COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2056-CR **Cir. Ct. No. 2008CT2074**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMMY K. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Reversed.*

¶1 ANDERSON, J.[1] Tommy K. Miller appeals from a judgment of conviction of operating a motor vehicle while intoxicated, second offense. Miller

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

entered a guilty plea after the circuit court denied Miller's motion to suppress statements and evidence due to unlawful search and seizure, detention and arrest. In denying the motion to suppress, the circuit court upheld the validity of the stop based on its determination that the officer was acting as a bona fide community caretaker. We do not agree and, therefore, reverse the judgment.

¶2 In the early morning hours of August 13, 2008, Officer Matthew Harper was on routine patrol in the village of Hartland. At approximately 1:19 a.m., Harper observed Miller's vehicle, a white Lexus SUV, in the 300 block of Cottonwood Avenue. At first, the SUV appeared to be stopped in the middle of the road; however, as Harper approached, he saw that it was traveling at approximately five miles per hour.

¶3 Harper continued to observe the SUV from a distance and saw it continue slowly, southbound on Cottonwood Avenue and turn into the driveway for Endter's Sports Bar and Grill. Harper then lost sight of the SUV as it pulled behind the building. Harper's observation lasted approximately ten to fifteen seconds.

¶4 Endter's had been closed for several hours, and Harper decided to follow up and determine what the SUV was doing in the parking lot. Harper drove his squad into the Hartland police department parking lot across from Endter's with the intent of walking from his squad toward Endter's parking lot to see why the SUV pulled behind the building. Harper exited his squad car to inspect the situation, but before he began walking toward Endter's, he saw headlights emerging from behind the building. He then observed the same SUV drive back onto Cottonwood Avenue, this time heading northbound. The 300 block of Cottonwood Avenue is a single-lane road with a parking lane on either side,

divided by a double yellow center line. In order for a vehicle to turn around, it would need to turn around in a driveway or parking lot, as it would be illegal to make a U-turn.

¶5 While on Cottonwood, the SUV proceeded slowly in Harper's direction, again at about five miles per hour. Harper testified that as the SUV approached, its driver looked in his direction. The area was lit well enough that Harper identified the driver as male.

¶6 Once the SUV was past Harper, its driver accelerated up to the speed limit. At that time, Harper started the engine of his squad car, accelerated to catch up to the SUV, and followed it through two controlled intersections toward Highway 16. When the SUV turned onto the highway on-ramp, Harper followed, turning on his red and blue lights to stop the vehicle. Harper testified that at no time did he witness the SUV commit any traffic violations or engage in any other suspicious driving.

¶7 Upon stopping the SUV, Harper identified the driver as the defendant, Miller. Harper asked Miller to step out of his vehicle to perform field sobriety tests and also gave Miller a preliminary breath test. Based on the results of the tests, Harper believed Miller to be under the influence of intoxicants and placed him under arrest.

¶8 Miller was subsequently charged and on October 1, 2008, he filed a motion to suppress statements and evidence due to unlawful seizure, detention and arrest. At the motion hearing on November 19, 2008, the circuit court denied the motion, ruling the court was "satisfied that the officer was operating appropriately

in ... the community caretaker function" and that there "was a basis for the officer to have had contact with the defendant under the circumstances."[2]

¶9 Following the court's denial of the motion to suppress, Miller pled guilty to operating while intoxicated as a second offense, contrary to WIS. STAT. § 346.63(1)(a), and was sentenced to the same. Miller appeals from the judgment.

¶10 Whether a stop passes constitutional muster is a question of law that an appellate court reviews de novo. ***State v. King***, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993). Accordingly, an appellate court independently reviews whether an officer's conduct falls within the community caretaker function and satisfies the requirements of the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. *See* ***State v. Kelsey C.R.***, 2001 WI 54, ¶¶29, 34, 243 Wis. 2d 422, 626 N.W.2d 777. A circuit court's findings of fact will be affirmed upon appeal unless they are against the great weight and clear preponderance of the evidence. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990).

[2] In its ruling, the circuit court also stated it was "hard pressed to view that under the circumstances … there was *probable cause* for the commission of a crime or traffic offense." (Emphasis added.) However, in order for an officer to make an investigatory stop, the officer must possess "specific and articulable facts which would warrant a *reasonable* belief that criminal activity was afoot." ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996) (emphasis added). Stated another way, the officer must have "reasonable suspicion" and does not need "probable cause" to perform a ***Terry*** stop. *See* ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968) (A Fourth Amendment seizure has occurred when an officer, "by means of force or show of authority, has in some way restrained the liberty of a citizen.").

Regardless, the circuit court's holding that the stop was valid under the officer's community caretaker function implies a finding that reasonable suspicion under ***Terry*** did not exist. We need not address this issue further because the narrow issue on appeal is whether the officer was acting as a bona fide community caretaker when he performed the stop.

¶11 On appeal, Miller argues that Harper was not acting as a bona fide community caretaker;[3] therefore, the circuit court erred when it denied his motion to suppress. The State argues that Miller's "extremely slow speed," combined with the late hour of the night, constitute a sufficient basis on which we can hold that Harper acted as a bona fide community caretaker under ***State v. Kramer***, 2009 WI 14, ¶42, 315 Wis. 2d 414, 759 N.W.2d 598.

¶12 In order to assess whether Harper was acting as a community caretaker, we begin with ***State v. Anderson***, 142 Wis. 2d 162, 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 outlined the three-step test for this evaluation:

> [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 a bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.

Id. at 169.

¶13 The first step of the ***Anderson*** test requires that there must be a seizure under the Fourth Amendment. ***Id.*** A Fourth Amendment seizure has occurred when an officer, "by means of force or show of authority, has in some way restrained the liberty of a citizen." ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968). Here, there is no issue as to whether a seizure occurred. Harper seized Miller when he activated his red and blue squad lights and pulled over Miller's SUV.

[3] On appeal, Miller also argues that reasonable suspicion for an investigatory stop did not exist. *See* ***Waldner***, 206 Wis. 2d at 55. Whether there was reasonable suspicion under ***Terry*** has already been decided by the circuit court in Miller's favor and is not at issue in this appeal. *See* footnote 2 of this opinion.

¶14 The second step requires that the police action in seizing the defendant be a "bona fide community caretaker activity." ***Anderson***, 142 Wis. 2d at 169. "When evaluating whether a community caretaker function is bona fide, we examine the totality of the circumstances as they existed at the time of the police conduct." ***Kramer***, 315 Wis. 2d 414, ¶30. In order to be considered a community caretaker function, the police action must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973).

¶15 In ***Kramer***, our supreme court articulated what is required when evaluating whether a community caretaker function is bona fide. It determined that ***Cady***'s "totally divorced" language does not mean that the officer must have no law enforcement concerns. ***Kramer***, 315 Wis. 2d 414, ¶30. Rather, the community caretaker function is "'totally divorced' from an officer's law enforcement function because a different facet of police work is paramount." ***Id.***, ¶35. Given this, the supreme court held that "when a search or seizure is not supported by probable cause or reasonable suspicion and it is contended that the reasonableness of police conduct stands on other footing, an officer's subjective motivation is a factor that may warrant consideration." ***Id.***, ¶27. Moreover, "[i]f the [circuit] court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances ... he [or she] has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." ***Id.***, ¶36.

¶16 We conclude that Harper's conduct was not a bona fide community caretaker activity because it did not meet the standard. *See* ***id.***, ¶¶27, 35; *see also* ***Anderson***, 142 Wis. 2d at 169. Harper did not testify that he was motivated by a belief that the driver was in need of any assistance, medical or mechanical. *See*

Kramer, 315 Wis. 2d 414, ¶27. Additionally, Harper did not articulate an objectively reasonable basis for his actions as a community caretaker. *See* ***id.***, ¶36. Indeed, the record is void of any showing that Harper was concerned that Miller may have been in need of assistance. The record tells us little more than Harper "wanted to stop [Miller's] vehicle right away before it merged onto [Highway] 16." Harper's actions were not "totally divorced" from his law enforcement function and, therefore, do not qualify as actions within his community caretaker function.[4] *See* ***id.***

By the Court.—Judgment reversed.

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

[4] Because Harper was not acting as a bona fide community caretaker, we need not proceed to the third step of the ***Anderson*** test. *See* ***State v. Anderson***, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). The three-step ***Anderson*** test requires that all factors be answered in the affirmative. Specifically, the test attaches an "if-so" proposition to each subsequent step. The test as applied to the third factor reads as follows: "whether the police conduct was a bona fide community caretaker activity; and (3) *if so*, whether the public need and interest outweigh the intrusion upon the privacy of the individual." ***Id.*** at 169 (emphasis added). We have answered the second step in the negative and therefore do not proceed to the third step.