

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0275-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

WILLIAM BRUEGGEN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dunn County:
WILLIAM C. STEWART, Judge. *Reversed and cause remanded with directions.*

¶1 CANE, C.J.¹ The State appeals from an order dismissing the criminal complaint charging William Brueggen with operating a motor vehicle

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.

while under the influence of an intoxicant, second offense. The State contends that the dismissal was inappropriate based on the court's conclusion that the arresting officers, knowing that Brueggen was intoxicated, failed to carry out their community caretaker functions when returning car keys to him and admonishing him not to drive. This court agrees. The order is therefore reversed and the matter is remanded to the trial court for further proceedings.

¶2 At approximately 1:52 a.m., Brueggen was a passenger in a vehicle the police had stopped in the City of Menomonie because they suspected the driver was operating the vehicle while under the influence of an intoxicant. The vehicle belonged to Brueggen. While the officers were conducting field sobriety tests of the driver, Brueggen became disorderly and kept getting out of the vehicle after being told repeatedly not to do so. Consequently, the officers had to restrain Brueggen by handcuffing him and returning him to his car. Brueggen finally calmed down after the officers completed their field sobriety tests and placed the driver under arrest for OWI. Before returning the car keys to Brueggen, the police secured and locked his car. They then released Brueggen without any charges, gave him the only keys to the car and because he appeared intoxicated, admonished him numerous times not to drive the vehicle. Concerned that Brueggen may drive the car, the officers warned another officer to be alert in case Brueggen decided to operate his car. Within minutes, the other officer observed Brueggen driving the car and arrested him for OWI. For purposes of his motion, Brueggen does not dispute that he was highly intoxicated and instead advances his high state of intoxication as a basis for the police neglecting their caretaker duty.

¶3 Before trial, Brueggen filed a motion to dismiss the charges against him alleging that the officers failed to properly carry out their community caretaker function and thereby denied him his due process rights. Brueggen

argued that the officers had an obligation not to return the car keys to him knowing that he was severely intoxicated. The trial court granted the motion reasoning that because Brueggen appeared obviously intoxicated, the officers had an obligation to insure his safety as well as the public's and that by giving him the car keys, they failed to perform their community caretaker duty.

¶4 The State argues that the officers had no right, much less a duty under the community caretaker obligations, to retain Brueggen's car keys when he was not going to be arrested or held in custody. Additionally, it argues that even if the officers had a duty to prevent Brueggen from driving, dismissal of the OWI charge is not an appropriate remedy. In response, Brueggen cites a number of civil cases holding that when the State takes a person into custody, the due process clause makes the State responsible for that person's safety as well as the general public. However, all those cases deal with a situation where the State created some danger to the person or public and was consequently held civilly liable for those injuries.² None of those cases deal with a situation where the dismissal of a case is warranted.

¶5 The trial court was concerned that the police should have exercised better judgment by helping Brueggen obtain other transportation to his home rather than leaving him with the car keys so early in the morning, especially in light of their suspicion that he would drive when intoxicated. This court would agree that under the community caretaker doctrine, there might possibly be civil

² See *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998); *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996); *Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993); *Bies v. State*, 76 Wis. 2d 457, 251 N.W.2d 461 (1977); *State v. Dull*, 211 Wis. 2d 652, 565 N.W.2d 575 (Ct. App. 1997); *State v. Anderson*, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987), *rev'd*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990).

liability for damages if Brueggen had injured himself or others. However, it does not follow that the remedy in this case is dismissal of the charge against Brueggen who, contrary to the officers' numerous admonitions not to drive, proceeded to drive anyway. He must still stand to answer for his alleged criminal action.

¶6 The exclusionary rule and dismissal of criminal cases are remedies applied to illegal search and seizure conduct and are harsh remedies designed to reduce the risk of unreasonable police misconduct.³ Civil remedies appear to be the more appropriate remedy reserved for violations of duties created under the community caretaker doctrine. This court refuses to expand the law permitting civil remedies under the community caretaker function into the arena of criminal law. Therefore, the order dismissing the OWI charge against Brueggen is reversed and the matter is remanded for further proceedings in the trial court

By the Court.—Order reversed and cause remanded with directions.

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

³ Here, Brueggen does not contend that the police actions constituted such egregious misconduct so as to require dismissal. He relies solely on the duties created under the community caretaker doctrine.

