COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2337-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GEORGE F. SAVAGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] George Savage appeals a judgment entered after he pled no contest to operating a motor vehicle while under the influence of an

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

intoxicant. WIS. STAT. § 346.63(1)(a).[2] Savage contends that the trial court erred when it denied his motion to suppress,[3] claiming that he was illegally seized and questioned in his driveway and that the seizure was not justified under law enforcement's "community caretaker" function. Because the trial court did not err when it denied Savage's motion, this court affirms.

FACTS

¶2 The following facts were adduced at the suppression hearing motion. Officer Lisa Sterr was westbound on East Shore Drive[4] at approximately 7 p.m. when she observed a dark-colored Cadillac stuck in the snow, off the roadway. Sterr slowed, backed up, parked just east of the Cadillac and observed that its driver was trying to free it by putting it in forward and then reverse. Sterr turned on her emergency lights and exited her vehicle, at which point the driver, Savage, turned the ignition and lights off and started to exit his vehicle. Sterr was unaware of anyone else being present or observing the scene. She asked Savage what had happened and he indicated that he had just pulled into his driveway from East

[2] WISCONSIN STAT. § 346.63(1)(a) provides in part:

> No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or a combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving ….

[3] Savage filed a motion to dismiss the complaint. The trial court correctly treated it as a motion to suppress, as does Savage on appeal.

[4] According to the testimony, one side of East Shore Drive is residential, and on the other side is the Wildlife Sanctuary Preserve.

Shore Drive and slid into the snowbank. Sterr asked Savage where he was going, and he responded that he was on his way home, "and then he indicated this was his home." During this encounter Sterr observed that Savage's speech was slurred and drawn.

¶3 Officer David Graf testified that he was dispatched to the scene "to assist another officer with a disabled vehicle." Graf, who also observed indications of Savage's intoxication, ultimately investigated and arrested Savage for operating a motor vehicle while under the influence of an intoxicant. Savage filed a motion to suppress, claiming insufficient probable cause to arrest. The motion was denied. Savage entered a no contest plea to the charge, reserving the right to appeal the trial court's denial of his motion. This appeal followed.

STANDARD OF REVIEW

¶4 On review of the denial of a motion to suppress evidence, this court will uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Eason***, 2000 WI App 73, ¶3, 234 Wis. 2d 396, 610 N.W.2d 208. However, the application of constitutional principles to the found facts is a question of law this court decides independently. ***Id.***

ANALYSIS

¶5 This court perceives Savage's contention to be that the trial court held that Sterr lawfully obtained probable cause for an arrest under the "community caretaker" exception to the Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution. He argues that this exception was not applicable under the facts of this case. Savage claims that:

> To ascertain whether a citizen's Fourth Amendment rights have been violated by police exercise of the caretaker function, a court must determine whether: (1) a seizure within the meaning of the Fourth amendment has occurred; (2) the police conduct was a "bona fide community caretaker" activity; and (3) the public need and interest outweigh the intrusion upon the individual.

¶6 This court provided an analysis for evaluating "community caretaker" claims in ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). There we explained that after a Fourth Amendment issue is implicated, a court must make the latter two inquiries Savage identifies: "bona fide community caretaker activity" and "weighing the public need and interest against the intrusion." Indeed, the ***Anderson*** court further required that the court make a determination about the overall "reasonableness" of law enforcement's conduct. ***Id.*** at 171. Although none of the authorities cited by Savage expressly requires the trial court to determine whether a seizure occurred, this court agrees that this determination is appropriate.

¶7 Savage first argues that he was seized within the meaning of the Fourth Amendment. However, that this was not a traffic stop, which is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures,[5] complicates his analysis. As the State notes in its brief, Savage does not describe when the seizure occurred. Rather, he reiterates the motion hearing evidence, advances factual suppositions not specifically supported by the record, and concludes that Sterr asserted sufficient authority over him to constitute a seizure.

[5] ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987).

¶8 Savage further notes that the trial court did not specifically find that Savage was seized. While this is true, there is no dispute that he was seized. The real issues are when was he seized and whether Sterr was justified in being where she was at the time she made observations justifying the seizure. This court holds that the community caretaker exception lawfully brought Sterr to the place where she was then able to make observations justifying the seizure.

¶9 The trial court found that Sterr "made contact to determine if there was need of aid or assistance." Savage argues that everything Sterr did suggests otherwise and therefore the trial court's finding was clearly erroneous. This court disagrees. First, there is evidence that Sterr's purpose was to determine the need for aid or assistance. Savage concedes that Sterr apparently called Graf before she left her squad to approach Savage. Graf testified that he was "dispatched to assist another officer with a disabled vehicle." This testimony is indicative of Sterr's motivation in stopping and approaching Savage. Further, Sterr testified essentially that she was acting in a capacity to render immediate aid and assistance when she stopped and talked to Savage.[6]

¶10 There is, moreover, circumstantial evidence to support Sterr's assertion that she stopped at the scene to render assistance: Her testimony was not informed by the issue addressed in Savage's motion. As the State points out and

[6] Sterr reiterated her reason for stopping on cross-examination:

> Q So, when you approached and you first say the vehicle, would it be fair to say that it appeared to you that it was simply a motorist trying to get the vehicle out of a stuck position on the driveway?
>
> A That was my first impression, and I was stopping to give any assistance that I could.

Savage does not refute, the motion hearing was prompted by a motion to dismiss the complaint for lack of probable cause. Indeed, at the conclusion of the hearing, Savage argued dismissal was warranted because Sterr initially had no probable cause to believe that the stuck vehicle had operated on a public way.

¶11 The trial court implicitly relied on the testimony and inferences supporting the community caretaker exclusion rather than any contrary evidence. Its credibility assessment will not be overturned because it is not inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Finally, there is no evidence that at the time Sterr saw the vehicle stuck in the snow she knew its driver lived at that residence, or had neighbors or anyone else available to render aid.[7]

¶12 The Fourth Amendment and art. I, § 11, prohibit unreasonable searches and seizures. ***State v. Horngren***, 2000 WI App 177, ¶8, 238 Wis. 2d 347, 617 N.W.2d 508. The touchstone of these amendments is reasonableness. There is nothing unreasonable about converting an inquiry into whether assistance is needed into a temporary seizure for investigation if the initial inquiry lawfully puts the officer in a position to observe evidence that a law has been violated. Here, the court found that the officer stopped at the scene of a vehicle apparently stuck in the snow and approached the driver to determine if he needed assistance. This was a minimal intrusion in terms of weighing competing interests, if striving to offer assistance to a motorist on the private property of unknown persons is

[7] Savage repeatedly stresses that he was at his residence and could have used the phone or otherwise gotten assistance. He also claims that his neighbors were at hand. These facts are immaterial because they were unknown to Sterr at the time she decided to provide assistance.

intrusive at all. Further, attempting merely to render aid is a bona fide community caretaker activity, divorced "from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[8] ***State v. Dull***, 211 Wis. 2d 652, 658, 565 N.W.2d 575 (Ct. App. 1997). Sterr's conduct was thus lawful under the community caretaker exception. Upon encountering Savage, however, Sterr was in a position to observe signs that provoke a reasonable suspicion that he was operating under the influence of an intoxicant.[9] Sterr's initial constitutional interference with Savage's liberty occurred at that point. This reasonable suspicion justified the seizure to conduct a further investigation.[10] The trial court thus properly denied Savage's motion.

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[8] Our supreme court has stated that "the 'community caretaker' function of the police … while perhaps lacking in some respects the urgency of criminal investigation, is nevertheless an important and essential part of the police role." ***Bies v. State***, 76 Wis. 2d 457, 471, 251 N.W.2d 461 (1977).

[9] Sterr's inquiry as to what had happened, which caused Savage to speak and thus demonstrate signs of intoxication, was reasonably related in scope to Sterr's community caretaker purpose. It would be absurd to suggest that an officer performing a community caretaker function could not lawfully make such an inquiry.

[10] Savage conceded in the trial court, and has not argued otherwise before this court, that the driving admission and Sterr's observations of Savage provided reasonable suspicion to investigate.

By the Court.—Judgment affirmed.

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