COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2641-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL T. VAN ORNUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Daniel T. Van Ornum appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI)[2] contrary to

[1] This appeal is decided by one-judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] A companion prohibited alcohol concentration violation, contrary to WIS. STAT. § 346.63(1)(b), was dismissed.

WIS. STAT. § 346.63(1)(a) and from an order denying his motion to suppress evidence of the violation. He contends that his stop by the officer was unreasonable and unlawful. We disagree and affirm.

¶2 The relevant facts are undisputed. On April 19, 1999, at approximately 12:33 a.m., City of Oshkosh Police Officer Timothy Skelton observed a legally parked vehicle on the east side of Taft Avenue near the boat marina with its parking lights on and its engine running. Skelton was suspicious of the vehicle because of the time of day and his knowledge of a past history of break-ins at the marina. Skelton stopped his marked squad car in the westbound lane of Taft Avenue twenty-five to thirty feet from the other vehicle, turned on his emergency lights and indicated to the driver, "who was looking right at [Skelton]," to roll his window down.

¶3 The driver did not roll his window down, so Skelton yelled at him to roll it down. When the driver still did not do so, Skelton got out of his squad car and approached the vehicle. When Skelton was approximately six feet from the vehicle, and with the driver still looking at him, the driver put the vehicle in gear and drove off. Skelton ran back to his squad car and pursued the other vehicle until it pulled into a driveway about one block away, which turned out to be the Van Ornum residence. Skelton did not notice anything unusual about the manner in which Van Ornum's vehicle was operated.

¶4 When Van Ornum exited his vehicle, he stumbled, had to grab onto the side of the vehicle, appeared to be very off balance, was very agitated and swore at Skelton about not messing with his dogs, who were in a kennel near the end of the driveway. Van Ornum told Skelton to get off his property and that he was agitating his dogs. Van Ornum told Skelton that he had seen the officer

waving at him, but he did not think that he needed to stay there and that he did not hear the officer because he had his window up and was playing music very loud. Skelton had not heard any music as he walked towards Van Ornum's vehicle. Based upon Skelton's observations of Van Ornum's condition in his driveway, Skelton arrested Van Ornum for OWI.

¶5 Van Ornum contends that his vehicle was parked legally, that he violated no traffic regulations and that Skelton had no reasonable basis to believe that he had committed a violation or crime. Therefore, Van Ornum argues that Skelton's actions were violative of his Fourth Amendment rights when Skelton confronted and seized him in his driveway. The State contends that Skelton acted in a caretaker capacity based upon the existing facts and circumstances.

¶6 When reviewing the denial of a suppression motion, the trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). We review the trial court's conclusion of constitutional reasonableness de novo. *See* ***id.*** at 137-38. We conclude that the Fourth Amendment "community caretaker" exception, recognized in ***State v. Anderson***, 142 Wis. 2d 162, 167, 417 N.W.2d 411 (Ct. App. 1987), is applicable here.[3] The community caretaker function has been described in ***Cady v. Dombrowski***, 413 U.S. 433 (1973), where the United States Supreme Court said:

> Local police officers, unlike federal officers, frequently investigate vehicle [incidents] in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or

[3] Wisconsin also recognizes an "emergency" exception to the warrant requirement. *See* ***State v. Dunn***, 158 Wis. 2d 138, 144, 462 N.W.2d 538 (Ct. App. 1990).

> acquisition of evidence relating to the violation of a criminal statute.

Id. at 441.

¶7 In ***Anderson***, we set out the following test for determining whether the community caretaker exception to the Fourth Amendment is applicable:

> [W]hen a community caretaker function is asserted as justification for the seizure of a person, the trial court must determine: (1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.

Anderson, 142 Wis. 2d at 169.

¶8 As to the first ***Anderson*** factor, we note that Van Ornum told Skelton that he did not believe that a seizure had occurred on Taft Avenue. However, his suppression motion contends that an unconstitutional seizure did occur in his driveway after he had driven away from Skelton. We are satisfied that a Fourth Amendment seizure of Van Ornum did occur.

¶9 As to the second ***Anderson*** consideration, reasonableness is the foundation of Fourth Amendment challenges. Here, Skelton approached an ambiguous automobile situation where there was a possibility, however small, that crime evidence might surface. Police officers are trained to detect crime and are obligated to be attentive to the potential for criminal activity. It is not unreasonable to interpret the community caretaker function as bona fide based upon Skelton's explanation that the vehicle was stopped with its parking lights on, the engine was running, it was an unusual time of day and the vehicle was in an area with a history of criminal activity. We are satisfied that Skelton was involved

in a bona fide community caretaker activity that could focus on either assisting the vehicle's operator or, if necessary, protecting the marina property.

¶10 The third factor, whether the public need and interest outweigh the intrusion upon the privacy of the individual, has four elements:

> (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. at 169-70 (footnotes omitted).

¶11 In ***State v. Ellenbecker***, 159 Wis. 2d 91, 96, 464 N.W.2d 427 (Ct. App. 1990), we said that in a community caretaker case reasonableness is determined by balancing the public need and interest furthered by the police conduct against the degree and nature of the intrusion upon the privacy of the citizen. This balance is heavily weighted in favor of permitting inquiries of the sort conducted by Skelton. The public has a strong interest in assisting motorists and protecting private property. That interest can only be satisfied if officers can inquire into situations that address those ends. The risk to the motorist is slight. The inconvenience of a motorist rolling down his or her vehicle window and answering an officer's inquiry under the circumstances described by the officer here is far outweighed by the benefit to the motorist who needs assistance or to the security of the area.

¶12 We agree with the State and the trial court that Skelton was engaged in a bona fide community caretaker activity. Skelton did not know what to expect when he observed Van Ornum's vehicle, and he was not engaged in a specific investigation of criminal activity. Skelton had no idea, until he observed Van

Ornum exit the vehicle in his driveway, that he might be intoxicated and violating the law by operating a motor vehicle. We conclude that Skelton's actions leading to Van Ornum's arrest and conviction did not violate Van Ornum's Fourth Amendment protections against unlawful seizure.

By the Court.—Judgment and order affirmed.

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