COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1097-CR **Cir. Ct. No. 2009CT149**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JASON L. SEDAHL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Reversed and cause remanded for further proceedings.*

¶1 PETERSON, J.[1] The State appeals an order dismissing a criminal complaint charging Jason Sedahl with operating a motor vehicle while intoxicated,

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

fourth offense, and operating a motor vehicle with a prohibited alcohol concentration, fourth offense. The trial court concluded that law enforcement officers' failure to perform their community caretaker function warranted dismissal of the charges. We agree with the State that the community caretaker doctrine is not a legal basis for dismissing a criminal complaint. We therefore reverse and remand for further proceedings.

BACKGROUND

¶2 On April 16, 2009, at approximately 1:53 a.m., Dunn County Sheriff's Deputy Dennis Rhead was flagged down by Jason Sedahl, who was standing on the sidewalk along North Broadway Street in the City of Menomonie. Sedahl asked Rhead to give him a ride to his vehicle. Rhead responded that he could not give Sedahl a ride, but agreed to call a cab for Sedahl. Sedahl stated he was going to take the cab to the Red Cedar Medical Center, where his vehicle was parked, and from there he planned to drive home.

¶3 Rhead observed that Sedahl was "severely intoxicated," and Sedahl admitted to Rhead that he was "drunk off his ass." Rhead advised Sedahl he should not drive because he would be arrested or would injure someone. Sedahl repeated that he intended to drive himself home. Rhead then notified the Menomonie Police Department that Sedahl intended to drive.

¶4 Sergeant Rick Hollister of the Menomonie Police Department then responded to North Broadway Street. He observed that Sedahl was intoxicated and was not fit to drive. Hollister advised police officers in the area to respond to the Red Cedar Medical Center and watch for Sedahl.

¶5 Kelly Rauscher, a Menomonie police officer, responded to the Red Cedar Medical Center. When Sedahl arrived, he approached Rauscher and identified himself. Rauscher told him she was there to make sure he did not drive. Sedahl stated that "he was going to get in his vehicle and drive and … he paid taxes and could do what he wanted to do." Sedahl was loud and argumentative and made a number of offensive comments to Rauscher. Rauscher conceded Sedahl's behavior would have justified arresting him for disorderly conduct. However, she testified it was not uncommon for people to talk to police officers in that manner.

¶6 Rauscher offered to call Sedahl a cab or call someone to give him a ride home. Sedahl refused to provide Rauscher with any contact numbers and insisted he would drive himself home even though he knew he was intoxicated. Rauscher obtained Sedahl's home phone number from the dispatch center, but when she called she reached a generic voicemail message. Sedahl refused to provide Rauscher with another phone number for his wife.

¶7 Throughout her contact with Sedahl, Rauscher repeatedly told him he would be arrested if he attempted to drive. Despite these warnings, Sedahl ultimately entered his vehicle, started it, and revved the engine. Rauscher then parked her patrol car behind Sedahl's vehicle to prevent him from driving away and arrested him.

¶8 Sedahl subsequently moved to dismiss the charges based on the officers' failure to "effect what the community caretaker function is." Sedahl argued the officers, as community caretakers, had a duty to prevent him from driving while intoxicated. Specifically, he argued they should have arrested him for disorderly conduct or taken him into custody pursuant to WIS. STAT. ch. 51

(the Mental Health Act) or ch. 55 (the Protective Services System). The trial court granted Sedahl's motion, stating:

> There were circumstances that, let's say Mr. Sedahl was not at his best behavior, would probably be a way to describe it, a lot of his behaviors with the officers that night were left wanting.
>
> [The officers] had several options that they could have exercised, and of course we expect officers to have thick skins, the members of the public that they end up dealing with, we understand that … they come in all shapes and sizes in their presentation to the officers. But in this particular case, the officers could have arrested Mr. Sedahl for a disorderly conduct long before he got behind the wheel and he was specifically instructed not to drive.
>
> But he chose to end up getting into his vehicle and initiating the operating of that vehicle in full view of the officers.
>
> Given those circumstances, I'm granting the defendant's motion in this case finding that the officers should have exercised their community caretaker function and prohibited—because of the circumstances Mr. Sedahl presented in this case, that he certainly was a danger to the public and to himself by him getting behind a wheel, and they sure certainly had a situation where they easily could have interceded and provided assistance both to Mr. Sedahl and the public.

The State appeals.

DISCUSSION

¶9 The dismissal of the criminal charges against Sedahl in this case amounts to exclusion or suppression of evidence. Until fairly recently, the general rule was that a court could not suppress evidence absent a violation of an individual's constitutional rights or of a statute expressly allowing suppression as a sanction. *See, e.g.,* ***State v. Begicevic***, 2004 WI App 57, ¶26, 270 Wis. 2d 675, 678 N.W.2d 293. However, the Wisconsin Supreme Court recently held that a

circuit court has discretion to suppress evidence obtained in violation of a statute that does not specifically permit suppression, depending on the facts and circumstances of the case and the objectives of the statute. ***State v. Popenhagen***, 2008 WI 55, ¶68, 309 Wis. 2d 601, 749 N.W.2d 611.

¶10 In this case, the trial court did not find, and Sedahl did not argue, that the officers violated his constitutional rights. Additionally, the trial court did not find that the officers violated any statute. While Sedahl argues on appeal that the officers violated WIS. STAT. § 51.45(11)(b)[2] by failing to take him into custody before he got behind the wheel, he did not make this argument in the trial court. Moreover, § 51.45(11)(b) does not expressly permit suppression, and the trial court did not consider the facts and circumstances of the case and the objectives of the statute to determine whether suppression was warranted. *See* ***Popenhagen***, 309 Wis. 2d 601, ¶68. The trial court's dismissal of the charges against Sedahl was not based on either a constitutional or statutory violation.

¶11 Instead, Sedahl's motion and the trial court's decision were based on the community caretaker doctrine. Our supreme court has recognized that police officers may perform two types of functions: law enforcement functions and community caretaker functions. *See* ***State v. Kramer***, 2009 WI 14, ¶32, 315 Wis. 2d 414, 759 N.W.2d 598. When an officer discovers a member of the public who is in need of assistance, aiding that person is a community caretaker function. ***Id.*** "[A] police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and

[2] WISCONSIN STAT. § 51.45(11)(b) states that "[a] person who appears to be incapacitated by alcohol shall be placed under protective custody by a law enforcement officer."

seizures." ***State v. Pinkard***, 2010 WI 81, ¶14, 785 N.W.2d 592. For instance, in ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973), the United States Supreme Court held that a warrantless search of a vehicle was permissible because police were engaged in "what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

¶12 Sedahl argues the community caretaker doctrine placed an affirmative duty on the officers in this case to prevent him from driving while intoxicated. Because the officers did not do so, he contends dismissal of the charges against him was proper. However, the only Wisconsin case law dealing with the community caretaker doctrine uses the doctrine to justify warrantless searches and seizures. No Wisconsin case holds that the doctrine places an affirmative duty on police to intercede and take a person into preventative detention prior to the commission of a crime. No Wisconsin case authorizes the dismissal of criminal charges based on law enforcement officers' failure to perform community caretaker functions. Sedahl has attempted to create a defense where none exists. There is no legal authority for the trial court's use of the community caretaker doctrine to dismiss the charges against Sedahl.

¶13 In attempt to support the dismissal, Sedahl poses a hypothetical. He asks whether it would have been reasonable for the officers to do nothing if, instead of telling them he was going to drive while intoxicated, he had told them he was going to burglarize a house across the street and hurt anyone he found inside. We could even posit that Sedahl told police he was going to kill the house's occupants. Of course, in this scenario, the officers' failure to intervene would be unreasonable. However, the salient question is not whether the officers' actions were reasonable. The question is whether a court could dismiss charges of

homicide and burglary because the police failed to stop Sedahl from committing those offenses. Obviously, a court could not. This case is no different. While the officers' failure to take Sedahl into custody before he operated a motor vehicle may not have been the most reasonable course of conduct, it did not provide a legal basis for dismissing the charges against him.

¶14 The recognized defense closest to Sedahl's theory is entrapment, which is available "to a defendant who has been induced by law enforcement to commit an offense which the defendant was not otherwise disposed to commit." ***State v. Pence***, 150 Wis. 2d 759, 765, 442 N.W.2d 540 (Ct. App. 1989). Entrapment is not a basis for pretrial dismissal, but is an affirmative defense a defendant has the burden of proving at trial. *See* ***id.*** (a defendant must prove by a preponderance of the evidence that he or she was induced by law enforcement to commit a crime).

¶15 Even looking at the allegations pretrial, the officers' actions did not constitute entrapment. The officers did not induce Sedahl to commit an offense. To the contrary, they repeatedly tried to talk him out of driving while intoxicated and offered to find him an alternate means of getting home. Moreover, the offense was one that Sedahl was otherwise disposed to commit. He told the officers multiple times that he wanted to drive, even though he knew he was intoxicated.

¶16 Because entrapment allows a person to go free who would otherwise be guilty, it is disfavored in the law and should not be entertained lightly by the courts. ***State v. Hilleshiem***, 172 Wis. 2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992). If courts should be reluctant to entertain the defense of entrapment, surely they should not recognize a defense that allows dismissal of charges when the government's conduct is less culpable and the defendant's conduct is more

culpable. Here, the officers merely failed to dissuade Sedahl from committing an offense he already intended to commit. This conduct did not warrant dismissal of the criminal complaint.

¶17 We conclude the trial court erred by dismissing the charges against Sedahl without any legal authority to support its ruling. Police officers' failure to perform community caretaker functions does not justify the dismissal of criminal charges. We therefore reverse the trial court's order and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

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