COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1162 **Cir. Ct. Nos. 2007TR15092**
2007TR15093

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. RICE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.[1] Daniel Rice appeals a judgment of conviction entered upon a guilty finding after a stipulated trial to the court for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

operating a motor vehicle while impaired (OWI) and operating a motor vehicle with a prohibited blood alcohol concentration (BAC), first offense. Prior to trial, Rice moved to suppress evidence obtained after an alleged unlawful stop and detention and an arrest without probable cause. Rice argues that the circuit court erred in denying his motion to suppress without an evidentiary hearing. We disagree and conclude, applying the standards enunciated in ***State v. Garner***, 207 Wis. 2d 520, 533-34, 558 N.W.2d 916 (Ct. App. 1996), that the court did not erroneously exercise its discretion in denying Rice's motion without an evidentiary hearing. We therefore affirm.

BACKGROUND

¶2 Daniel Rice was found asleep at the wheel of his motor vehicle, with the engine running, in the parking lot of the University of Wisconsin Memorial Union by a University of Wisconsin police officer. The officer had contact with Rice, but only after extensive efforts to arouse him. Based on her observations of Rice, the field sobriety tests and the results of a preliminary breath test, the officer arrested Rice for OWI-first offense. Additional facts will be provided later in this opinion.

¶3 Rice moved to suppress evidence of his intoxication and requested an evidentiary hearing on the motion. Rice later amended his motion to suppress and included evidentiary submissions in support of his motion. The circuit court denied Rice's amended motion to suppress without an evidentiary hearing. Rice was found guilty of OWI and of having a blood alcohol concentration over the legal limit following a stipulated trial to the court. Rice appeals the court's order denying his motion to suppress without an evidentiary hearing and the judgment of conviction for OWI.

DISCUSSION

I. Legal Standard for Determining Whether an Evidentiary Hearing Is Required on a Pretrial Motion to Suppress Evidence

¶4 The issue on appeal is whether the circuit court improperly denied Rice's amended pretrial motion to suppress evidence without an evidentiary hearing. When addressing motions brought after a conviction, circuit courts apply the two-part test set forth in ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972), to determine whether the defendant is entitled to an evidentiary hearing. ***State v. Velez***, 224 Wis. 2d 1, 17, 589 N.W.2d 9 (1999) (citing ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996)). To be entitled to a hearing on a postconviction motion, the defendant must allege facts in the suppression motion which would entitle the defendant to relief. ***Nelson***, 54 Wis. 2d at 497-98; ***Garner***, 207 Wis. 2d at 533. When the postconviction motion fails to allege sufficient facts entitling the defendant to relief, the circuit court may, within its discretion, deny the motion without an evidentiary hearing if the motion fails to allege sufficient facts to raise a question of fact; if the motion presents only conclusory allegations; or if the record conclusively demonstrates that the defendant is not entitled to a hearing. *See* ***Bentley***, 201 Wis. 2d at 309-10.

¶5 In ***Garner***, we considered the standard for determining when a defendant is entitled to an evidentiary hearing on a motion brought before trial to suppress witness identification evidence. We concluded that the ***Nelson*** test provided a good framework for evaluating Garner's motion, but concluded that ***Nelson*** alone "would not always be adequate to measure whether an evidentiary hearing is required for a *pretrial* motion to suppress identification." ***Garner***, 207 Wis. 2d at 532-33. Thus, we applied a modified version of the ***Nelson*** test to the pretrial motion to suppress witness identification, stating that, in addition to

meeting the requirements of ***Nelson***, a court addressing a pretrial motion such as Garner's must

> provide the defendant the opportunity to develop the factual record where the motion, alleged facts, inferences fairly drawn from the alleged facts, offers of proof, and defense counsel's legal theory satisfy the court of a reasonable possibility that an evidentiary hearing will establish the factual basis on which the defendant's motion may prevail.

Id. at 533. In ***Velez***, the supreme court subsequently adopted the ***Garner*** analysis, applying ***Garner***'s modified ***Nelson*** test to a pretrial motion to dismiss a criminal complaint. *See* ***Velez***, 224 Wis. 2d at 13.

¶6 Regarding the applicability of ***Garner*** to the present case, we find no published cases applying ***Garner***'s modified ***Nelson*** test to a pretrial motion to suppress anything other than witness identification evidence. However, nothing in the rationale of ***Garner*** would appear to limit ***Garner*** to witness identification evidence, and the supreme court in ***Velez*** has already expanded ***Garner*** to apply its modified ***Nelson*** test to pretrial motions other than those to suppress evidence. Moreover, Rice does not explain why ***Garner*** should not apply to his pretrial suppression motion,[2] and we are not aware of any principled reason it should not. Accordingly, we apply the ***Garner*** standard in reviewing the circuit court's order denying Rice's pretrial motion to suppress without an evidentiary hearing.

II. Standard of Review

¶7 We review de novo whether Rice's pretrial motion alleges sufficient facts to require an evidentiary hearing. *See* ***Velez***, 224 Wis. 2d at 18. We review

[2] In a brief footnote, Rice flags the question of whether ***Garner*** applies, but fails to develop an argument that it does not apply.

under the erroneous exercise of discretion standard the circuit court's denial of Rice's pretrial motion without an evidentiary hearing, taking into account whether the court fulfilled its obligation under ***Garner*** to ensure that Rice had a sufficient opportunity to develop the factual record supporting his motion. *See* ***id.***; ***Garner***, 207 Wis. 2d at 533.

III. Whether the Circuit Court Properly Denied Rice's Motion to Suppress Evidence Without an Evidentiary Hearing for Lack of a Legal Basis to Stop

¶8 The first issue is whether the officer had a lawful basis for stopping Rice. Our first task is to determine as a matter of law whether Rice's amended motion to suppress and the evidentiary materials submitted in support of the motion state sufficient facts to warrant an evidentiary hearing on this issue. Next, we consider whether the circuit court properly exercised its discretion in denying the amended motion without an evidentiary hearing on the legality of the stop.

A. The Motion Failed to Allege Sufficient Facts to Warrant an Evidentiary Hearing

¶9 Rice had three opportunities to persuade the court that it was reasonably possible that an evidentiary hearing would establish a factual basis upon which his motion to suppress would prevail. In his first motion, Rice alleged that the officer lacked reasonable suspicion to stop him. The court denied the motion based on its finding that the allegations were conclusory and devoid of facts to support either allegation. However, the court gave Rice an opportunity to renew his motion and to include additional materials for the court to consider.

¶10 Rice subsequently filed an amended motion to suppress and an affidavit from trial counsel averring that the motion was based on the police reports, a transcript of the police officer's statements at the administrative

suspension review hearing, and counsel's review of the DVD recording of Rice's stop and arrest. In his amended motion, Rice alleged that the officer lacked reasonable suspicion to stop him and that the officer was not acting in her capacity as a community caretaker when she stopped him because the officer failed to inquire regarding his well being. He also alleged that the officer lacked probable cause to arrest him. Counsel, however, failed to attach some of the materials referred to in the affidavit with the amended motion to suppress. The court denied the suppression motion without an evidentiary hearing, but again said it would grant a hearing if Rice could point to additional facts supporting "a reasonable possibility that an evidentiary hearing would establish a factual basis for the motion."

¶11 Rice submitted a third motion to suppress and included the following submissions: a copy of the transcript from Rice's administrative review hearing and a copy of the police report prepared by the arresting officer, as well as copies of the breathalyzer test results, the citations issued to Rice, the Informing the Accused form signed by the police officer, the intoximeter report, the alcohol/drug influence report, notice of intent to suspend operating privilege form, the responsibility agreement form, and the DVD recording of Rice's arrest. After reviewing the amended motion and submissions, the circuit court issued a final decision denying Rice's motion without an evidentiary hearing.

¶12 Upon our independent review, we conclude that the amended motion and submissions fail to provide sufficient facts to warrant an evidentiary hearing under the first prong of the ***Nelson*** test. Rice's allegation that the officer lacked reasonable suspicion to detain him is conclusory and unsupported by facts. Similarly, Rice's allegation that his detention was not consistent with the community caretaker function is also conclusory and not supported by facts.

Furthermore, Rice's suggestion that an officer must inquire as to a person's well-being to carry out a community caretaker function is not supported by reference to any legal authority and we know of no authority to support this contention. Because the amended motion to suppress does not allege sufficient facts, Rice has failed to meet his burden under the first prong of the ***Nelson*** test. We therefore turn to whether the court properly exercised its discretion under the second part of the ***Nelson*** test as modified by ***Garner*** in denying Rice's motion without an evidentiary hearing.

B. The Circuit Court Properly Exercised Its Discretion under Nelson as Modified by Garner in Denying the Motion without an Evidentiary Hearing

¶13 The circuit court denied Rice's motion to suppress without an evidentiary hearing on grounds that the evidence submitted by Rice showed that the officer had reasonable suspicion to stop Rice because his car was parked in a traffic lane in the Memorial Union parking lot, and on grounds that the officer was acting as a bona fide community caretaker when she seized and detained Rice. Because we conclude below that the stop was justified as an exercise of the officer's community caretaker function, we need not address whether the officer also had reasonable suspicion to stop Rice for a traffic violation. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (where one ground is sufficient to sustain the trial court's determination, we need not address additional grounds on appeal).

¶14 Both the United States Constitution and the Wisconsin Constitution prohibit unreasonable searches and seizures. U.S. CONST. Amend. IV; WIS. CONST. art. 1, § 11. A brief investigative stop is a seizure within the meaning of these constitutional provisions, and is reasonable if the officer can point to

specific, articulable facts supporting a reasonable suspicion that the individual has committed a crime. *See* ***State v. Harris***, 206 Wis. 2d 243, 258-59, 557 N.W.2d 245 (1996). However, a seizure not supported by reasonable suspicion may nonetheless be justified as an exercise of the officer's duties as a community caretaker. *See* ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973). Among an officer's functions 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.

¶15 We apply a three-part test to determine whether an otherwise unreasonable seizure by the police is justified under the community caretaker doctrine. ***Kramer***, 315 Wis. 2d 414, ¶21. First, there must be a seizure within the meaning of the Fourth Amendment. ***Id.*** Here, neither party disputes that a seizure occurred within the meaning of the federal and state constitutions, and therefore we conclude that the first element of the community caretaker test is satisfied.

¶16 Second, the police conduct must be a bona fide community caretaker activity. ***Id.*** To determine whether the police conduct was a bona fide community caretaker activity, we assess the totality of the circumstances surrounding that conduct. ***Id.***, ¶30. Where the totality of the circumstances provides an objectively reasonable basis for community caretaker activity, the police conduct meets the bona fide community caretaker standard. ***Id.*** The officer's subjective concerns will not negate that determination, although the officer's subjective concerns are one factor that may be considered in the totality of the circumstances. ***Id.***, ¶¶30, 36.

¶17 Third, the public's need and interest must outweigh the intrusion upon the privacy of the individual seized. ***Id.***, ¶21. To determine whether the

public's need and interest outweighs the intrusion on an individual's privacy, we consider four factors:

> (1) 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.

Id., ¶41 (citation omitted).

¶18 With regard to the second part of the community caretaker test, we conclude that the totality of the circumstances provides an objectively reasonable basis for community caretaker activity. The facts the circuit court relied on in reaching its conclusion that Rice's detention was appropriate as a community caretaker activity support its conclusion. The following facts are undisputed and are taken from the transcript of the administrative review hearing and from the officer's police report.

¶19 The officer came upon a vehicle parked in a lane of travel in the Memorial Union parking lot with its engine running at approximately 2:50 a.m. Seeing no movement within the vehicle, the officer honked her squad car's horn twice. She observed no response from within the parked vehicle. The officer then approached the vehicle, and observed Rice sitting in the driver's seat. Rice appeared to be passed out. The officer knocked repeatedly on the driver's side window to rouse Rice. She testified at the administrative hearing that her intent in "approach[ing]" Rice's vehicle "was [to] check [on his] welfare."

¶20 Rice argues that the officer could not have been acting as a bona fide community caretaker because she did not specifically inquire after his well-being.

We disagree. As we have noted, Rice points to no authority that requires an officer to specifically inquire as to a subject's well-being for the officer's action to be a bona fide community caretaker function.

¶21 With regard to the multi-factored third part of the test, we conclude that application of the factors to the facts of record demonstrate that the public need and interest for an officer to exercise her community caretaker function outweigh the limited intrusion on Rice's privacy. First, the public interest in providing assistance to a motorist who appeared to be unconscious and in clearing a public right-of-way weighs heavily in favor of officer intervention. Second, the surrounding circumstances supported the seizure. It was late at night, the motor vehicle was sitting with the motor idling in a traffic lane of a parking lot, and the motorist, who appeared to be passed out, failed to respond to the officer's repeated efforts to get his attention. Despite Rice's arguments to the contrary, the degree of overt authority used by the officer—specifically, activating her emergency lights—was appropriate and a reasonable safety measure under the circumstances. Third, the claimed exercise of the community caretaker function involved an automobile. *See* ***Cardwell v. Lewis***, 417 U.S. 583, 590-91 (1974) (persons have a lower expectation of privacy in a vehicle than in their home). Finally, the circumstance of a vehicle parked in the right-of-way under the control of an unresponsive individual called for the officer to stop and investigate; there were no other feasible, less intrusive alternatives to the officer's actions under the circumstances.

¶22 Applying the above factors, we conclude that a reasonably objective basis existed for the officer to believe that a motorist may have been in need of assistance when she stopped her vehicle behind Rice's vehicle and made contact with him. Rice was passed out; he failed to respond to the officer's repeated

efforts to get his attention. It was reasonable for the officer to be concerned about Rice's welfare. Accordingly, the officer's contact with Rice was justified as a bona fide community caretaker function.

¶23 Rice argues that an evidentiary hearing is necessary to take evidence concerning the officer's subjective motivation in detaining him. He asserts that the law on the community caretaker function in existence at the time Rice filed his amended motion to suppress would not have supported his detention. He maintains that the facts of this case would have been analyzed under the standard in effect at that time under ***State v. Anderson***, 142 Wis. 2d 162, 166, 417 N.W.2d 411 (Ct. App. 1987) (the actions of the police constitute a bona fide community caretaker function when they are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.") While it is true that this court's decision in ***State v. Kramer***, 2008 WI App 62, 311 Wis. 2d 468, 750 N.W.2d 941, had not been decided at the time Rice filed his amended motion to suppress, ***Kramer*** had been decided prior to the circuit court's final decision in this case. Thus, the rule in ***Kramer*** with respect to an officer's subjective intent had been in place for several months at the time the circuit court issued its decision here.

¶24 In the alternative, Rice argues that an officer's subjective intent remains a factor under ***Kramer*** in determining whether an officer's actions were justified pursuant to her community caretaker function, and therefore an evidentiary hearing was necessary under ***Kramer*** to determine the officer's subjective intent. We agree with Rice that an officer's subjective intent in stopping or detaining an individual was and continues to be a factor in determining whether an officer's actions constitute a bona fide community caretaker function at the time the circuit court issued its decision. *See* ***State v. Horngren***, 2000 WI

App 177, ¶12, 238 Wis. 2d 347, 617 N.W.2d 508; ***Kramer***, 315 Wis. 2d 414, ¶36. "[H]owever, if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, [s]he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." ***Kramer***, 315 Wis. 2d 414, ¶36. In this case, the circuit court considered the totality of the circumstances based on the materials Rice provided to the court, and concluded that the officer here was acting as a bona fide community caretaker.

¶25 In sum, because the stop was justified as an exercise of the officer's community caretaker function, we conclude that the record conclusively demonstrates that Rice is not entitled to an evidentiary hearing on the legality of the stop.

¶26 With regard to ***Garner***'s modifications to ***Nelson*** applicable to pretrial motions, we conclude that the circuit court provided Rice with an adequate opportunity to develop the record and thus fulfilled its obligations under ***Garner***. As noted, the court twice gave Rice additional opportunities to develop the factual basis for his motion to suppress before formally entering an order denying the motion without an evidentiary hearing. The court accepted and reviewed Rice's numerous additional submissions. The court provided Rice ample opportunity to develop the record. The court also gave Rice adequate opportunity to develop arguments to the court based on the facts and the law. Accordingly, we conclude that the court properly took into account Rice's ability to develop the factual basis for his motion to suppress and thus did not misuse its discretion in denying his motion to suppress evidence without an evidentiary hearing.

IV. Whether the Court Properly Denied Rice's Motion to Suppress Evidence for Lack of Probable Cause to Arrest Without an Evidentiary Hearing

¶27 Rice contends that the circuit court improperly denied his amended motion to suppress without an evidentiary hearing on the issue of whether there was probable cause to arrest him because the motion, along with the supplementary material, and the legal theories he presented, established a reasonable possibility that an evidentiary hearing would establish a factual basis on which his motion would prevail. We disagree.

¶28 In his amended motion to suppress, Rice alleged that his arrest was not supported by probable cause because "[h]is performance on [the field sobriety] tests did not indicate an impaired ability to drive due to intoxication"; the horizontal gaze nystagmus (HGN) test was improperly administered; the officer had Rice perform the balance tests, although Rice had back problems; and the DVD of the stop failed to establish that Rice exhibited any signs of intoxication, "such as slurred speech." In addition, Rice alleged that there was no probable cause under WIS. STAT. § 343.303 to administer the preliminary breath test (PBT); thus, the results of the test should not have been used in assessing probable cause to arrest.

¶29 On appeal, Rice's argument that the circuit court erred in denying his suppression motion without a hearing on the question of whether there was probable cause to arrest focuses on alleged problems in the administration of the HGN test, back problems that Rice asserts compromised his ability to execute the walk-and-turn and one-leg-stand tests, and visual evidence on the DVD that allegedly contradicts the officer's assertions that Rice exhibited signs of intoxication. However, Rice does not renew on appeal his argument that the

officer lacked probable cause under WIS. STAT. § 343.303 to request the PBT. Accordingly, we consider the results of the PBT—as noted, Rice registered a .10 BAC—in determining whether probable cause existed to arrest Rice for OWI.

¶30 Regarding Rice's challenge to the HGN test results, we agree with the circuit court that Rice's claim that the HGN test was "administered improperly" lacks specificity. While Rice cannot be expected to fully develop the factual basis to support a motion, his challenge to the HGN test lacks even a suggestion of how the HGN test was improperly administered. On its face, Rice's amended motion does not state an adequate basis for exclusion of the HGN test results. We therefore include these test results in determining the existence of probable cause.

¶31 Assuming without deciding that Rice's allegations concerning his back problems are sufficient to call into question the results of the walk-and-turn and one-leg-stand tests, we nonetheless conclude that the PBT result, HGN test results and additional facts contained in the record are sufficient to constitute probable cause to arrest Rice for OWI. These additional facts include that Rice was passed out in his car with the motor running in a traffic lane; failed to respond to the officer's efforts to rouse him; and gave the officer a dollar bill instead of his identification when asked by the officer to provide identification. Moreover, Rice showed various signs of intoxication such as slurry speech, watery and bloodshot eyes; emitted a strong odor of intoxicants; and admitted to drinking a couple of beers that evening.

¶32 In addition, we reject Rice's arguments that the results of the HGN and balance tests must be disallowed in the probable cause calculus. As noted, we agree with the circuit court that Rice's claim that the HGN test was "administered

improperly" lacks specificity. While Rice cannot be expected to fully develop the factual basis to support a motion, his challenge to the HGN test lacks even a suggestion of how the HGN test was improperly administered. Further, as for the assertion that Rice's back problems somehow affected the results of the one-leg-stand and turn-and-walk tests, the record contains no evidence that he either told the officer that his back was causing him trouble in executing the tests, or requested to be excused from the tests due to his back problems.

¶33 For the reasons discussed above, we therefore conclude that the allegations contained in Rice's motion are insufficient to require an evidentiary hearing on the issue of whether the officer had probable cause to arrest Rice for OWI.

¶34 Turning to the second part of the ***Nelson*** test as modified by ***Garner***, we conclude that, under the analysis set forth in ¶31 *supra*, the record conclusively demonstrates that probable cause existed to arrest Rice for OWI, and, therefore, Rice was not entitled to an evidentiary hearing. Further, as we concluded in ¶26 *supra*, the circuit court fulfilled its duties under ***Garner*** by allowing Rice an adequate opportunity to further develop the factual record supporting his suppression motion.

CONCLUSION

¶35 Rice had three opportunities to demonstrate to the court that he was entitled to an evidentiary hearing on his motion to suppress evidence. We conclude that his amended motion failed to provide sufficient facts to establish that there was a reasonable possibility that an evidentiary hearing would establish a factual basis on which Rice's motion might prevail. We also conclude that the circuit court properly exercised its discretion, after considering the record, Rice's

amended motion, counsel's arguments and offers of proof, and the law, in denying Rice's amended motion to suppress without an evidentiary hearing. We therefore affirm.

By the Court –Judgment affirmed.

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