

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2012AP1131-CR

Cir. Ct. No. 2011CT465

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAMELA L. HAMMERSLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, C.J.¹ In this case, a sheriff's deputy noticed a car parked with its lights off in a field access pathway at 10:00 p.m. The deputy suspected

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

that this vehicle was trespassing and was aware that two homicides had occurred in Manitowoc county in the past two years in wooded areas. Therefore, the deputy stopped the vehicle on suspicion of trespassing and in the exercise of the community caretaker function as soon as the vehicle backed out of the access way and began to drive. But when we look at Manitowoc county's trespass ordinance and line the facts up against it, it is clear that key elements of the trespass are missing. As for the community caretaker rationale, a key feature found in past cases is absent—facts showing that officer assistance might be needed. We reverse.

¶2 Pamela Hammersley was convicted of a third-offense operating a vehicle while intoxicated. She moved to dismiss on grounds that the deputy had no reasonable suspicion that a crime had been committed. After testimony and argument, the trial court found reasonable suspicion that she was trespassing. The trial court did not decide the case on community caretaker grounds, noting that the car did drive away. The deputy did not testify to any “bad driving” prior to the stop.

¶3 It is settled law that a stop cannot be based on an officer’s mistaken understanding of the law. *State v. Longcore*, 226 Wis. 2d 1, 3-4, 594 N.W.2d 412 (Ct. App. 1999). It appears that this is what happened here. The deputy said the stop was made, in part, on suspicion that a trespass had been committed. The State points to Section 6.07 of the MANITOWOC CNTY., WIS., CODE as justification for the stop. In particular, the State focuses on Sec. 6.07(1)(d) of the ordinance. Here is what Sec. 607(1)(d) says:

- (1) Whoever does any of the following may be punished as provided in Section 6.01 herein:

- d. Enters any enclosed or cultivated land of another with a vehicle of any kind without the express or implied consent of the owner or occupant.

¶4 The evidence does not support a stop based on the ordinance. First, there is no testimony that the land was enclosed. Indeed, because Hammersley was parked in an access way, the only implication is that it was open. The only description given in the testimony is that she was parked in an “open field.” This was the description provided by the deputy himself. Second, the only testimony was that she was parked on a field access pathway. There is nothing to suggest that the land was cultivated. Clearly, if the deputy believed that parking in an open field without consent of the owner or occupant is a violation of the trespass ordinance, he was mistaken. Thus, we apply *Longcore* and hold that there was no reasonable suspicion for the deputy to stop Hammersley’s vehicle based on the municipal ordinance.²

¶5 Alternatively, the State asserts that we can affirm on the community caretaker ground even though the trial court did not base its decision on it. The State claims that the facts here are similar to the facts in *State v. Kramer*, 2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598, where the supreme court upheld a stop based on the community caretaker function. We agree that *Kramer* is instructive, but it works against the State, not for it. There, the officer stopped behind the defendant’s legally parked vehicle that had its *hazard flashers on*. *Id.*, ¶37. The court pointed to the officer’s testimony that “when a vehicle is parked on the side of the road with its hazard flashers operating, typically there is a vehicle problem.”

² The State concedes that the facts do not meet the elements for trespass under the state statute, WIS. STAT. § 943.13. We do not need to discuss this statute.

Id. Another case cited by the State is *State v. Truax*, 2009 WI App 60, 318 Wis. 2d 113, 767 N.W.2d 369. There, a motorist passed a law enforcement vehicle and abruptly pulled over to the side of the road. Because this behavior was unusual, the officer monitored the vehicle for ten to fifteen seconds and saw no one exiting the vehicle. The officer became “concerned for the well-being of the driver inside at that time,” such as a possible medical condition or mechanical problem with the vehicle. *Id.*, ¶4. What these two cases teach is that the possibility of assistance being needed, based on unusual vehicle conduct, is what forms the basis of a bona fide community caretaker function.

¶6 But here, there is no vehicle conduct which would lead a reasonable police officer to believe that assistance was needed. In fact, as noted by the trial court, the vehicle soon backed out and drove away. This simple fact brings to waste the State’s defense of the stop on grounds that there might have been mechanical problems or health problems necessitating having to park in an open field. The State also keys on the deputy’s concern about the vehicle due to two murders in wooded areas in the preceding two years as a reason to make sure the occupants in the vehicle were alright. But, again, the vehicle backed out and drove away. Clearly, the occupants were not victims of a murder. The bottom line is that there simply was no bona fide caretaker function afoot. Because the motion to suppress should have been granted, we reverse the judgment and remand with directions that the trial court proceed in a manner not inconsistent with this opinion.

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

This opinion will not be published in the official reports.

