COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2886-CR **Cir. Ct. No. 04CT000333**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID S. DICKELMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

¶1 BROWN, J.[1] We conclude that when an officer observed the brake lights of a legally parked car going on and off "every once in awhile" and also observed the driving lights going on and then off at 2:45 a.m. on a winter's night,

[1] This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All further references are to the 2003-04 version unless otherwise noted.

the officer was justified in making contact to see if there were any problems in the vehicle. We affirm the trial court's conclusion that the officer was engaged in a community caretaker function in what ultimately led to an operating a motor vehicle while intoxicated conviction.

¶2 A village of Kohler police officer was patrolling the village streets on February 21, 2004, at about 2:45 a.m. when he observed an automobile legally parked by a curb. What drew the officer's attention to the automobile was that it was not parked directly in front of a residence, it did not appear to be a vehicle from the area and it appeared that there was at least one occupant in the vehicle. The officer proceeded past the vehicle and parked down the road so as to observe the vehicle. In the five minutes that he was there, he saw that "the brakes would come on and off every once in awhile, and at one point it appeared the driving lights of the vehicle went on, but then a short time later they went off." After five minutes, the officer activated his emergency lights and came up behind the vehicle because he wanted to, in the officer's words, "make contact … to see if there was any problems in the vehicle."

¶3 After the officer activated his emergency lights, the lights to the parked vehicle came on and the officer observed the vehicle proceed forward and drive up onto a snow bank. The officer made contact and subsequently determined that the occupant, David S. Dickelman, was intoxicated. He was arrested for OWI. Dickelman moved to dismiss for lack of probable cause to make the stop, which he asserted had occurred at the point the officer activated his emergency lights. The trial court found that the officer was engaged in a community caretaker function, thus justifying the stop. Dickelman then pled guilty to OWI, second offense. He now appeals the community caretaker determination of the trial court.

¶4 In ***State v. Anderson***, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987) (***Anderson I***), this court laid out both the theory and process behind the community caretaker function. We observed that both the United States Supreme Court and our supreme court had recognized such a function when officers are engaged in making contact with lay citizens for reasons "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Id.*** at 166-67. We also recognized that the exercise of a community caretaker role did not place officers beyond constitutional scrutiny. ***Id***. at 167. We established an objective three-factor test that a trial court must consider in determining whether a seizure is justified under the community caretaker function. We stated that a trial court must determine: (1) whether 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. ***Id.*** at 169. The trial court made its finding after considering these three factors and Dickelman does not contend otherwise. Instead, he complains that the trial court erred in its conclusions regarding the latter two factors.

¶5 The trial court at least implicitly found that the seizure occurred when the officer turned on his emergency lights and before Dickelman drove his car up on the snow bank. We agree. The first factor is not at issue as far as this court is concerned.

¶6 The trial court found that the officer's conduct was bona fide community caretaker activity. The court keyed on the brake and driving lights going on and off of a parked vehicle in the early morning as justifying approaching the vehicle to find out if someone was in need of assistance.

¶7 Dickelman's assault on this finding boils down to the idea that because everything the officer saw prior to the stop was legal, the officer's justification for the stop—to see if everything was all right—was a pretext. As proof of this pretext, Dickelman points out that if the officer were really concerned about the safety of the occupant in the vehicle, he would not have driven his squad car down the block to conduct surveillance for five minutes. Dickelman concludes that the officer's conduct was therefore not "totally divorced from detection, investigation, or acquisition of evidence relating to the violation of the criminal statute" so as to be justified as a community caretaker situation.

¶8 Dickelman is missing the point. There was prior justification for the officer to be where he was. His attention was first alerted to the car when he saw that it was parked, albeit legally, in a place not in front of a residence at quarter to three in the morning in the middle of winter. He was not familiar with this car as belonging to the neighborhood, and he saw that there was an occupant in the vehicle. Certainly, he was within his rights to conduct surveillance of the vehicle. Surveillance is not synonymous with a stop, and it is in no way an intrusion on Dickelman. In short, the officer had a right to be where he was. Sure, the surveillance was conducted with the view of investigating possible criminal activity. But that is as far as it went. *See* ***id.*** at 167. ("The key question in such a case is one of prior justification; in other words, did the police have the right to be where they were, make their observations, and take their responsive action.").

¶9 It was what happened afterward which changed this from an investigation into a community caretaker situation. The officer saw brake lights go on and off several times. He also saw the driving lights go on, and then a short time later, go off. Certainly, to an objective observer such as this court, the behavior is unusual, even remarkable. And certainly, an objective person in the

position of a police officer could believe that there might be a person in the vehicle who was in some sort of distress. This court is convinced that a bona fide caretaker situation existed.

¶10 Dickelman also takes issue with the third factor. He posits that activation of the emergency lights begets the inference that this was a "traffic stop" rather than a mere intention to see if everything was all right. In Dickelman's view, the activation of the lights meant that he was not free to leave, that he was seized, and that his freedom was curtailed, as was his right to privacy. Dickelman says it would have been less intrusive for the officer to simply drive next to the car, have the occupant roll down the window, and ask if everything was all right. If that had happened, Dickelman contends, it would not have been like a seizure, he would not have felt that his freedom was curtailed and his privacy rights would have been largely intact.

¶11 We admit that the officer could well have done it the way Dickelman suggests. But that does not mean the officer's decision to activate his emergency lights was too intrusive. The time was 2:45 a.m., and the officer was doing this without any backup. He did not know who was in the vehicle, and he was in the process of assessing an unknown situation. As the State points out, in such a circumstance, the officer should not be required to suspend natural caution or concern for his own safety in the exercise of his duties. As the State further suggests, it does not take much to imagine a situation where harm might befall an officer who approaches an unfamiliar, yet occupied, vehicle in the middle of the night in such a casual manner. As we said in ***Anderson I***, the intrusion "must be as limited as is *reasonably possible*." ***Id.*** at 169 (emphasis added). The officer's action was reasonable under the circumstances.

By the Court.—Judgment and order affirmed.

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