COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2844-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

LEON J. SEESE,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed in part; reversed in part and cause remanded.*

NETTESHEIM, J. This case involves an appeal and a cross-appeal relating to the arrest of Leon J. Seese for operating a motor vehicle while under the influence of an intoxicant (OWI), second offense, contrary to § 346.63, STATS. The State appeals the trial court's order suppressing evidence obtained during the

traffic stop which led to Seese's arrest. The trial court ruled that the police did not have probable cause to believe that Seese had operated a motor vehicle because Seese's vehicle was legally parked and the engine was not running. Based on that ruling, the court granted Seese's motion seeking suppression of evidence garnered as a result of the arrest. We conclude that the facts provided the police with circumstantial evidence of Seese's operation of the vehicle. Therefore, we reverse the suppression order.

Seese cross-appeals the trial court's further ruling that his initial detention by the police was reasonable. Seese argues that the police lacked the reasonable suspicion necessary to approach his vehicle and conduct a temporary detention pursuant to § 968.24, STATS. We conclude that the police were engaged in legitimate community caretaker activity when they approached Seese's vehicle and then temporarily questioned him. We affirm this portion of the trial court's ruling.

On May 5, 1997, at approximately 2:10 a.m., Officer Thomas Roberts and another officer of the Sheboygan police department observed a brown pick-up truck parked at the side of the street. The vehicle's headlights were on but very dim. As the officers drove closer to the vehicle, they observed a male, later identified as Seese, sitting in the driver's seat of the vehicle apparently sleeping. When the officers pulled up behind the vehicle and activated their emergency lights, Seese suddenly sat up and put his hands in the air. When Roberts approached the truck, Seese rolled down his window to speak with him. Roberts immediately noticed a strong odor of intoxicants coming from the vehicle.

Before Roberts requested any identification, Seese handed Roberts his boating registration form and told Roberts that he was parked next to his boat.

The officers observed that there was not a boat anywhere in the area. Seese then attempted to exit his vehicle. Roberts told him to remain in the vehicle and produce a driver's license, but again Seese attempted to exit the vehicle. Roberts again told Seese to remain in the vehicle and produce a driver's license. Eventually Seese produced the license. During this time, Roberts noticed that Seese was very disoriented and his speech was very slurred.

Roberts then directed Seese to exit the vehicle for purposes of field sobriety testing. When Seese exited the vehicle he supported himself with the door and side of his truck. Seese failed the tests and Roberts arrested him for operating a motor vehicle while intoxicated.

On July 16, 1997, Seese entered a plea of not guilty to OWI and demanded a jury trial. His plea was accompanied by a motion for suppression of evidence alleging that the police had unlawfully stopped and detained him and that his later arrest was without probable cause. At the close of the motion hearing, the trial court ruled that the officers' initial detention and investigation were reasonable, stating: "I certainly appreciate that the law enforcement officers stop behind this car; that they investigated it to make sure that Mr. Seese was okay. I have no problem with that. I think you have an obligation to do it …." However, the trial court granted Seese's motion to suppress based on the court's further holding that the officers lacked probable cause to believe that Seese had "operated" the vehicle. The State challenges this finding on appeal. Seese cross-appeals the trial court's finding that the officers' initial stop was reasonable.[1]

[1] We note that the trial court's written order, dated September 19, 1997, does not address its finding regarding the officers' initial detention of Seese. However, it is clear from the trial court's oral decision that it found the initial detention to be reasonable.

Although the issue does not arise until Seese's cross-appeal, we begin by addressing the legality of the officers' initial approach to Seese's vehicle and their ensuing temporary questioning of Seese prior to the arrest. Seese contends that the officers did not have a reasonable suspicion justifying his initial temporary detention under ***Terry v. Ohio***, 392 U.S. 1 (1968), and § 968.24, STATS. However, the State defends the trial court's ruling on "community caretaker" grounds.[2] Seese questions whether the court's ruling was based on this theory. We address this question first.

In ruling on Seese's motion to suppress evidence based on the initial detention, the trial court stated: "I certainly appreciate that the law enforcement officers stop behind this car; that they investigated it to make sure that Mr. Seese was okay. I have no problem with that. I think you have an obligation to do it …." At the close of its decision, the court made the following comments—apparently aimed at Roberts: "So please keep checking people. If you see [defense counsel] at three in the morning on the side of the road sleeping in his car with the headlights on please investigate, [because] he might need help …." Although the trial court did not expressly speak the phrase "community caretaker," the court's remarks invoke the considerations underpinning the "community caretaker" function of the police. We conclude that the court's ruling was based on this doctrine and we will address the issue in that context.

The freedom of the police to act is not limited to cases where there is probable cause as to the commission of a crime. *See* ***State v. Anderson***, 142

[2] Although the State's brief cites to ***Terry v. Ohio***, 392 U.S. 1 (1968), its substantive argument does not develop the law of ***Terry*** or § 968.24, STATS. Instead, the State's argument addresses the issue under the law of "community caretaker activity."

Wis.2d 162, 167, 417 N.W.2d 411, 413 (Ct. App. 1987). "Police actions beyond the investigation of crime constitute 'a part of the "community caretaker" function of the police which, while perhaps lacking in some respects the urgency of criminal investigation, is nevertheless an important and essential part of the police role.'" ***Id***. (quoting ***Bies v. State***, 76 Wis.2d 457, 471, 251 N.W.2d 461, 468 (1977)). In reviewing police actions taken under the community caretaker function, we must determine whether the police had a right to be where they were, make their observations and take responsive action. *See* ***id***. When a seizure within the meaning of the Fourth Amendment has occurred, it may be justified if the police conduct was bona fide community caretaker activity and if the public need and interest outweigh the intrusion upon the privacy of the individual. *See* ***id***. at 169, 417 N.W.2d at 414.

Here, the police were engaged in routine neighborhood patrol during the early morning hours when they observed Seese's vehicle legally parked on a public road with its headlights on, but dimmed, and a person apparently sleeping behind the steering wheel. Seese does not dispute that the officers had the right to be where they were and to make these observations. The question is whether the officers were entitled to check out the situation or were required to ignore it. We hold that the officers were entitled to investigate the matter. The person in the vehicle may well have been in distress. This is especially so since the headlights were on, but dimmed, suggesting that the engine was not running and that the person had been in the location for some time.

Seese contends that Roberts did not detain him to ascertain if he needed assistance but rather detained him because he had a "hunch that something untoward might be going on." In support, Seese relies on the fact that Roberts activated his emergency lights when pulling behind Seese's vehicle. Seese

contends that this "contradicts any contentions that he simply wanted to know if Mr. Seese was all right." We are unpersuaded.

Commonsense and experience demonstrate that police officers routinely activate emergency lights whether they are assisting motorists in distress, issuing citations or arresting motorists who have violated the law. In addition, we reject Seese's argument that police conduct indicative of an investigation necessarily defeats any justification of community caretaker activity. Situations encountered by the police are often ambiguous—further investigation might reveal whether someone is in need of assistance or whether criminal activity is afoot. We are satisfied that the officers in this case were engaged in bona fide community caretaker activity when they approached Seese's vehicle. Thereafter, upon making direct contact with Seese, evidence of Seese's possible intoxication immediately surfaced and the officers were entitled to pursue that suspicion.

A community caretaker analysis also requires that we balance the public interest and need for the police action against the intrusion of the citizen's privacy. Although Seese argues that the officers were not engaged in bona fide community caretaker activity when they intruded upon his privacy, he does not contend that his interests against such an invasion—if deemed community caretaker activity—outweigh the public's need and interest. In any event, we conclude that it does not. Any intrusion upon Seese's privacy was minimal. Roberts simply approached the vehicle in order to speak with Seese and ascertain that he was not in need of assistance and that "[no] type of activity [was] going on in the neighborhood that possibly shouldn't be." We are satisfied that the public need and interest in having officers engage in activity designed to ensure the safety of both the driver of a vehicle on a public road and the surrounding residents are not outweighed by a minimal intrusion of the driver's privacy. We

affirm the trial court's ruling that initial temporary detention of Seese's vehicle was justifiable community caretaker activity.

We thus move to the State's contention on appeal that the trial court erroneously found that the officers lacked the requisite probable cause to believe that Seese had "operated" a motor vehicle while under the influence of intoxicants. The underlying facts of this case are not disputed on appeal. Whether those facts meet the constitutional standard of probable cause to arrest is a question of law which we review de novo. *See* ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987).

Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. *See* ***State v. Truax***, 151 Wis.2d 354, 359, 444 N.W.2d 432, 435 (Ct. App. 1989). It is to be judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *See* ***id***. at 360, 444 N.W.2d at 435. The evidence need only lead a reasonable officer to believe that guilt is more than a possibility; it need not be sufficient to prove that guilt is more probable than not. *See* ***id***.

The State contends that the undisputed facts coupled with the reasonable inferences which can be drawn therefrom provide grounds for probable cause. We agree. When the officers approached Seese's vehicle, the headlights were on and the engine was not running, but the keys were in the ignition. There were no other occupants in the vehicle and no other persons were observed in the area who might have operated the vehicle. A reasonable inference (indeed the *most* reasonable inference) to be drawn from these facts is that Seese drove his vehicle to the location, parked it, turned off the engine but not the headlights, and

fell asleep. We conclude that the available evidence was sufficient to lead a reasonable officer to believe that Seese's operation of the vehicle was more than a possibility.

Seese maintains, however, that because the motor vehicle was not running when the officers encountered him, the officers lacked the requisite probable cause to believe that he "operated" the vehicle within the meaning of § 346.63(3)(b), STATS. The trial court agreed, finding that the State "failed to meet [its] burden of proof to show that there was probable cause to believe that the defendant was operating the motor vehicle."

Section 346.63(3)(b), STATS., defines "operate" as "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Seese argues that our holdings in ***County of Milwaukee v. Proegler***, 95 Wis.2d. 614, 626, 291 N.W.2d 608, 613 (Ct. App. 1980), and ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis.2d 185, 189-90, 366 N.W.2d 506, 508 (Ct. App. 1985), necessitate a finding that the vehicle's engine was running, or had been running, in situations where operation is established through circumstantial evidence. Seese is mistaken. Although both ***Proegler*** and ***Borzyskowski*** presented situations in which the engines were running at the time of the stop, neither case imposes that factual requirement to a finding that the defendant "operated a motor vehicle."

The ***Proegler*** court quoted with approval that "[a]n intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving, but it does exist." ***Proegler***, 95 Wis.2d at 627, 291 N.W.2d at 614 (quoted source omitted). Although the engine of Seese's vehicle was not

running, Seese had possession of the keys which were in the ignition. A practical consideration of this evidence would lead a reasonable person, not acting as a legal technician, to fairly infer that Seese had operated the vehicle to the location where the officers found it. We reverse the trial court's ruling that the officers did not have probable cause to believe that Seese operated the motor vehicle. We remand for further proceedings on the complaint.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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