COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0746-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MITCHEL L. SCHANKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed.*

BROWN, J. Mitchel L. Schanke appeals from a judgment of conviction for operating while under the influence contrary to § 346.63(1)(a), STATS. He contends that the police officer who approached him to inquire as to his identity did not have the requisite reasonable suspicion of criminal activity to perform a ***Terry***[1] stop; therefore, the stop was illegal and the trial court erred when

[1] ***Terry v. Ohio,*** 392 U.S. 1 (1968).

it denied his motion to suppress the evidence. We disagree. Because the stop was valid under the police community caretaker function, it is of no consequence that the officer did not possess a reasonable suspicion of criminal wrongdoing. We affirm.

In October 1997, the State charged Schanke with driving while intoxicated. The complaint alleged that on September 7, 1997, the police placed Schanke under arrest for operating a motor vehicle while intoxicated after he failed a field sobriety test. Also, the complaint alleged that Schanke had submitted to a blood test which reported his blood alcohol concentration at 0.275% by weight, which is above the legal limit of 0.08%. *See* § 346.63(1)(b), STATS. Schanke pled not guilty and moved to suppress the evidence, arguing that it was the fruit of an illegal stop.

A hearing on the motion was had. The only witness to testify was the arresting officer, Brian Kohlmeier, of the City of Two Rivers Police Department. He testified that on September 7, 1997, he was in uniform and on patrol in a marked squad car when at 12:45 a.m. he heard the dispatcher assign officers Schleis and Schroeder to a call from a woman complaining that her boyfriend was standing on her front porch knocking on her door and that "she did not want him there." Kohlmeier initially took no action until the dispatcher informed him that the boyfriend had left the scene in an automobile before the officers arrived. Although the vehicle's direction of travel was unknown, the dispatcher gave a general description of the vehicle as "possibly a blue four-door ...." Kohlmeier then proceeded to the general area where the incident occurred to look for the vehicle.

A short time later Kohlmeier learned that the boyfriend might be headed back to his residence in Manitowoc. He also learned that Schroeder, while responding to the call, had observed a vehicle matching the general description at the intersection of 22nd Street and Forest Avenue. Schroeder also added that the vehicle was either a Buick, Oldsmobile or Pontiac. Based on this information, Kohlmeier decided to head to where Schroeder had last seen the vehicle, continue through the city limits and head towards Manitowoc.

Upon turning onto Memorial Drive, Kohlmeier saw two vehicles ahead of him driving towards the Manitowoc/Two Rivers city line. He caught up with the first vehicle, a light blue four-door Oldsmobile with a single male operator, and identified it as matching the general description of the vehicle he was looking for. Kohlmeier then passed the first vehicle in order to catch up to the second vehicle. However, the second vehicle did not match the general description given and Kohlmeier slowed down to allow the first vehicle to overtake him.

While Kohlmeier followed the first vehicle, he radioed Schleis—who was talking with the girlfriend about the incident—to ask who was the owner of the vehicle he was searching for. Schleis responded that the vehicle would be registered to Schanke, and Kohlmeier proceeded to run a registration plate check on the vehicle he was following. Schleis further indicated that although there were no charges against Schanke, she wanted to pass along a message to Schanke advising him not return to the residence.[2] Schleis also informed Kohlmeier that there was a possibility Schanke was intoxicated. Although Kohlmeier testified

[2] Apparently, it was the woman who initially called the police who did not want Schanke to return to her house; however, the record is not clear on this point.

that he believed Schleis obtained this information from the girlfriend, the record is silent on how Schleis came upon this information.

Kohlmeier followed the vehicle for a total of four blocks. He testified that at no time did he observe any erratic driving or other traffic violations. Also, Kohlmeier never activated his emergency lights or siren.

But before Kohlmeier received any response from the registration plate check, the vehicle turned into and parked in a tavern parking lot. Kohlmeier followed the vehicle into the parking lot and parked parallel to the driver's side of the vehicle about one car width away. Kohlmeier testified that the only reason he followed the vehicle into the parking lot was to determine if the driver was Schanke and, if it was Schanke, to pass along the message advising him not to return to the woman's house. He was not investigating any criminal activity.

After waiting a few seconds to determine if the driver was going to exit the vehicle, Kohlmeier left his squad car and walked around to the front of his vehicle. Kohlmeier testified that by the time he reached the front of his squad car and began to approach the driver's side of the vehicle, the driver had already exited his car and was standing up. Kohlmeier then asked the driver his name. The driver asked why he wanted to know and walked towards the front of his car, where Kohlmeier was standing. Kohlmeier told him he was investigating an incident in the downtown Two Rivers area and that a vehicle matching the description of Schanke's car was seen leaving the area. The driver denied any involvement.

During this time, Kohlmeier observed that the driver had difficulty maintaining his balance as he alighted from his vehicle. Kohlmeier testified that the driver was hanging onto the vehicle with his right hand and that as he walked

about four or five steps towards the front of the vehicle, he staggered back and forth until he got to the front driver's side quarter panel, where he stopped and leaned against it.

Kohlmeier again asked the driver his name, and the driver identified himself as Schanke. At this point, Kohlmeier received a reply from the registration plate check identifying Schanke as the owner of the vehicle. Kohlmeier asked for Schanke's driver's license, which Schanke provided. Also, he asked him if he had been drinking that evening. The record does not indicate how Schanke responded to this question. Kohlmeier then proceeded to administer a field sobriety test.

The trial court agreed with Schanke that the officer did not have a reasonable suspicion to stop the vehicle or detain the driver. The trial court observed, however, that the officer did not stop Schanke's vehicle. Instead, Schanke voluntarily drove into the parking lot, stopped his car and left the vehicle. According to the trial court, Kohlmeier simply observed Schanke stagger as he left his car. Thus, the trial court denied Schanke's motion, reasoning that there was no involuntary detention until after Kohlmeier observed Schanke stagger upon voluntarily exiting his car, a point at which Kohlmeier had a reasonable suspicion that Schanke was operating a motor vehicle while under the influence. Schanke later entered a plea of guilty to the charge.

On appeal, Schanke reasserts his argument that the evidence should be suppressed as the fruit of an illegal stop. Because we independently apply constitutional principles to the facts as found by the trial court, *see* ***State v. Phillips,*** 218 Wis.2d 180, 189-90, 577 N.W.2d 794, 798-99 (1998), our review is de novo.

The thrust of Schanke's argument is that "[t]he initial temporary stop ... was unjustified because officer Kohlmeier lacked the required reasonable suspicion" that a crime is or had been committed. He relies upon ***Terry v. Ohio,*** 392 U.S. 1 (1968), to support his contention.

There is no dispute that prior to observing Schanke exit his vehicle, Kohlmeier did not have a reasonable suspicion of criminal activity. But this is not a ***Terry*** stop case, and the freedom of the police to interact with citizens of this state and still remain within constitutional bounds is not restricted to only those situations where probable cause exists as to the commission of a crime. *See* ***State v. Anderson,*** 142 Wis.2d 162, 167, 417 N.W.2d 411, 413 (Ct. App. 1987), *rev'd on other grounds*, 155 Wis.2d 77, 454 N.W.2d 763 (1990). "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)). When reviewing police actions taken under the community caretaker function, the key question is prior justification and we must determine whether the police had a right to be where they were, make their observations and take responsive action. *See* ***id.*** So even if police conduct intrudes upon a defendant's Fourth Amendment rights, i.e., a seizure occurred, the intrusion 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.[3] *See*

[3] We acknowledge that the trial court did not address the issue of whether the stop fell within the ambit of a valid community caretaker function, nor was the issue addressed by either party at trial or on appeal. Nevertheless, we may affirm on grounds different than those relied on by the trial court. *See* ***Vanstone v. Town of Delafield***, 191 Wis.2d 586, 595, 530 N.W.2d 16, 20 (Ct. App. 1995). Because Schanke directly challenges the validity of the stop, we address the issue of whether the stop was a valid community caretaker function.

id. at 169, 417 N.W.2d at 414. As with all Fourth Amendment issues, the final measuring stick is the reasonableness of the stop in light of the facts and circumstances of the case. *See* ***Bies***, 76 Wis.2d at 468, 251 N.W.2d at 466.

The question is whether Kohlmeier had a right to be where he was to observe Schanke stagger as he exited his vehicle. Stated otherwise, the issue is whether Kohlmeier was entitled to continue his investigation and approach Schanke to inquire as to his identity. We hold that he was. Kohlmeier's contact with Schanke was not for the purpose of furthering the investigation of suspected criminal activity. Instead, Kohlmeier testified that his sole motivation for following the vehicle into the parking lot and approaching the driver was to determine whether Schanke was the driver and, if so, to pass along the message not to return to the woman's house. Although not a function readily associated with police activity, the role of intermediary in a domestic disturbance is a task police commonly perform. Kohlmeier's activity therefore falls squarely within the scope of permissible community caretaker activity.

Labeling an officer's conduct a community caretaker function, however, does not place the activity beyond constitutional scrutiny. The community caretaker analysis also requires that we determine if the public's need and interest outweigh the intrusion upon Schanke's privacy. *See* ***Anderson,*** 142 Wis.2d at 169, 417 N.W.2d at 414. Here, any intrusion into Schanke's privacy was slight. Schanke disagrees and argues that the intrusion was pervasive. He posits that Kohlmeier's actions constituted a seizure because a reasonable person in his position would have believed he was a suspect in an investigation and not free to leave. *See* ***State v. Goyer,*** 157 Wis.2d 532, 536, 460 N.W.2d 424, 425 (Ct. App. 1990) (person is seized only if in view of the circumstances a reasonable person would not believe he or she was free to leave).

The record reveals nothing about Kohlmeier's conduct prior to his observing Schanke stagger towards the front of his vehicle that would have led a reasonable person to believe Schanke was not free to leave. Kohlmeier did not stop Schanke's vehicle and did not activate his emergency lights or siren. He simply followed Schanke's vehicle into the parking lot, parked parallel to Schanke's car about a car width away and then exited the squad car about "ten seconds" later. Further, Kohlmeier testified that by the time he walked to the front of his squad car, Schanke had already gotten out of his vehicle and was standing up. As the trial court observed, it was Schanke who voluntarily stopped the car and exited the vehicle. Moreover, at no time did Kohlmeier tell Schanke he was not free to leave or that he was a suspect in a criminal investigation. Nor can Kohlmeier's actions be reasonably construed to convey such a message. Kohlmeier simply approached Schanke and asked him his name. Given the circumstances of this case, we discern nothing improper about Kohlmeier approaching Schanke to inquire as to his identity. As the Supreme Court has observed, as long as the police do not indicate compliance is mandatory they are free to approach a citizen and ask questions, including asking for identification, even if they harbor no reasonable suspicion of criminal activity. *See* ***Florida v. Bostick,*** 501 U.S. 429, 434-35 (1991).

Furthermore, the public has an interest in the investigation, peaceful resolution and prevention of domestic disturbances. Domestic disturbances often can escalate in intensity over a short period of time if not properly addressed. A few words from an officer, or even his or her presence, is often sufficient to dissuade a person from further disturbing behavior that might otherwise lead to a serious incident. Thus, Kohlmeier was clearly justified in continuing to determine whether Schanke was the driver of the vehicle.

We are satisfied that Kohlmeier was engaged in a bona fide community caretaker function when he approached Schanke's vehicle and inquired as to his identity. After making direct contact with Schanke, evidence of Schanke's possible intoxication was immediately palpable and Kohlmeier was entitled to pursue his suspicions.

By the Court.—Judgment affirmed.

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