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DISTRICT II

March 15, 2023

To:

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Circuit Court Judge
Electronic Notice

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Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

Michael C. Sanders
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You are hereby notified that the Court has entered the following opinion and order:

2021AP2105-CR State of Wisconsin v. Michael Gene Wiskowski
(L.C. #2019CF628)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael Gene Wiskowski appeals from a judgment of conviction entered after he pled no contest to one count of operating a motor vehicle while under the influence, fourth offense. Wiskowski argues that the circuit court erred in denying his motion to suppress evidence obtained after his vehicle was stopped in violation of the Fourth Amendment and article 1, section 11 of the Wisconsin Constitution.¹ Based upon our review of the briefs and record, we

¹ The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. *See* U.S. CONST. amend. IV. The same protection is provided by article I, section 11 of the Wisconsin Constitution. *See* WIS. CONST. art. I, § 11.

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).² We affirm.

At the first hearing on Wiskowski’s motion to suppress, former City of Plymouth police officer Devin Simon testified to the following facts. Shortly before 1:00 p.m. on September 6, 2019, Simon received a call from dispatch saying that there was a red Cadillac truck stopped in a McDonald’s drive-through because the driver was asleep. Simon arrived about one minute after receiving the call and saw a truck matching the description about to turn out of the parking lot. Simon followed the truck, turned on his emergency lights and siren, and pulled the truck over to conduct, in his words, a “welfare check.” Simon asked the driver for his license and proof of insurance and identified him as Wiskowski. Wiskowski handed Simon two different insurance cards, which Simon noted as an odd behavior.

Simon testified that Wiskowski told him that he had been working and awake for twenty-four hours. Simon then asked Wiskowski to step out of the truck. Wiskowski stumbled as he stepped out of the truck. As he spoke to Wiskowski, Simon smelled alcohol on his breath. Simon asked Wiskowski how much alcohol he had consumed and Wiskowski responded that he had a couple of beers a couple of hours before the stop. Simon then took Wiskowski to the police station, administered field sobriety tests, and ultimately arrested him.

The circuit court denied Wiskowski’s suppression motion after concluding that the stop was lawful under the community caretaker exception to the Fourth Amendment’s warrant

² All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

requirement. Using the three-part test for applying the exception,³ the court reasoned that Wiskowski had been seized when his truck was stopped, that Simon was acting in a bona fide community caretaker capacity in checking on his welfare and making sure he could drive safely without falling back asleep, and that the public interest in making sure Wiskowski was able to safely operate a motor vehicle outweighed the intrusion into his privacy.

A little over a year later, the circuit court held what it characterized as a hearing to reconsider its decision on the motion to suppress after the defense received body camera footage from the stop.⁴ Simon was again the only witness called to testify. He testified that the person who reported the sleeping driver in the drive-through lane knocked on the truck's window to wake up the driver after making the call. Simon acknowledged that after he stopped the truck, he was unsure whether he could ask Wiskowski to get out, and he discussed that with a more experienced officer at the scene. The officers then pulled up Wiskowski's driving record and learned that he had prior convictions for operating while intoxicated. But Simon acknowledged that before he asked Wiskowski to exit the truck, neither officer had detected any odor of alcohol or slurred speech and Wiskowski did not appear to be sleepy. The circuit court declined to reconsider its decision after determining "under [the] totality of the circumstances here that the officer acted reasonably under the community caretaker function."

³ See *State v. Kramer*, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598.

⁴ It does not appear from the record that Wiskowski ever filed a motion for reconsideration.

On appeal, Wiskowski argues that the stop was not justified under the community caretaker exception.⁵ That exception allows the police to conduct a seizure without first obtaining a warrant. *State v. Pinkard*, 2010 WI 81, ¶¶13-14, 327 Wis. 2d 346, 785 N.W.2d 592. To analyze whether a seizure is justified under the community caretaker exception, the court must determine: (1) whether a seizure under the Fourth Amendment has occurred; (2) if so, whether the officer was acting as a bona fide community caretaker; and (3) “if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.” *State v. Kramer*, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598 (quoting *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)). As to the first element, neither party disputes that a seizure occurred under the Fourth Amendment. Thus, our analysis focuses on the second and third elements of the test.

With respect to the second element, an officer acts in a bona fide community caretaker capacity if “there is ‘an objectively reasonable basis to believe ... a member of the public ... is in need of assistance.’” *State v. Maddix*, 2013 WI App 64, ¶20, 348 Wis. 2d 179, 831 N.W.2d 778 (citations omitted). An officer is responsible for both enforcing the law and helping a member of the public who is discovered to need assistance. *Kramer*, 315 Wis. 2d 414, ¶32. The State has the burden to prove an officer’s conduct falls within the scope of a reasonable community caretaker function. *State v. Ziedonis*, 2005 WI App 249, ¶15, 287 Wis. 2d 831, 707 N.W.2d 565.

⁵ Wiskowski also argues that Simon lacked reasonable suspicion to stop his truck. Even if true, this would not necessarily make the stop unconstitutional because “police conduct is not based on probable cause or reasonable suspicion when” the police act in the community caretaker capacity. *Kramer*, 315 Wis. 2d 414, ¶29. Because we conclude that the stop was justified as community caretaker conduct, whether Simon had reasonable suspicion is irrelevant.

Wiskowski argues that any community caretaker concern dissipated by the time Simon arrived because he did not observe Wiskowski asleep, but instead saw him make a lawful left turn out of the parking lot. We do not agree. Simon was called to the scene because of a report about a person sleeping in a drive-through in the middle of the day. This is not where one would fall asleep absent some substantial problem, including a potential medical issue, because one must maneuver a vehicle through the drive-through and interact with restaurant employees. Though Simon observed the truck turn out of the parking lot when he arrived, he still had an objectively reasonable basis to be concerned that the driver needed assistance or might not be able to safely drive the truck.

In addition, the balancing analysis under the third element further supports the legality of the stop. In determining whether the public interest outweighed Wiskowski's privacy interest, we consider the following factors:

(1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, and 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.

See *Kramer*, 315 Wis. 2d 414, ¶41 (quoting *State v. Kelsey C.R.*, 2001 WI 54, ¶36, 243 Wis. 2d 422, 626 N.W.2d 777).

On the first factor, there is a significant public interest in ensuring that drivers are able to safely operate their vehicles on public roads. Wiskowski argues that there was no danger to the public and that he was driving appropriately at the time of the stop and thus did not need to be checked on. We have already explained why this supposition is incorrect. A driver who falls asleep in a drive-through lane in the middle of the day and minutes later turns onto a public road

presents a risk to the public. Tired drivers, or those experiencing medical issues, are less likely to be alert on the roads, which can lead to more accidents. When Simon arrived at the scene, Wiskowski was pulling into traffic immediately after being reported as asleep. The information Simon had received from dispatch suggested that Wiskowski might not be able to operate his vehicle safely. This created an exigency, or urgent need, on Simon's part to determine whether Wiskowski needed assistance and was able to drive safely. By immediately stopping Wiskowski, Simon was able to check on Wiskowski's condition and mitigate a risk to public safety.

The circumstances surrounding the stop also demonstrate that the exception applies. Simon pulled Wiskowski over after he exited the drive-through because he did not "want to initiate a traffic stop right in the center of the entrance [of the McDonald's]." Simon conducted the stop on a public street with both vehicles then pulling into a parking lot. The stop occurred around 1:00 p.m. in a public area. Simon used his emergency lights and siren to pull Wiskowski over and then approached the truck window to speak with him. These circumstances do not show the use of a high degree of overt authority and force or an extensive intrusion into a private space.

As to the third factor, the stop involved an automobile, which is the focus of community caretaker activity. See *Caniglia v. Strom*, 141 S. Ct. 1596 (2021) (holding that community caretaker role does not justify warrantless search or seizure in a residence); *State v. Promer*, No. 2020AP1715-CR, unpublished slip op. ¶22 (WI App Dec. 21, 2021) ("*Caniglia* clarified that the community caretaker doctrine ... is limited to cases involving searches and seizures of

automobiles.”).⁶ Approaching a vehicle to determine whether a driver needs assistance is reasonable community caretaker activity and can only be accomplished by stopping the vehicle.

Finally, Simon lacked an alternative to pulling Wiskowski over that would enable him to effectively check on his welfare and ability to drive safely. When an officer has an objectively reasonable belief that a motorist may need assistance, the officer is not required to allow the motorist to continue driving until the need for assistance becomes evident. *Kramer*, 315 Wis. 2d 414, ¶45. Here, had Simon waited and followed Wiskowski, he may have fallen asleep again while driving and seriously injured someone. Absent a feasible and effective alternative, Simon acted reasonably under the circumstances by stopping Wiskowski immediately.

For these reasons, we conclude that the stop of Wiskowski’s truck was permissible under the community caretaker doctrine, and thus the circuit court correctly denied Wiskowski’s suppression motion.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeal

⁶ Though unpublished, *State v. Promer*, No. 2020AP1715-CR, unpublished slip op. (WI App Dec. 21, 2021) may be cited for persuasive value. See WIS. STAT. RULE 809.23(3)(b).

