COURT OF APPEALS
DECISION
DATED AND RELEASED

April 17, 1996

No. 95-2924-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY RACH,

Defendant-Appellant.

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

SNYDER, J. Gary Rach appeals from an order denying his pretrial motion to suppress evidence and from a judgment of conviction. On appeal, Rach questions the constitutionality of the police stop. He claims that there was insufficient suspicion to warrant a *Terry*[1] stop and insufficient exigency to justify invocation of the emergency doctrine. Consequently, Rach

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

argues that he was unlawfully seized and all evidence from the subsequent search of his person should have been suppressed.

We conclude that the initial stop was constitutional because the police officer was properly exercising his community caretaker duties. Second, the totality of the circumstances warranted the performance of a pat-down search. Accordingly, we affirm.

At approximately 3:00 a.m., on August 3, 1995, Deputy Blaine Spicer of the Sheboygan County Sheriff's Department spotted Rach "staggering" along a dark, rural county road. Spicer observed that Rach was having trouble keeping his balance and was walking about a foot off of the traveled portion of the pavement.

Spicer stopped his squad car and asked Rach to cross the road. They made contact behind the vehicle and Spicer noticed that Rach's eyes were bloodshot, his breath had a strong odor of intoxicants and his speech was quite slurred. After speaking with Rach to ascertain his identity, Spicer determined that Rach's intoxicated condition placed him at risk of injury.[2] Spicer told Rach that he had concerns about his safety and feared that he might be hit by oncoming traffic. Spicer informed Rach that he was going to give him a ride home.[3]

---

[2] Rach told Spicer that he had been at a tavern playing darts and was on his way home. At the suppression hearing, Rach testified that he had consumed approximately two pitchers of beer at the tavern and admitted that he felt intoxicated.

[3] Spicer testified at the pretrial hearing that Rach did not object to his offer of a ride home. Rach testified that he told the officer that he did not want a ride home.

Acting according to departmental policy, Spicer performed a pat-down search of Rach before letting him into the vehicle. During the search, Spicer felt a hard, square box in Rach's left shorts pocket measuring approximately three by five inches. He asked Rach about the item and was told it was a lighter box.

Spicer asked Rach to produce the box, believing that it was large enough to contain a blade or some other type of weapon. Rach gave the box to Spicer, who inspected the contents and found a chrome marijuana pipe with residue in the bowl. Spicer then placed Rach under arrest for possession of drug paraphernalia and proceeded to execute a search incident to arrest, recovering a small vial of marijuana from Rach's left shorts pocket.

At a pretrial motion hearing, Rach argued that the evidence should be suppressed because he was seized in violation of the Fourth Amendment prior to being subjected to the search. The trial court denied the motion to suppress, concluding that Spicer had properly exercised his community caretaker duty when he detained Rach.

As a result, the court ruled that the pretransport pat-down search of Rach and the following search incident to arrest were lawful.[4] Rach was subsequently convicted at a bench trial. He now appeals the denial of the suppression motion and the judgment of conviction.

[4] On appeal, Rach does not dispute the legality of the search incident to arrest, other than his contention that the evidence obtained during that search should be suppressed under a "fruit of the poisonous tree" theory.

Determining the constitutionality of a seizure is a question of law subject to de novo review. ***State v. Richardson,*** 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990). It has been well established that the ability of the police to act is not limited to instances where there is probable cause for the commission of crime. ***State v. Anderson,*** 142 Wis.2d 162, 167, 417 N.W.2d 411, 413 (Ct. App. 1987). Police action in situations beyond criminal investigation constitutes a part of the community caretaker function—an important and essential aspect of the police role. ***Id.***

The community caretaker function has been defined as police activity totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute. ***State v. Ellenbecker,*** 159 Wis.2d 91, 96, 464 N.W.2d 427, 429 (Ct. App. 1990). However, the freedom to act within the caretaker role does not create an opportunity for police to violate citizens' Fourth Amendment rights to be free of arbitrary invasions from government officials. *See* ***Anderson,*** 142 Wis.2d at 167, 417 N.W.2d at 413. Recognition of the police community caretaker function does not necessarily place the episode beyond constitutional scrutiny. ***Id.***

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 bona fide community caretaker activity, and (3) the public need and interest outweigh the intrusion upon the individual. ***Id.*** at 169, 417 N.W.2d at 414. It is undisputed by both parties that

Spicer's contact with Rach constituted a seizure within the meaning of the Fourth Amendment.

We next determine whether Spicer was engaged in bona fide community caretaker activity. Since community caretaker activity is that which is divorced from criminal investigation, we look to Spicer's motivation for stopping to speak with Rach. When he came upon Rach, Spicer did not suspect him of criminal activity. Spicer stopped because he was concerned for Rach's welfare and wanted to make sure that he was all right. He saw a pedestrian having difficulty keeping his balance walking alone on a rural road in the middle of the night. Stopping Rach to ascertain his need for assistance was clearly bona fide community caretaking.

Finally, we consider whether the public need and interest outweigh the intrusion upon the privacy of the individual. The following factors are determinative: (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including the time, location and degree of overt authority and force displayed; and (3) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished. ***Anderson***, 142 Wis.2d at 169-70, 417 N.W.2d at 414.

There is a strong public interest in administering assistance to individuals who may be incapacitated or stranded along the side of the road. Given the remote location, the time of the incident and Rach's obvious physical impairment due to his admitted state of intoxication, the slight intrusion upon

his privacy was distinctly outweighed by the need to ensure his safe return home. Spicer momentarily stopped Rach, asked him a few questions and determined that he needed a ride home. This was the most effective and least intrusive way of satisfying the public interest.

Rach contends that Spicer unlawfully subjected him to a ***Terry*** stop because there was insufficient suspicion that a crime had been or was about to be committed. *See* ***Terry v. Ohio***, 392 U.S. 1 (1968). However, the State is not arguing that this case involves a ***Terry*** stop. At the pretrial hearing, the State expressly noted, "[T]his is not a ***Terry*** stop .... It's just a very dutiful, caretaker-type stop."

Rach also argues that there was insufficient exigency to justify an emergency doctrine seizure. The medical emergency exception allows warrantless entries and searches when police reasonably believe a person is in need of aid. ***State v. Prober,*** 98 Wis.2d 345, 360, 297 N.W.2d 1, 9 (1980), *overruled on other grounds by* ***State v. Weide***, 155 Wis.2d 537, 455 N.W.2d 899 (1990). For example, persons who are unconscious or semi-conscious may be searched to ascertain the cause, and homes may be entered to search for victims or apprehend those responsible for a crime. ***Id.*** at 360-61, 297 N.W.2d at 9.

The emergency doctrine is not at issue in this case. The State does not offer this exception as its justification for seizing Rach, and the doctrine does not apply to the factual situation in this case. Nonetheless, based on our previous analysis, we conclude that Spicer's stop was a proper exercise of his

community caretaker duty and as such did not violate Rach's Fourth Amendment rights.

We now shift our analysis to a determination of whether the pat-down search was reasonable. Whether a search is reasonable is a question of law and is reviewed without deference to the trial court. *See* ***State v. Morgan,*** 197 Wis.2d 200, 208, 539 N.W.2d 887, 891 (1995).

In making its determination, the court must balance the need for the search against the invasion of the individual's privacy. ***Id.*** at 208-09, 539 N.W.2d at 891. The objective test is whether "a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety ... was in danger. ... [D]ue weight must be given ... to the specific reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience." ***Id.*** at 209, 539 N.W.2d at 891 (quoting ***Terry***, 392 U.S. at 27).

Pat-down searches are justified when an officer has a reasonable suspicion that a suspect may be armed. ***Id.*** The determination of reasonableness is based on the totality of the circumstances known to the searching officer. ***Id.***

The decision to give Rach a ride home placed Spicer in a vulnerable position. Spicer was alone in an isolated area and he was about to place an intoxicated person he did not know into his squad car. There was the possibility that Rach could suddenly become irrational and act unpredictably. Spicer testified that he was accustomed to performing a pat-down search for

officer safety before allowing anyone into his squad car, and that this was part of the policy of the Sheboygan County Sheriff's Department. Given the time, the location and Rach's state of intoxication, it was reasonable for Spicer to perform the pat-down search.

Spicer testified that when he performed the pat-down search, he felt a hard, square object in Rach's shorts pocket. He testified that because of the size and configuration of the object, he believed that it was large enough to contain a knife or some type of blade. He asked Rach what it was, and after Rach responded that it was a lighter box, Spicer asked to see it. Rach then pulled it from his pocket and gave it to Spicer.

Based on the totality of the circumstances as articulated earlier, we conclude that the pat-down search and subsequent examination of the lighter box were not violative of Rach's Fourth Amendment protections. Spicer was justified in his suspicion that Rach might be armed.

By the Court.—Judgment and order affirmed.

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