed six clues, which together indicated to the deputy "a high probability that" Miller had a blood alcohol content above .10. During the walk-and-turn test, Miller displayed two clues out of an available eight, which also indicated "a high probability" that Miller was beyond a blood level of .10. With regard to the one-leg-stand test, Miller exhibited two out of an available four clues, again indicating to the deputy "a high probability" that Miller's blood level was greater than .10.

¶33 A PBT "may be requested when an officer has a basis to justify an investigative stop but has not established probable cause to justify an arrest." ***State v. Felton***, 2012 WI App 114, ¶8, 344 Wis. 2d 483, 824 N.W.2d 871 (quoting ***State v. Fischer***, 2010 WI 6, ¶5, 322 Wis. 2d 265, 778 N.W.2d 629); *see also* ***Renz***, 231 Wis. 2d at 317 (quantum of proof required is "greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the

'reason to believe' necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest"). I conclude that the deputy had the requisite level of suspicion to administer the PBT here, and that the arguments Miller offers to the contrary have no merit.

¶34 Regarding Miller's assertion that the deputy improperly administered the field sobriety tests, Miller presented no expert or other evidence that the deputy improperly administered the field sobriety tests. In the absence of such evidence or any developed argument based on the facts as found by the circuit court, I cannot conclude that the circuit court erred in concluding that it lacked a basis to determine that the deputy did not properly administer the tests.

¶35 Regarding Miller's reference to his "passing" aspects of the field sobriety test, this is of little consequence given the other indicia of impairment that the deputy was presented with, summarized above.

¶36 In itself, it is frivolous for Miller to argue that that the deputy lacked *any* information, at the time he administered the PBT, supporting an inference that Miller had operated while under the influence. In any case, the facts surrounding the initial encounter with Miller, together with the results of the field sobriety test, easily justify administration of the PBT.

CONCLUSION

¶37 For all of these reasons, I affirm.

By the Court.—Judgment affirmed.

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