

STATE OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Appeal No. 07-AP-1834-CR

TODD LEE KRAMER,

Defendant-Appellant-Petitioner.

ON APPEAL FROM THE DECISION OF THE COURT OF
APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT
OF CONVICTION ENTERED IN COLUMBIA COUNTY,
THE HONORABLE JAMES O. MILLER PRESIDING,
TRIAL COURT CASE NO. 06-CF-329

**BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT-PETITIONER**

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ISSUES PRESENTED

1. Was the stop of Todd Kramer's vehicle a seizure within the meaning of the state and federal constitutions?

The court of appeals did not resolve this issue because the court assumed that if a seizure had occurred, the seizure was justified under the community caretaker exception to the Fourth Amendment of the United States Constitution and Article I, Section 11 of the State of Wisconsin Constitution.

2. Was the stop of Todd Kramer's vehicle justified by the community caretaker doctrine?

The court of appeals ruled that the stop was constitutional, since the officer was performing a community caretaker function.

POSITION ON ORAL ARGUMENT
AND PUBLICATION

This court's granting of the petition for review indicates that the case is sufficiently important to warrant both oral argument and publication.

STATEMENT OF THE CASE

On August 26, 2006, Todd Kramer was charged with operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration, both fifth offenses. (R.4.) Kramer filed a motion to suppress the blood test results. (R.15.) Kramer argued that there was no reasonable suspicion for the stop and seizure of Kramer. (R.30:3.)

The trial court held a hearing on the Motion to Suppress on May 18, 2007. (R.30.) The State argued that there was no seizure, but that if there was a seizure, it was justified under the community caretaker doctrine. (R.30:23-24.) Kramer argued that there was a seizure and that the community caretaker doctrine did not apply. (R.30:24-29.) At the conclusion of the hearing, the trial court denied the motion to suppress, finding no constitutional violation. (R.30:29-32; App. 20-23.)

On July 2, 2007, Kramer pled no contest to Count 1 of the Information, fifth offense OWI. Count 2, the PAC charge, was dismissed. (R.20,31.) The trial court sentenced Kramer to 6 years in prison (3 years of initial confinement followed by 3 years of extended supervision). That sentence was stayed, and Kramer was placed on 3 years of probation with the following conditions: 12 months in jail with Huber and good time, a fine and court costs totaling \$3,300.50 fine, a 36-month revocation of his driver's license, AODA assessment and treatment, the requirement of an ignition interlock device for 24 months, no possession or consumption of alcohol, and a DNA sample. (R.20.) The execution of the entire sentence, including probation, was stayed pending this appeal. (R.20, 31.) Kramer timely filed a Notice of Intent to Pursue Post-Conviction Relief and a Notice of Appeal. (R.21, 24.)

On March 27, 2008, the Wisconsin Court of Appeals affirmed the trial court's decision, holding that if a seizure had occurred, it was lawful because the officer was acting in a community caretaker capacity. (A.2.)

STATEMENT OF THE FACTS

This case arose out of an August 26, 2006, encounter between Kramer and Deputy Todd Wagner of the Columbia County Sheriff's Department. At the suppression hearing, Deputy Wagner testified that his assignment that evening was to patrol the township of Lodi. (R.30:9-10.) At about 8:45 p.m., Deputy Wagner was traveling southbound on County Highway J. He observed a pick-up truck parked on the shoulder of the roadway with its headlights and its four-way hazard lights activated. (R.30:4-5.) According to Deputy Wagner, the truck did not appear to be damaged or disabled. The truck was not impeding traffic, nor was it jeopardizing public safety in any way. The truck was legally parked. (R.30:13.) The driver did not flag down Deputy Wagner. (R.30:15.) Other than the fact that the truck had its hazard lights on, Deputy Wagner had no reason to believe that the person in the vehicle was in distress. (R.30:11.)

Under cross-examination, Deputy Wagner admitted that a concern that a crime might have been going on "was in my mind." (R.30:8.) He further admitted that he "wasn't sure what was being done in the car," but concerns that something illegal was being done in the car "were always in my mind." (R.30:8-9.) When asked if he had been concerned that the driver could have been doing drugs, Deputy Wagner acknowledged that he thought "[i]t could have been anything." (R.30:9.)

Deputy Wagner conceded that when he first saw the car, he could have driven past and come back to check on the truck a few minutes later. (R.30:16.) Wagner did not know how long the truck was there before he pulled up behind it. (R.30:12.) Instead, Deputy Wagner immediately made a U-turn, activated his red-and-blue emergency lights, and pulled up to

the rear of the truck. (R.30:12.) Roughly a minute passed from the time Deputy Wagner first saw the truck until he pulled up behind it with his lights flashing. (R.30:11.) At this point, Deputy Wagner testified Kramer was not free to leave. (R.30:16.) If Kramer had taken off, Deputy Wagner would have followed him and pulled him over. (Id.) Deputy Wagner emerged from his squad car and walked toward the rear of the truck with his hand on his gun. He shined his flashlight into the rear cab window. (R.30:7-8.)

Kramer was sitting in the driver's seat of the truck. Wagner approached the driver's side window, spoke with Kramer and noticed that Kramer's speech was slurred. He also smelled an odor of intoxicants coming from within the truck. (R.30:7.) These observations led Deputy Wagner to believe that further investigation was necessary.

Kramer was subsequently arrested for driving while under the influence of an intoxicant, fifth offense.

ARGUMENT

I. KRAMER WAS SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT.

A. Standard of Review

Whether a person has been seized within the meaning of the Fourth Amendment is a question of constitutional fact. An appellate court accepts the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous, but should independently determine whether or when a seizure occurred. State v. Young, 2006 WI 98, ¶ 17, 294 Wis.2d 1, 717 N.W.2d 729.

In reviewing a motion to suppress, the appellate court employs a 2-step analysis. An appellate court will uphold the Circuit Court's findings of fact unless clearly erroneous. Whether those facts constitute reasonable suspicion, however, is a question of law that this Court reviews de novo. Id. at ¶ 17.

B. A Seizure Occurred.

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Similarly, the State of Wisconsin Constitution provides the same protection in Article I, Section 11. In a constitutional sense, police-citizen encounters need not rise to the level of arrests to constitute seizures under the Fourth Amendment. The Wisconsin Supreme Court recognizes two types of seizures: those that are “full-blown arrest[s]” and those that are merely investigatory. State v. Young, 2006 WI 98, ¶ 20-22.

The United States Supreme Court established the test for whether a seizure has occurred in its landmark decision, United States v. Mendenhall, 446 U.S. 544, 554 (1980). A seizure within the meaning of the Fourth Amendment has occurred if, under the circumstances, a reasonable person would not believe he was free to leave. The Mendenhall court cited examples of circumstances that might be indicative of a seizure, which include:

the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.

Mendenhall at 554. In State v. Young, 2006 WI 98, 295 Wis.2d 1, 717 N.W.2d 729, the Wisconsin Supreme Court held that the Mendenhall test is appropriate when the subject of police attention is either subdued or submits to a show of authority. Young at ¶ 39. The test for a “show of authority” is objective: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer’s words and actions would have conveyed that to a reasonable person. Id. Stopping a vehicle and detaining its occupants constitutes a

seizure within the meaning of the Fourth Amendment. State v. Anderson, 142 Wis.2d 162, 167 (Ct. App. 1987).

While Deputy Wagner did not “stop” Kramer’s vehicle on the night in question, he did activate his squad car’s flashing red-and-blue emergency lights, execute a U-turn, and park his squad car directly behind Kramer’s pick-up truck. As Deputy Wagner approached Kramer’s truck, he kept his hand on his gun. He shined his flashlight through the truck’s rear window. All the while, the squad car’s red-and-blue emergency lights continued to flash. At the suppression hearing, Deputy Wagner testified that after he pulled up behind Kramer with the squad car’s emergency lights flashing, Kramer was not free to leave. (R.30:4-19.)

Under the Mendenhall test, the circumstances, taken as whole, indicate that Deputy Wagner seized Kramer. No reasonable person under the circumstances described above would have believed he was free to leave. Kramer himself even testified that he did not believe he was free to leave once the officer stopped behind him with the red-and-blue lights flashing. (R.30:22.)

C. The Trial Court Did Not Definitively Rule On Whether A Seizure Occurred, Failing To Satisfy The *Anderson* Requirement.

In State v. Anderson, 142 Wis.2d 162, 417 N.W.2d 411 (Ct. App. 1987), the Wisconsin Court of Appeals held that a trial court must make three findings when considering whether a seizure is justified under the community caretaker doctrine: (1) that 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)

whether the public need and interest outweigh the intrusion upon the privacy of the individual. Anderson at 169. Nonetheless, the trial court in the instant case failed to find that a seizure had occurred. Instead, the trial court stated:

And in this particular case, the evidence that's before me is that he turned around, put on his emergency lights and his lights. And I would agree 100 percent that when that occurred, there is some authority involved in it. But that's the nature of a police car. That's what it's equipped with. When he pulls over and those lights are flashing, it's warning everyone around as is Mr. Kramer's own flashers that there is a vehicle and there may be activity going on.

And while if I was pulled over and an officer came up behind me, wouldn't consider turning my car on and gunning it and taking off because now there is somebody behind me, and I know it's flashing lights. I know its authority. I don't have this or get the impression that this is a circumstance that would leave one to believe that they are under immediate concern for arrest.

(R.30:30.)

Although the trial court acknowledged that Deputy Wagner displayed authority in his encounter with Kramer, the court confused the question of whether a *seizure* occurred with the question of whether an *arrest* had occurred. As earlier stated, Wisconsin recognizes two types of seizures: those that are arrests and those that are investigatory. While the trial court was correct in ruling that no arrest had occurred when the officer activated his squad car's emergency lights, and that a reasonable person would not have been concerned about arrest upon merely seeing a squad car's emergency lights, an

investigatory seizure did occur that night. If no investigatory seizure had occurred, Kramer would have been free to ignore the squad car's emergency lights and could have driven away. However, as every reasonable motorist knows, once a police officer activates a squad car's emergency lights and pulls behind a vehicle, that motorist is not free to leave.

D. The Court of Appeals Declined to Answer the Seizure Question, Sidestepping the *Anderson* Requirement.

In a footnote to its decision, the court of appeals stated that the seizure question did not need to be resolved because assuming a seizure had occurred, it was justified under the community caretaker doctrine. (A.4.) Like the trial court, the court of appeals ignored the Anderson requirement that when community caretaker is asserted as a justification for the seizure of a person, a trial court must first find that a seizure within the meaning of the Fourth Amendment has occurred. By sidestepping the seizure question, the court of appeals failed to decide a crucial issue: is a motorist seized when a police officer activates the red-and-blue emergency lights of his or her squad car and pulls behind the motorist? The answer to this question will impact motorists across the state in a variety of ways.

First, the answer to this question will impact the way motorists view the authoritative display of a squad car's emergency lights. The reasonable motorist knows that a squad car's flashing lights mean "pull over." The reasonable motorist also knows that when a vehicle is pulled over to the side of the road and a squad car is parked behind it with its emergency lights flashing, that motorist is not free to leave until the officer grants permission for the motorist to do so. If, as the State would suggest, that motorist is not seized, what are the citizens of Wisconsin to think when they see the flashing lights of a police car? Do motorists have discretion over whether the lights mean "pull over" or whether they mean something else?

The flashing lights of a police car are the clearest indicator to a motorist that the police are exercising authority over a vehicle or a person. If this Court finds that these lights do not mean the police are attempting to make - at the very least - an investigative seizure, traffic officers will not be able to effectively police Wisconsin's roads. Once a reasonable motorist submits to this display of authority, under Mendenhall and Young, a seizure has occurred.

Second, the answer to the seizure question will impact current statutory law. Under Wis. Stat. § 346.04(3):

No operator of a vehicle, after having received a visual or audible signal from a ...marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians...

In the present case, Todd Kramer received a visual signal from a marked police vehicle on the night of August 26, 2006. If he had disregarded that signal and driven away, Deputy Wagner, as he himself testified, would have followed Kramer and attempted to pull him over, presumably for fleeing under Wis. Stat. § 346.04. (*See* R.30:16.) If this Court holds that Kramer was not seized on the night in question, then Kramer could have lawfully driven away from the scene that night despite Deputy Wagner's display of authority, and despite Wis. Stat. § 346.04. This would make Deputy Wagner's assertion, that he would have stopped Kramer if Kramer had fled, unreasonable and unlawful. This would be an absurd result.

Deputy Wagner, like any reasonable police officer, knew full well that by displaying his emergency lights and pulling behind Kramer, he was conducting a seizure, and

Kramer could not have lawfully left the scene without Deputy Wagner's permission. Wisconsin statutes forbid Kramer from doing so. Kramer, like any reasonable motorist, knew full well that he was being seized and could not have lawfully left the scene without making contact with Deputy Wagner. What happened that night was a seizure and this Court should definitively make that finding.

In its brief to the court of appeals, the State argued:

[I]n a setting where an officer turns on the emergency lights while stopping to assist a motorist along the highway, the reasonable innocent person will not feel that he or she is being seized.

(Brief of Plaintiff-Respondent, p.8.) This line of reasoning ignores the fact that a motorist assist did not occur Kramer's case.

The facts in Kramer do not involve an officer who pulled over to help a motorist clearly in need of assistance, and while doing so, the officer turned on his emergency lights for safety reasons. The facts in Kramer involve a motorist who pulled over to take a cell phone call; a motorist whose vehicle was not damaged or appeared to be disabled; a motorist whose vehicle was legally parked; a motorist whose vehicle was not jeopardizing public safety or the flow of traffic; a motorist who did not flag down an officer for help. (R.30:13.) Kramer was not in need of any assistance, and Deputy Wagner did not know whether Kramer was in need of assistance. (R.30:15.) Deputy Wagner himself testified that he "had no idea what was going on inside the vehicle." (R.30:15.) The reason he seized Kramer was to investigate. Likening Kramer's case to that of a motorist assist is a false analogy.

As earlier stated, Mendenhall sets the standard for when a seizure has occurred. No reasonable motorist, innocent or not, would have believed he or she was free to leave if put in the same situation as Kramer. Accordingly, this Court should find that Kramer was seized.

II. THE SEIZURE WAS NOT JUSTIFIED BY REASONABLE SUSPICION OR PROBABLE CAUSE.

The State has not asserted that the seizure of Kramer was justified by reasonable suspicion or probable cause. Reasonable suspicion and probable cause are not at issue in this case. Deputy Wagner's seizure of Kramer was not permitted by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) or Wis. Stat. § 968.24.

III. THE SEIZURE WAS NOT JUSTIFIED UNDER THE COMMUNITY CARETAKER DOCTRINE.

A. Burden of Proof

The State bears the burden of proving that the community caretaker exception applies. State v. Ziedonis, 2005 WI App. 249, ¶ 15, 287 Wis.2d 831, 707 N.W.2d 565.

B. The Advent of the Community Caretaker Doctrine

The State's position is that if a seizure occurred, it was justified as a "community caretaker" function. The "community caretaker" doctrine stems from Cady v. Dombrowski, 413 U.S. 433 (1973). Cady was originally a Wisconsin case in which the defendant was involved in a one-vehicle accident, apparently caused by his heavy intoxication. In that case, the defendant drove through a guard rail and

crashed into a bridge abutment. A passing motorist drove the defendant into town, where he telephoned police. The police then picked the defendant up at a tavern and drove him to the scene of the accident. Cady at 436. There, the police took measurements relating to the accident and questioned the defendant about the circumstances surrounding the crash. The defendant was subsequently arrested for drunk driving and thereafter, the police found evidence of a homicide inside the defendant's vehicle. Id. at 436-37.

In conducting an analysis of whether the search of the defendant's vehicle was reasonable, the United States Supreme Court stated:

Local police officers...frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Id. at 441. In holding that the search of the defendant's vehicle was not unreasonable, the Cady court noted:

These officers in a rural area were simply reacting to the effect of an accident-one of the recurring practical situations that results from the operation of motor vehicles and with which local police officers must deal every day. The [defendant's vehicle] was not parked adjacent to the dwelling place of the owner as in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it

represented a nuisance, and [there] is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure.

Id. at 446-47. As indicated by the Cady court's reasoning, the United States Supreme Court created the community caretaker doctrine as a response to the defendant's challenge of a police officer's authority to search his vehicle after a drunken car crash. The facts in Cady, however, are quite distinguishable from the present case, which will be further discussed below.

In 1977, the Wisconsin Supreme Court acknowledged the community caretaker doctrine in Bies v. State, 76 Wis.2d 457, 251 N.W. 2d 461 (1977). In Bies, a police officer was dispatched to investigate a noise complaint in the area near the defendant's garage. As the officer approached the defendant's garage, the light inside the garage went out. After walking around the garage in an attempt to see inside of it, the officer found an empty doorway and shined his flashlight into it. The officer then discovered what he believed to be stolen telephone cable. Bies at 460-62. After further investigation, the defendant was charged with and convicted of theft. Id. at 460.

In upholding the search of the defendant's garage as reasonable, the Wisconsin Supreme Court stated:

It is apparent that the information the officer had could justify little police intrusion upon the privacy of a citizen. However, it undoubtedly justified at least some response by the police. Checking noise complaints bears little in common with investigation of crime. As a general matter it is probably more a part of the "community caretaker" function of the

police which, while perhaps lacking in some respects the urgency of criminal investigation, is nevertheless an important and essential part of the police role.

Id. at 471. As the court's language in Bies indicates, the officer had very little information to justify a search of the defendant's garage. However, the officer in that case had, at the very least, *some* indication that a disturbance was afoot, unlike the present case.

Subsequent Wisconsin cases applied the community caretaker doctrine to circumstances in which police conducted searches or seizures in non-criminal investigations. *See State v. Callaway*, 106 Wis.2d 503, 317 N.W.2d 428 (1982) (disabled or damaged vehicles that jeopardize public safety or interrupt the flow of traffic may be removed or impounded by police); *State v. Anderson*, 142 Wis.2d 162, 417 N.W.2d 411 (Ct. App. 1987) (case remanded to trial court on suggestion of "subterfuge" by police who pulled defendant over to investigate a parking complaint by a private citizen; trial court needed to determine whether officer was partaking in bona fide community caretaking at the time of the stop); *State v. Ellenbecker*, 159 Wis.2d 91, 464 N.W.2d 427 (Ct. App. 1990) (officer came upon a motorist who was attempting to fix his disabled vehicle at the side of the road; officer was permitted to ask for the motorist's driver's license); *State v. Dull*, 211 Wis.2d 652, 565 N.W.2d 575 (Ct. App. 1997) (although officer was initially acting in a community caretaker capacity, that status ended when he uncovered evidence of a crime; warrantless search was therefore not justified under community caretaker); *State v. Ferguson*, 2001 WI App 102, 244 Wis.2d 17, 629 N.W.2d 788 (officer investigating underage drinking was acting in a community caretaker capacity; his only motive for opening the defendant's closet was to confirm that there was no one inside who needed assistance); *State v. Ziedonis*, 2005 WI App 249, 287 Wis.2d 831, 707 N.W.2d 565 (officer who

entered the home of the defendant to check on the defendant's welfare was acting in a community caretaker capacity; defendant's door was found open in the middle of the night, his dog was running loose and he lived in a high crime area).

C. The *Anderson* 3-Part Test

In State v. Anderson, 142 Wis.2d 162, 417 N.W.2d 411 (Ct. App. 1987), the Wisconsin Court of Appeals set forth a balancing test for trial courts to use when the State alleges that a police search or seizure is justified under the community caretaker doctrine. The Anderson court noted that the ultimate standard under the Fourth Amendment is the reasonableness of the search or seizure in light of the facts and circumstances of the case. Anderson at 168. In a community caretaker case, this requires a balancing of the public need and interest furthered by the police conduct against the degree and nature of the intrusion upon the privacy of the citizen. Id. This test requires an objective analysis of the circumstances confronting the police officer, including the nature and reliability of his information, with a view toward determining whether the police conduct was reasonable and justified. This test also requires an objective assessment of the intrusion upon the privacy of the citizen. Id. Overriding this entire process is the fundamental consideration that any warrantless intrusion must be as limited as is reasonably possible consistent with the purpose justifying it in the first instance. Id. at 168-69.

In conducting a community caretaker analysis, a trial court must determine: (1) that a seizure within the meaning of the Fourth Amendment occurred; (2) if so, whether 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. With respect to the second part of the test, a bona fide community caretaker activity is one that is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation

of a criminal statute." State v. Dull, 211 Wis. 2d 652, 658 (Ct. App. 1997). With respect to the third part of the test, the Anderson analysis requires a weighing of 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, 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. 142 Wis. 2d at 169. The Anderson court held that stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment. Therefore, Fourth Amendment considerations are implicated even if officers were acting pursuant to the community caretaker function of the police. Id. at 167.

A close examination of community caretaker precedent reveals that the doctrine has been applied only in limited cases when police were clearly not investigating criminal activity. This is consistent with the Cady court's holding that community caretaking is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady at 441. Prior community caretaker cases are distinguishable from the present case.

For example, Cady involved a defendant who crashed his car and abandoned it at the scene of the accident. Cady himself informed the police of the accident. The subsequent investigation that occurred, and which eventually implicated Cady in a homicide, all stemmed from Cady's request for police assistance after the crash. On the contrary, in the instant case, Kramer did not request any assistance by the police. Deputy Wagner testified that Kramer's vehicle did not appear to be disabled or damaged. (R.30:13.) Deputy Kramer did not receive any calls about Kramer's truck. (Id.) Kramer's truck was not jeopardizing public safety or impeding traffic.

(Id.) In fact, according to Deputy Wagner's own testimony, Kramer's truck was legally parked. (Id.)

In Bies, the officer was investigating a noise complaint when he happened upon evidence of another crime. Again, in that case, the police were responding to a complaint made by a citizen. When the officer in that case approached the defendant's garage, the lights in the garage went out as though someone was attempting to evade the police. In Kramer's case, however, Deputy Wagner was not responding to a citizen complaint, nor did he observe any evasive action on the part of Kramer that would give him reasonable suspicion to seize Kramer.

In Wisconsin community caretaker cases involving vehicles, warrantless searches and seizures have been justified by the doctrine only in cases where defendants actually requested an officer's assistance or a vehicle was jeopardizing public safety or the flow of traffic. See State v. Callaway and State v. Ellenbecker. Kramer is unable to locate any Wisconsin case that addresses the unique facts in his case. The most similar case is State v. Ellenbecker, 159 Wis.2d 91, 464 N.W.2d 427 (Ct. App. 1990).

In Ellenbecker, the court of appeals upheld the seizure of a motorist under the community caretaker doctrine. The facts in Ellenbecker, however, are distinguishable from the facts in Kramer. In Ellenbecker, the officer observed a vehicle at the side of the road with its hood up. Jumper cables were lying next to the car and the officer also observed a passenger inside the vehicle. Ellenbecker at 93. Unlike Ellenbecker, Kramer's vehicle did not appear to be disabled, nor did the officer initially observe anyone inside of the vehicle. Ellenbecker involved a motorist assist, while Kramer's case involves an officer who conducted a warrantless seizure without knowing whether Kramer needed any assistance.

In State v. Anderson, the court of appeals noted that in some situations, a citizen has a lesser expectation of privacy in an automobile. Anderson at n.4. The Anderson court cited New York v. Class, 475 U.S. 106, 106 S.Ct. 960 (1986), in support of this idea. In Class, the United States Supreme Court held that an officer who stops a vehicle for traffic violations may enter the suspect's automobile for the purposes of obtaining the vehicle's identification number, but only when the number is not visible from outside of the vehicle. Class at 119. See also Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (Search of an automobile pursuant to issuance of speeding citation violated Fourth Amendment). The Class holding limits police intrusion into a citizen's vehicle, even when that citizen is suspected of violating a traffic statute. It would follow, then, that a citizen who is not suspected of violating a traffic statute should enjoy even greater protection. As the United States Supreme Court stated in Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 2470 (1974), "the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion."

In light of Wisconsin community caretaker precedent, and the United States Supreme Court's limits on police intrusion into automobiles even when citizens are suspected of violating traffic statutes, this Court should not uphold Deputy Wagner's seizure of Kramer as justified under community caretaker. The community caretaker doctrine should continue to be applied only in cases where a citizen's automobile is obstructing traffic, or when a citizen actually requests the assistance of an officer when his or her vehicle is damaged or disabled. If Deputy Wagner's seizure is deemed valid under the community caretaker doctrine, police officers will essentially have no limits when it comes to seizing vehicles. An officer who has a mere hunch about the criminality of a motorist's activities could always justify a seizure if the doctrine is broadly applied.

For example, suppose that while driving along a highway, an officer observes a motorist's vehicle come close to the fog line, but never touch it. An officer probably could not justify a stop under reasonable suspicion, but he could then assert "community caretaker" by claiming he thought the driver might be having a heart attack. In doing this, he could justify what would otherwise be impermissible under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). In Terry, the United States Supreme Court cautioned against accepting an officer's vague justifications for a search or seizure, stating that the Fourth Amendment is only meaningful when police actions are subjected to the neutral scrutiny of a judge who evaluates the reasonableness of the officer's actions. The Terry court stated:

Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple good faith on the part of the arresting officer is not enough. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police. [citations omitted]

Terry at 1880. The Terry court's language foreshadows the circumstances under which the State justifies the seizure of Kramer in the present case. Deputy Wagner had an inarticulate hunch that something was amiss when he seized Kramer's vehicle. This Court should not accept good faith alone on the part of Deputy Wagner; if it does, this would evaporate the protections of the Fourth Amendment, and as the Terry court stated, citizens of Wisconsin would enjoy constitutional protections only at the discretion of the police.

D. The Trial Court Ruling

The trial court never addressed the three part test of Anderson. The trial court merely stated when an officer:

sees a vehicle on the side of the road I think in a public caretaker position should have an obligation to at least find out if there is some kind of circumstance that requires further action by the officer.

(R.30:31.) The trial court went on to state that it did not:

appear to be an emergency type situation, but the officer doesn't know unless he inquires. It could have been a person on the phone or a person with a heart attack, could be any number of things that have gone on.

(R.30:31.) The court then determined that the officer's actions were a "responsible means of proceeding considering that he [the officer] does not know what the circumstance is." (Id.) The court further stated that when the officer pulled over in "his interest of safety, he has a flashlight, his hand on the gun, but this I don't think is an excessive show of force". (Id.) The court stated that automobiles pulled over to the side of the road with four-way flashers is not something that people just do for the "heck of it". (R.30:31-32.) Lastly, the court said:

There are all sorts of alternatives. We can sit here and second guess until the cows come home, but the fact of the matter is, again, as the officer passes, it would appear to me if there is a public service that's going to be performed, driving down the road and coming back ten minutes later without knowing what, if any, problem is existing can only make the problem worse.

(Id.)

As indicated earlier, the trial court never really determined the first step of the Anderson test, whether a seizure occurred. Neither did the court make a determination as to whether a bonafide community caretaker activity occurred, i.e., one that is totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. In fact, the court seemed to indicate that the officer's actions were not totally divorced from the detection of crime by holding that the officer has an obligation to find out "if there is some kind of circumstance that requires further action by the officer". (R.30:31.)

Finally, the trial court did not find that the public need and interest outweighed the intrusion into Kramer's privacy. The court only held that there were "all sorts of alternatives" to the officer seizing Kramer.

E. The Court of Appeals Ruling

1. *The Court of Appeals Erroneously Found That the Officer Was Acting In a Bona Fide Community Caretaker Capacity.*

The court of appeals did not complete the first part of the Anderson test, which would be making a determination that a seizure occurred. However, after assuming that a seizure did occur, the court conducted an analysis of the remaining Anderson requirements.

First, the court of appeals found that, but for Deputy Wagner's subjective concerns, he was acting in a bona fide community caretaker capacity. (A.7.) The court questioned Kramer's assertion that Deputy Wagner's subjective concerns were relevant. However, the court assumed that they were and nonetheless concluded that the subjective concerns did not preclude a finding that the officer's activity was bona fide

community caretaker activity. (A.6.)

The court noted that officers often “act as community caretakers in situations where it remains reasonably possible that they will discover some criminal activity.” (Id.) In support of this idea, the court cited State v. Ziedonis, 2005 WI App 249, 287 Wis.2d 831, 707 N.W.2d 565, and State v. Ferguson, 2001 WI App 102, 244 Wis.2d 17, 629 N.W.2d 788. As noted above, however, Ziedonis and Ferguson both involve officers who were responding to actual complaints. In Kramer’s case, Deputy Wagner was not responding to any complaint. His response in seizing Kramer after he observed Kramer parked at the side of the road was based on a hunch, not on a duty to act as a community caretaker.

The court of appeals further cautioned against a “too narrow view” of the community caretaker function, or police might be hesitant about fulfilling that function, citing State v. Ziedonis, 2005 WI App 249, and State v. Horngren, 2000 WI App 177, 238 Wis.2d 347, 617 N.W.2d 508. However, the Ziedonis and Horngren courts, like other courts that have upheld the community caretaker doctrine, were faced with fact situations in which officers were required to fulfill a specific duty (controlling vicious dogs in Ziedonis and preventing a suicide in Horngren). This must be reconciled with the United States Supreme Court holding in Terry that Fourth Amendment protections cannot be preserved solely at the discretion of the police.

Surprisingly, the court of appeals rejected Kramer’s “totally divorced” argument because “apart from this argument, it is undisputed that the officer was engaged in ‘bona fide community caretaker activity.’” (A.7.) This holding turns the community caretaker doctrine on its head. The community caretaker doctrine requires that an officer’s activity must be “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal

statute.” Cady at 441. This mandate stems from Cady v. Dombrowski and has consistently been upheld in Wisconsin. (See, e.g., State v. Dull, 211 Wis.2d 652.) If the community caretaker doctrine does not rest on the “totally divorced” rule, then police officers would be free to perform searches and seizures at will, without reasonable suspicion or probable cause, or any requirement that their community caretaking functions be separate from a criminal investigation. As stated earlier, without any discernible limits on the community caretaker doctrine, officers could circumvent reasonable suspicion by citing community caretaking as justification for a warrantless search or seizure.

As earlier stated, the officer in Kramer’s case was not faced with a situation in which he was required to be a community caretaker. Deputy Wagner himself testified that he “wasn’t sure what was being done in the car,” but concerns that something illegal was being done in the car “were always in my mind.” (R.30:8-9.) This testimony does not satisfy the community caretaker doctrine’s requirement that an officer’s activities must be totally divorced from any criminal investigation. Deputy Wagner’s testimony describes an inarticulable hunch he experienced on August 26, 2006, when he encountered Kramer’s vehicle. He was not acting in a bona fide community caretaker capacity, and this Court should reject any argument that he was.

2. *The Court of Appeals Erroneously Found That the Public Need and Interest Outweigh Kramer’s Privacy Interest.*

The court of appeals rejected Kramer’s argument that the public interest in the officer’s conduct was low. (A.7-8.) In support of this reasoning, the court cited State v. Goebel, 103 Wis.2d 203, 208, 307 N.W.2d 915 (1981). In Goebel, the defendant’s vehicle was parked at the side of the road, partially on the shoulder and partially in the road. When the officer

approached the vehicle, he noticed two individuals inside, one of whom made a furtive gesture. Goebel at 206. The Goebel court noted that the defendant in that case did not allege any impropriety in the officer's original contact with him and commented, "contacts of this sort are not only authorized, but constitute an important duty of law enforcement officers." Goebel at 208.

On the contrary, in the instant case, Kramer does allege that the officer did not have any authority to conduct the original seizure. Kramer's case is quite different than Goebel, in that Kramer's vehicle was not partially blocking the road, as Goebel's vehicle was. In addition, the officer in the present case did not observe any occupants inside Kramer's truck, as the officer did in Goebel. (See R.30.13.) Finally, the officer in Kramer's case did not observe Kramer make any furtive gesture, unlike the officer in Goebel.

A more on-point case is State v. Clark, 2003 WI App 121, 265 Wis.2d 557, 666 N.W.2d 112. In Clark, a police detective responded to a report of an attempted robbery during which shots were fired. Id. at ¶ 2. Clark escaped from his assailant, but left his car behind. Id. at ¶ 4. The car was legally parked and undamaged. Id. Because the car was left unlocked, the police detective decided to have it impounded for safekeeping. Before the impound, the police detective conducted an inventory search and discovered cocaine. Id. After being charged with possession of cocaine, Clark moved to suppress the cocaine. Id. at ¶ 5. The trial court denied the motion. Id. at ¶ 9.

The Wisconsin Court of Appeals reversed, finding that impounding the car was not a reasonable exercise of the community caretaker function. Id. at ¶ 27. Engaging in the first step of this balancing test, the court noted that none of the usual public safety concerns or exigencies related to vehicles were in play:

The vehicle in question was not: (1) involved in an accident; (2) interrupting the flow of traffic; (3) disabled or damaged; (4) violating parking ordinances; or (5) in any way jeopardizing the public safety or the efficient movement of vehicular traffic... The [car] was legally parked and undamaged. Thus, it posed no apparent public safety concern.

Id. at ¶ 22. But the detective testified that the vehicle was impounded not for public safety reasons; rather, the vehicle was impounded to protect the vehicle itself and any property left within it. Id. at ¶ 23. The court conceded that this appeared to be bona fide community caretaker activity. Id.

However, the court then considered the availability, feasibility, and effectiveness of alternatives to the type of intrusion actually accomplished. Id. at ¶ 25. In considering these alternatives, the Court remembered Anderson's "fundamental consideration that any warrantless intrusion must be as limited as is reasonably possible, consistent with the purpose justifying it in the first instance." Id. at ¶ 21.

With these principles in mind, the court found that there were at least two reasonable alternatives to impounding the vehicle:

A reasonable police officer presented with a similar situation, being primarily concerned with the safety of a vehicle and its contents, could simply lock the vehicle and walk away. This alternative is the least burdensome on the police department, as well as the least intrusive on the individual. Alternatively, if an officer is convinced that a vehicle needs to be towed for safekeeping, either because the vehicle cannot be locked or

because the officer reasonably believes that the vehicle could be stolen or vandalized, he or she should at least attempt to contact the owner and obtain consent.

Id. at ¶ 26.

Focusing on the availability of effective alternatives to the action actually taken, the court concluded that the public need to impound the unlocked vehicle did not outweigh the intrusion upon Clark's privacy. Id. at ¶ 27. See also State v. Paterson, 220 Wis.2d 526, 530, 583 N.W.2d 190 (Ct. App. 1998) (Search did not fall under community caretaker exception where police responded to a residential burglary at 5:25 p.m. Shortly after arriving at the scene, after an unsuccessful attempt to call the house and without first trying to get a response by knocking, the officers opened a closed, but unlocked, door and entered the residence. The court found that these facts were insufficient to reasonably suggest criminal activity or the need for police intrusion into the residence to protect the property.); State v. Dull, 211 Wis.2d 652, 660-61 (Ct. App. 1997) (Entry into house not justified by community caretaker exception because the officer never attempted to contact the brother from the outside by ringing the doorbell or by any other methods).

The court of appeals also stated that the public interest was implicated in his case because his flashing lights:

signaled to any reasonable observer that Kramer or his truck might be experiencing some sort of problem. It is common knowledge that motorists with vehicle trouble often pull over and activate their hazard lights without taking any additional steps to flag down passers-by.

(A.8.) The court of appeals, however, ignores that it is also common knowledge that motorists often pull over to use cell phones or look at maps. These motorists use hazard lights for safety reasons, so that passing motorists will see them and exercise caution.

The court of appeals also ignores that, aside from his displaying his hazard lights, Kramer did not signal for help in any way. The Wisconsin Department of Transportation's Motorists' Handbook states that when a motorist's vehicle becomes disabled, that motorist should pull over, turn on his or her four-way flashers and stand on the side of the road, away from traffic. The motorist should also raise the hood of the vehicle or tie a white cloth to the exterior of the vehicle. *See* Wisconsin Department of Transportation, Motorists' Handbook, at 33 (Feb. 2007). Kramer did not do any of these things. On the contrary, he did what the Wisconsin Department of Transportation recommends to drivers when they are using cell phones. He pulled over. *See* Wisconsin Department of Transportation, Cell Phones Behind the Wheel: Recent Research and Guidance for Curbing Employee Use, at 5 (Nov. 7, 2006); A.56.

With respect to the exigency of the situation, the court of appeals conceded that there was "no significant indication that immediate assistance was needed." The court noted that the driver could have been in distress, but concluded that "this factor favors Kramer, but only slightly." (A.8.) Kramer maintains that there was no indication that he was in any distress, and the officer did not have any reason to believe he was, aside from the hazard lights. However, as earlier noted, hazard lights are but one indication of vehicle trouble. The officer in this case should not have conducted an immediate seizure without more information. Even the officer in State v. Ferguson, 2001 WI App 102, who had information that three people were locked in a bedroom and possibly in need of medical assistance, waited thirty minutes before entering the

locked room. Ferguson at ¶ 5.

With respect to the third Anderson factor, whether an automobile was involved, the court of appeals rejected Kramer's use of State v. Clark, 2003 WI App 21, ¶ 27, 265 Wis.2d 557, 666 N.W.2d 12, where the court of appeals held that a citizen may reasonably expect to legally park a vehicle without the vehicle being towed. The court stated that "the obvious pertinent distinction between towing a legally parked vehicle and checking on a vehicle stopped alongside a highway needs no explanation." This comment ignores Deputy Wagner's own acknowledgment that Kramer's vehicle was legally parked. (R.30:13.) This also ignores the fact that Kramer's vehicle was not involved in an accident; it was not interrupting the flow of traffic; it was not disabled or damaged; it was not violating parking ordinances; it was not jeopardizing the public safety or the efficient movement of vehicular traffic. Under the reasoning of Clark, Kramer's vehicle posed no apparent public safety concern.

While vehicles are subject to a lesser expectation of privacy, "the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion." Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974). A citizen ought to be able to pull over to the side of the road to look at a map or use a cell phone without being subjected to the prying eyes of the government. While the State might contend that innocent people do not mind being questioned by police when legally parked at the side of the road, even innocent people are not fans of uninvited government meddling. If citizens are no longer able to pull over and look at maps or use cell phones under safe conditions without being subjected to government scrutiny, what motive will they possibly have to exercise caution on the road? Rather than answer to the police for their innocent actions, motorists might instead choose to drive while distracted.

3. *The Court of Appeals Erroneously Found That There Were No Available, Reasonable and Effective Alternatives.*

Regarding other available, feasible and effective alternatives, the court of appeals held that the officer in the instant case could not have responded in any other effective way. (A.10.) This is not true. Like the police detective in Clark, Officer Wagner had several other feasible alternatives to the action he took. The availability of these equally effective measures weighs heavily against the reasonableness of the seizure. He could easily have continued on his patrol route and returned to the site a few minutes later to determine if a problem existed. He could easily have driven by and visually viewed what was going on, or using his headlights, viewed the movement inside the truck as he passed. He could easily have pulled up alongside the truck, and without even getting out of his squad car, motioned to Kramer, to roll his window down so that he could ask if everything was all right. Even better, Deputy Wagner could even have simply parked his squad car nearby—someplace visible to Kramer—to observe the truck for a few minutes. This would have given Deputy Wagner an opportunity to readily determine whether anything was amiss, either with the vehicle or its occupants. Additionally, this last option would have given Kramer an excellent opportunity to affirmatively signal Deputy Wagner if he did require any assistance.

The court of appeals was incorrect in stating that none of these alternatives is effective. While it might seem easier for the officer to approach Kramer and question him, the Fourth Amendment was not designed to make a police officer's job easier. It was designed to protect citizens from unreasonable searches and seizures.

IV. AN OFFICER'S SUBJECTIVE CONCERNS ARE RELEVANT WITH RESPECT TO THE COMMUNITY CARETAKER DOCTRINE.

The court of appeals was conflicted about what the “totally divorced” rule means. In determining whether an officer’s actions were reasonable, should courts consider an officer’s subjective state of mind, or like other Fourth Amendment precedent, should courts consider the circumstances objectively?

With respect to the community caretaker doctrine, an officer’s subjective state of mind is always relevant. The officer in a community caretaker case generally does not assert reasonable suspicion or probable cause as justification for a warrantless search or seizure. Therefore, courts need to hear an officer’s reasons for conducting such a search or seizure in order to determine whether his actions were reasonable. This prevents police from circumventing reasonable suspicion and probable cause with community caretaker. The Cady court built this protection into the doctrine by asserting that community caretaker functions are “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” Cady at 441.

By creating the “totally divorced” rule, the Cady court renders an officer’s reasons for a warrantless search or seizure relevant, while at the same time leaving the officer’s actions subject to the Fourth Amendment reasonableness standard. In Kramer’s case, this means that Deputy Wagner’s concerns or suspicions prior to seizing Kramer are relevant (in order to determine the second Anderson factor, whether the officer was partaking in bona fide community caretaker activity) and his actions in response to those concerns or suspicions are subject to the reasonableness standard (to determine the third Anderson factor, whether the public need and interest outweigh Kramer’s privacy interest).

Despite the clear standard set forth in Cady, the court of appeals believes that Cady has been misinterpreted. The court cited an Illinois case, People v. Cordero, 830 N.E.2d 830 (Ill. App. Ct. 2005), in support. In his concurring opinion, a justice in Cordero commented that Cady simply recognizes that many police-citizen encounters *are* totally divorced from a criminal investigation, not that they *must be* totally divorced. The court of appeals agrees with that concurring opinion.

However, Kramer does not assert that all police-citizen encounters must be totally divorced from a criminal investigation. Kramer merely asserts that an officer acting in a community caretaker capacity may not justify a warrantless search or seizure unless his actions are totally divorced from a criminal investigation. The Cady rule only addresses the community caretaker doctrine. Other police-citizen encounters that expand into criminal investigations are still subject to the reasonable suspicion or probable cause standards. Community caretaker must be limited to non-criminal investigations. Holding otherwise would allow this doctrine to swallow reasonable suspicion and probable cause, leaving the Fourth Amendment within the firm grasp of the police. While the court of appeals believes that Wisconsin cases observing the Cady “totally divorced” rule may have been erroneously decided, the courts in Ferguson, Horngren and Dull were correct in considering the officers’ subjective motives in those cases.

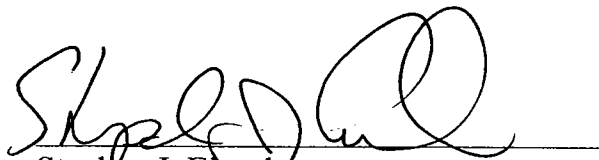
CONCLUSION

Kramer was seized when Deputy Wagner turned on his red-and-blue flashing lights, parked behind Kramer’s truck, approached Kramer’s vehicle with his hand on his gun and shined a light inside the truck. This seizure was not justified under the community caretaker doctrine because the officer was not acting in a bona fide community caretaker capacity, nor did he employ the least restrictive means possible in determining whether Kramer was actually in need of

assistance. Feasible and effective alternatives were available to the officer. The officer's subjective motivation for seizing Kramer is relevant under the "totally divorced" rule of Cady. For all of the foregoing reasons, this Court should reverse Kramer's conviction and remand the case to the trial court for further proceedings not inconsistent with this opinion.

Dated this 11th day of July, 2008.

EISENBERG LAW OFFICES, S.C.

A handwritten signature in black ink, appearing to read "Stephen J. Eisenberg", written over a horizontal line.

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STATE OF WISCONSIN

SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Appeal No. 07-AP-1834-CR

TODD LEE KRAMER,

Defendant-Appellant-Petitioner.

APPENDIX

DECISION OF THE COURT OF APPEALS

DATED MARCH 27, 2008 App. 1

TRANSCRIPT OF MOTION TO SUPPRESS HEARING

HELD ON MAY 18, 2007 App. 19

CIRCUIT COURT'S ORAL DECISION

DENYING SUPPRESSION MOTION

ON MAY 18, 2007. App. 47

WISCONSIN DEPARTMENT OF TRANSPORTATION,

CELL PHONES BEHIND THE WHEEL: RECENT

RESEARCH AND GUIDANCE FOR CURBING USE

(NOV. 7, 2006),

<http://www.dot.state.wi.us/library/research/docs/>

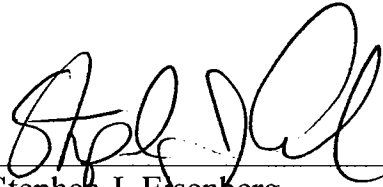
[ttrs/tsrcellphone.pdf](http://www.dot.state.wi.us/library/research/docs/ttrs/tsrcellphone.pdf) App. 52

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,953 words.

Dated this 11th day of July, 2008.

EISENBERG LAW OFFICES, S.C.

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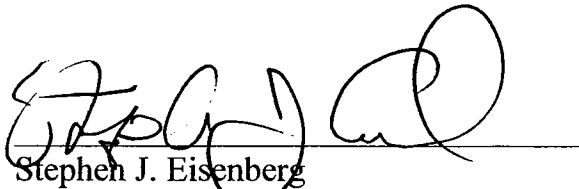
CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief is an Appendix that complies with § 809.19(2)(a), Wis. Stats., and that contains:

1. The Decision and Opinion of the Court of Appeals;
2. A transcript of the suppression hearing that was held on May 18, 2007, necessary for an understanding of the brief;
3. The Oral Decision of the circuit court dated May 18, 2007, necessary for an understanding of the brief; and
4. A copy of a Wisconsin Department of Transportation article, cited in the brief and helpful for an understanding of the brief.

Dated this 11th day of July, 2008.

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**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2008

David R. Schanker
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. 2007AP1834-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2006CF329

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD LEE KRAMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
JAMES O. MILLER, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 **LUNDSTEN, J.** This is a Fourth Amendment “community caretaker” case. Todd Kramer appeals a circuit court judgment convicting him of operating a motor vehicle while under the influence of an intoxicant. Some unknown time after Kramer pulled his pickup truck over to the side of a highway

with its hazard lights flashing, a police officer happened by. The officer decided to check on the stopped truck. With the squad's red and blue emergency lights activated, the officer pulled in behind the truck to inquire whether Kramer needed assistance. This inquiry led to the discovery that Kramer was intoxicated. Kramer argues that he was unlawfully seized by the time the officer approached Kramer's side window and observed signs of intoxication. We disagree. Assuming that a seizure occurred, we conclude that it was lawful because the officer was acting in a community caretaker capacity. We affirm the judgment.

Background

¶2 Kramer moved to suppress evidence of his intoxicated driving acquired after the officer pulled up behind his truck and approached his side window. At a hearing on the motion, the arresting officer testified that he was on patrol on a county highway when he observed a truck parked on the shoulder of the roadway with its hazard lights on. It was late August, approximately 8:45 p.m., and dark outside. The officer did not know how long the truck had been there, and did not see inside the truck as he passed it.

¶3 The truck appeared to be legally parked, and it was not impeding traffic or jeopardizing public safety. Aside from being stopped on a roadside with its hazard lights flashing, the truck did not appear damaged or disabled. The officer observed nothing suggesting that a crime was being committed or that any traffic law was being broken.

¶4 The officer made a U-turn, activated his red and blue emergency lights, and pulled in behind the truck to see if there was a need for help. The officer approached Kramer's truck with his hand on his gun, something the officer always did when he approached a stopped vehicle "for safety considerations." In

addition, the officer shined a light in the back of Kramer's truck in an attempt to see inside, again for "safety concerns."

¶5 The officer's first words to Kramer were something to the effect of "Can I help you?" At that point, the officer noticed that Kramer's speech was slurred, and he could smell the odor of intoxicants coming from inside Kramer's truck. Subsequent investigation led to Kramer's arrest and conviction.

¶6 Kramer's testimony was brief. Kramer explained that he had pulled over to take a phone call, and had activated his hazard lights because there was a hill nearby and he wanted other vehicles to see him.

¶7 The circuit court denied Kramer's suppression motion, apparently assuming that a seizure occurred, but concluding that the seizure was legal because the officer was acting as a community caretaker by stopping to inquire into the situation.

Standard Of Review Of Suppression Decisions

¶8 When we review a motion to suppress, we uphold the circuit court's findings of fact unless those findings are clearly erroneous. *State v. Horngren*, 2000 WI App 177, ¶7, 238 Wis. 2d 347, 617 N.W.2d 508. The application of constitutional principles to the facts is a question of law that we review *de novo*. *Id.*

Discussion

¶9 The seizure in this case was justified, if at all, because the officer was acting in his community caretaker capacity. We will assume, without deciding, that the officer lacked reasonable suspicion or probable cause when he

seized Kramer by activating his red and blue emergency lights, pulling his squad car in behind Kramer's truck, and approaching the truck on foot. If the officer was not acting in his community caretaker capacity at the time of this seizure, it was unlawful and the evidence of intoxication must be suppressed.¹

¶10 In *State v. Anderson*, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987), we adopted a test for determining when a seizure is justified by the community caretaker function. We held that, if there is a seizure, the community caretaker function justifies that seizure if two requirements are met. First, the police activity must be a "bona fide community caretaker activity." *Id.* at 169. Second, "the public need and interest outweigh the intrusion upon the privacy of the individual." *Id.* We explained that the balancing aspect of this test requires "an objective analysis of the circumstances confronting the police officer" and "an objective assessment of the intrusion upon the privacy of the citizen." *Id.* at 168.

¶11 In the sections below, we first examine whether the police officer here was engaged in a bona fide community caretaker activity. We then engage in balancing the "public need and interest" against the "intrusion upon the privacy of the individual." Finally, we comment on the *Anderson* formulation of the community caretaker analysis and suggest that the analysis is inconsistent with longstanding Fourth Amendment search and seizure principles.

¹ The State does not argue that the officer possessed reasonable suspicion or probable cause to temporarily seize Kramer. The State does, however, contend that there was no seizure. We need not resolve this question because we agree with the State that, assuming a seizure occurred, it was justified by the officer's community caretaker function.

A. Bona Fide Community Caretaker Activity

¶12 The *Anderson* requirement that police must be engaged in a “bona fide community caretaker activity” is met only if the police activity is “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *State v. Dull*, 211 Wis. 2d 652, 658, 565 N.W.2d 575 (Ct. App. 1997) (internal quotation marks omitted; quoting *Anderson*, 142 Wis. 2d at 166 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973))).

¶13 There is no dispute that, but for the officer’s *subjective* concerns when he approached Kramer’s truck, the officer was acting in his community caretaker capacity when the seizure occurred. Kramer argues, however, that the officer was not engaged in a “bona fide community caretaker activity” because the officer’s conduct was not “totally divorced” from the officer’s law enforcement function. More specifically, Kramer points out that the officer testified that it “was in [the officer’s] mind” that a crime might be going on; that the officer was not sure what was going on in Kramer’s truck, but that concerns about something illegal are “always in [the officer’s] mind”; and that “[i]t could have been anything” going on in the truck. Thus, according to Kramer, the officer’s conduct did not meet the “totally divorced” rule.

¶14 Kramer’s argument assumes that we may rely on the officer’s subjective concern about the possibility of criminal activity to conclude that his motivation, in seizing Kramer and checking on him, supports a conclusion that the officer was not motivated only by a desire to assist Kramer if help was needed and, therefore, was not engaged in activity “totally divorced” from the officer’s law enforcement function. Kramer’s assumption is supported by cases such as

Horngren, 238 Wis. 2d 347, in which we considered an officer's actual motivation in deciding whether the officer's conduct fit the community caretaker function. See *id.*, ¶¶10-12. As explained in section C below, we question whether an officer's subjective motivation should be relevant to this Fourth Amendment seizure question. Here, however, we assume that the officer's subjective motivation is relevant. Nonetheless, we conclude that the officer's subjective concern that the innocent-seeming situation he faced might turn out to be dangerous or involve criminality does not prevent the officer's activity from being a bona fide community caretaker activity.

¶15 Whatever the precise meaning of "totally divorced," it cannot mean what Kramer is suggesting. In other words, it cannot mean that an officer must have subjectively ruled out all possibility of criminal activity in order to act in a community caretaker capacity. Police commonly act as community caretakers in situations where it remains reasonably possible that they will discover some criminal activity. See, e.g., *State v. Ziedonis*, 2005 WI App 249, ¶¶2-3, 17, 287 Wis. 2d 831, 707 N.W.2d 565 (no dispute that police were acting as bona fide community caretakers when they first approached dwelling in response to a loose animal complaint involving two vicious dogs that were "chasing people around"); *State v. Ferguson*, 2001 WI App 102, ¶13, 244 Wis. 2d 17, 629 N.W.2d 788 (police were engaged in bona fide community caretaker activity when investigating a call about a fight that led to discovery of underage drinkers); *Dull*, 211 Wis. 2d at 659-60 (officer investigating a noise complaint was initially acting as community caretaker, even though officer's role as community caretaker ended when officer determined that juvenile was intoxicated and took him into custody under the juvenile justice code).

¶16 If the meaning of “totally divorced” were as Kramer suggests, the situations in which an officer could lawfully perform valuable community caretaker services would be few and far between. This court has previously cautioned against a “too-narrow view” of the community caretaker function, lest police officers be dissuaded from discharging that function. See *Ziedonis*, 287 Wis. 2d 831, ¶15; see also *Horngren*, 238 Wis. 2d 347, ¶18.

¶17 Accordingly, because we reject Kramer’s “totally divorced” argument and because, apart from this argument, it is undisputed that the officer was engaged in a “bona fide community caretaker activity,” we conclude that the officer was acting as a bona fide community caretaker within the meaning of *Anderson* at the time of the seizure.

B. The Balancing Test

¶18 The *Anderson* requirement that “the public need and interest outweigh the intrusion upon the privacy of the individual” requires consideration of 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, 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.

Anderson, 142 Wis. 2d at 169-70 (footnotes omitted). Kramer makes several arguments in light of these factors. We address and reject each of those arguments in the following paragraphs.

¶19 Under the first factor, Kramer argues that the public interest in the officer’s conduct was low. We disagree. The public has a substantial interest in

encouraging police officers to be on the look-out for and offer aid to motorists who may be stranded or otherwise in need of assistance. "Contacts of this sort are not only authorized, but constitute an important duty of law enforcement officers." *State v. Goebel*, 103 Wis. 2d 203, 208, 307 N.W.2d 915 (1981) (officer stopped to see if a motorist who had pulled to the side of the road was in need of assistance).

¶20 Kramer seems to be arguing that this interest was not implicated here because he was not attempting to signal for help and because there was no indication that he or his truck was in distress. This argument misses the mark because Kramer's flashing hazard lights signaled to any reasonable observer that Kramer or his truck might be experiencing some sort of problem. It is common knowledge that motorists with vehicle trouble often pull over and activate their hazard lights without taking additional steps to flag down passers-by.

¶21 Also under the first factor, Kramer argues that there were no exigent circumstances. We agree that there was no significant indication that immediate assistance was needed. But it remains true that one possible explanation for the stopped truck was that an occupant was in distress. Thus, we conclude that this factor favors Kramer, but only slightly.

¶22 Under the second factor, Kramer notes that the officer made a display of authority by activating his red and blue emergency lights. We agree that this is a display of authority, but also agree with the State that it was a reasonable caretaker measure. In particular, the red and blue emergency lights minimize the danger created by passing motorists who may not be attentive, a danger inherent in roadside stops along highways.

¶23 Also under the second factor, Kramer points out that the officer approached Kramer's truck with his hand on top of his gun. But this is a limited

show of authority that does not convince us, alone or in combination with other factors, that the public interest was outweighed in this instance.

¶24 Under the third factor, we consider whether an automobile is involved. Kramer concedes that there is a lesser expectation of privacy in automobiles than in dwellings, but he nonetheless suggests that this factor weighs in favor of a conclusion that the public interest is outweighed in this case. In support, Kramer relies on *State v. Clark*, 2003 WI App 121, ¶27, 265 Wis. 2d 557, 666 N.W.2d 112, where we stated that a citizen can reasonably expect to leave a vehicle legally parked without the vehicle being towed. But the obvious pertinent distinction between towing a legally parked vehicle and checking on a vehicle stopped alongside a highway needs no explanation.

¶25 Regarding the fourth factor—the availability, feasibility, and effectiveness of alternatives to the type of intrusion the officer used—Kramer points out that the intrusion must be “as limited as is reasonably possible, consistent with the purpose justifying it in the first instance.” *Anderson*, 142 Wis. 2d at 169. Kramer argues that the officer had other reasonable, less intrusive alternatives and that, because the officer did not utilize one of these alternatives, the seizure was unreasonable. We disagree because none of Kramer’s suggested alternatives are as reasonable as the one chosen by the officer.

¶26 Kramer suggests, for example, that the officer could have pulled alongside Kramer’s truck and, without getting out, motioned to Kramer to roll down his window so the officer could ask if everything was all right. Kramer also suggests that the officer could have continued on his patrol route and returned a few minutes later, or, “[e]ven better, ... could even have simply parked his squad

car nearby—someplace visible to Kramer—to observe [Kramer's truck] for a few minutes.”

¶27 Kramer's suggested alternatives may or may not be reasonable, but they are not the most effective responses under the circumstances because they would have required that the officer allow additional time to pass or would have required the officer to stop in the middle of the roadway. Allowing additional time to pass before checking on Kramer could have merely aggravated a time-sensitive situation. For example, someone in Kramer's vehicle may have needed immediate medical attention, and this fact may not have been apparent if viewed from afar. It would have been more dangerous for the officer and for passing vehicles if the officer had stopped in a lane of traffic, particularly in light of Kramer's testimony that he activated his hazard lights because he was near a hill and wanted other vehicles to see him.

¶28 Kramer also suggests that the officer could have driven by and “visually viewed what was going on” or could have used his headlights to view any movement inside Kramer's truck. In making this suggestion, Kramer assumes too much about what was likely feasible under the circumstances. It was dark, and the officer testified that he was traveling at 55 miles per hour (or a bit less) when he saw Kramer's truck. Even assuming, however, that it was feasible for the officer to see inside Kramer's truck as the officer passed by, nothing the officer would have seen would have been likely to have confirmed that no one needed assistance.²

² Kramer also challenges the circuit court's decision based on the court's comment that the officer had “all sorts of alternatives.” However, read in context, it is clear the court was
(continued)

¶29 Having considered Kramer's arguments in light of the relevant factors, we conclude that the officer was lawfully acting in a community caretaker role. The public has a substantial need for and interest in encouraging police to offer help when faced with situations like the officer faced here. In many such situations, citizens would *want* an officer to stop and offer assistance. The public need and interest here outweigh the limited intrusion into Kramer's privacy.

C. Commentary On The "Totally Divorced" Rule

¶30 It appears that the *Anderson* "totally divorced" rule, used in Wisconsin to determine whether an officer is acting in a community caretaker capacity is inconsistent with well-settled law holding that police actions in search and seizure cases under the Fourth Amendment are judged by an objective standard. Because we are bound by our own community caretaker precedent, we only comment here. Our comment does not affect our decision. If there is to be a change in Wisconsin's community caretaker law, it must come from our supreme court.

¶31 As a unanimous United States Supreme Court recently explained: "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.'" *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)) (emphasis added in *Brigham City*); see also *Whren v. United States*, 517 U.S. 806, 813

saying that, although there may have been any number of alternatives, none of those alternatives would have been reasonable under the circumstances.

(1996) (United States Supreme Court “unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers”).

¶32 The reason for this objective approach is that “evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.” *Horton v. California*, 496 U.S. 128, 138 (1990). Society’s interest in assistance and protection, and the constitutional rights of suspects, should not depend on the happenstance of a particular officer’s subjective motivation. Consequently, in *Brigham City*, the Court declined to address the defendant’s argument that an entry into a residence was illegal because police were subjectively motivated, in part, by an interest in making arrests when they entered to quell a disturbance. See *Brigham City*, 547 U.S. at 404-05.

¶33 Wisconsin has, with the exception of community caretaker law, uniformly adopted an objective standard when addressing Fourth Amendment questions. *E.g.*, *State v. Sykes*, 2005 WI 48, ¶¶29-31, 279 Wis. 2d 742, 695 N.W.2d 277 (officer’s subjective intent not relevant to whether there was probable cause to arrest); *State v. Malone*, 2004 WI 108, ¶23, 274 Wis. 2d 540, 683 N.W.2d 1 (officer’s “subjective motivation may have been to pursue suspected narcotics trafficking, but his subjective motivations play no part in our analysis”); *State v. McGill*, 2000 WI 38, ¶¶23-24, 234 Wis. 2d 560, 609 N.W.2d 795 (in determining whether a protective frisk was warranted, court considered facts known to the officer which the officer did not use in his “subjective analysis of the situation”); *State v. Larsen*, 2007 WI App 147, ¶¶19-20, 302 Wis. 2d 718, 736 N.W.2d 211 (applying the objective test to an emergency doctrine search), *review denied*, 2007 WI 120, ___ Wis. 2d ___, 741 N.W.2d 241 (No. 2006AP1396-CR); *State v. Anderson*, 149 Wis. 2d 663, 675, 439 N.W.2d 840 (Ct. App. 1989) (“The

fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officers' action [seizure of a vehicle] does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990).

¶34 One caveat involving a subtle distinction must be made. In *State v. Kyles*, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449, the court held that "an officer may be questioned [at a suppression hearing] about [subjective fears] and that a court may consider an officer's [subjective fears] in determining whether the objective standard" is met. *Id.*, ¶39. Properly read, *Kyles* is completely consistent with the objective standard. The court was clear that a purely objective standard must be applied to the reasonableness of an officer's actions. *Id.* There is no suggestion in *Kyles* that a court may rely on an officer's subjective thoughts to conclude that, because an officer had a particular subjective state of mind, an action was either legal or illegal. To the contrary, the *Kyles* court observed that the "law is very clear" that "a [protective] frisk [for weapons] can be valid when an officer does not actually feel threatened by the person frisked." *Id.*, ¶23. Read in context, the *Kyles* court is apparently explaining that there may be a sort of brainstorming benefit in hearing an officer's subjective thoughts, akin to hearing argument from counsel about what is objectively reasonable under the circumstances.

¶35 In sum, apart from the community caretaker law we apply today, well-settled Fourth Amendment law provides that a search or seizure may not be found legal or illegal *because of* an officer's subjective motives or thoughts.

¶36 The reason community caretaker cases in Wisconsin have strayed from well-settled Fourth Amendment law appears to be that, in *Anderson*, we misinterpreted the United States Supreme Court's decision in *Cady*. It seems the same sort of misreading of *Cady* occurred in Illinois, prompting an appellate court justice there to explain the misreading and propose a course correction, albeit in a concurrence. Because the case law addressed by the Illinois justice is essentially the same as Wisconsin case law, and because the justice aptly addresses the topic, we begin by quoting from that concurrence.

¶37 In *People v. Cordero*, 830 N.E.2d 830 (Ill. App. Ct. 2005), Presiding Justice O'Malley wrote, in concurrence:

[W]hether a seizure is justified on community caretaking grounds does not depend on the officer's subjective purposes in effecting the seizure so long as his actions are objectively reasonable under the circumstances. Our district [of the Illinois Court of Appeals] has in the past fallen into a subjectivist error. Thus, in [one case we] said: "The 'community caretaking' function *must be* completely divorced from any *initial suspicion* of criminal activity." (Emphasis added.) ... [In another case we] said: "When an officer questions an individual to check on his well-being, *without initial thought of criminal activity, he is within the purview of community caretaking.*" (Emphasis added.) ... This approach is improper. The test for determining whether a seizure is justified is objective, the question being whether the facts and circumstances known to the officer at the time of the seizure warranted his action. An officer's testimony is relevant not for what it reveals about his inner thoughts, but for what it discloses about the objective circumstances of the encounter.

[Our] error in ... these other cases is rooted in a misunderstanding of the language from *Cady*, ... that police officers "frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady* was noting that many police-citizen encounters have nothing to do with

crime, not requiring that they must have nothing to do with crime Notably, *Cady* did not require the police officers in that case to have had a certain subjective state of mind in order to justify their search of the defendant's car.... However, what *Cady* ... intended as descriptive has been transformed into a prescription in this district's cases, culminating in [our] subjectivist error.

....

... Again, the test of whether a seizure is justified is objective, and so a seizure may not be deemed unreasonable based on the officer's subjective beliefs. For example, if an officer effects a seizure while believing, unreasonably, that criminal activity is afoot, the State is not precluded from proffering a community caretaking rationale for the officer's action based on an objective assessment of the circumstances.

Id. at 840-42 (O'Malley, P.J., concurring) (citations omitted).

¶38 In Wisconsin, as in Illinois, we interpreted *Cady's* observation—that many police-citizen encounters are “totally divorced” from the enforcement of laws—as a community caretaker *requirement*. See *State v. Fields*, 2000 WI App 218, ¶12, 239 Wis. 2d 38, 619 N.W.2d 279 (“[C]ommunity caretaking functions *must be* ‘totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.’”) (emphasis added; citation omitted); *Anderson*, 142 Wis. 2d at 166 (“[I]n [*Cady*] ... a warrantless search of a vehicle was permitted *because* the police were engaged in ‘... community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.’”) (emphasis added; quoting *Cady*, 413 U.S. at 441); accord *Ziedonis*, 287 Wis. 2d 831, ¶14;

Ferguson, 244 Wis. 2d 17, ¶10;³ *Horngren*, 238 Wis. 2d 347, ¶9; *Dull*, 211 Wis. 2d at 658.

¶39 Also, as in Illinois, our interpretation of *Cady* has led us to conclude that the subjective motivation of a police officer sometimes controls whether the officer is engaged in a bona fide community caretaker function. In *Ferguson*, we relied on “the trial court’s finding that the motivation for the police to enter Ferguson’s bedroom closet was to assist him, not to arrest” in concluding that the officer was acting in a community caretaker capacity. *Ferguson*, 244 Wis. 2d 17, ¶15. In *Horngren*, we similarly relied on testimony that “the officers’ actual motivation was to render immediate assistance, not to obtain evidence for a possible prosecution.” *Horngren*, 238 Wis. 2d 347, ¶12. In *Dull*, we commented on the defendant’s argument that an officer was subjectively motivated by a suspicion of criminal conduct when he entered a residence, and plainly implied that this subjective motivation might be relevant if the officer had not already stepped outside his community caretaker function. See *Dull*, 211 Wis. 2d at 661-63.

¶40 We note that in addition to the objective/subjective issue, our interpretation of the “totally divorced” language in *Cady* suggests that a bona fide community caretaker activity may not simultaneously involve a law enforcement activity. We wonder whether the two are mutually exclusive. For example, is an officer acting to assist person A, while simultaneously investigating person B,

³ We also question our contention in *State v. Ferguson*, 2001 WI App 102, 244 Wis. 2d 17, 629 N.W.2d 788, that police were engaged in a community caretaker activity because they were investigating conduct punishable by a forfeiture rather than “investigating a crime.” *Id.*, ¶13. It is not apparent why the investigation of a possible violation of law punishable by a forfeiture is a community caretaker activity.

necessarily not acting in a community caretaker capacity with respect to person A because the officer's activity is not totally divorced from law enforcement activity? In *State v. Paterson*, 220 Wis. 2d 526, 583 N.W.2d 190 (Ct. App. 1998), we commented on, but did not resolve, the State's assertion that sometimes police activity cannot easily be catalogued and is sometimes a blend of both the community caretaker function and the criminal investigation function. *Id.* at 534 n.1 In *Paterson*, we found it unnecessary to resolve the question because, even assuming the police were engaged in a bona fide community caretaker activity, the balancing part of the *Anderson* test was not met. *Paterson*, 220 Wis. 2d at 535-36.

¶41 We do not suggest that the entire community caretaker analysis used in Wisconsin is problematic. To the contrary, the most significant aspect of our current test is the directive that courts consider four factors in balancing the public need and interest in the officer's action with the intrusion on individual privacy. See, e.g., *Anderson*, 142 Wis. 2d at 169-70. The *Anderson* balancing requirement tracks what Presiding Justice O'Malley in *Cordero* recommends as the full community caretaker test. See *Cordero*, 830 N.E.2d at 841-42 (suggesting a case-by-case balancing of the individual's interest in proceeding about his or her business, unfettered by police, against the public's interest in having police officers perform public assistance services).

Conclusion

¶42 We assume, without deciding, that a seizure had occurred by the time the officer observed signs of intoxication. Nonetheless, we agree with the circuit court that the seizure was lawful because the officer was acting in a community caretaker capacity. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT COLUMBIA CO.

STATE OF WISCONSIN,
Plaintiff,

vs.

06-CF-329

TODD LEE KRAMER,
Defendant.

Transcript of Proceeding

Transcript of Motion to Suppress Hearing in the above-entitled
action before the HONORABLE JAMES O. MILLER, Circuit
Judge, Branch 2, Columbia County, Portage, Wisconsin commencing
on the 18th day of May 2007.

APPEARANCES:

State of Wisconsin, Plaintiff, appearing by
Assistant District Attorney TROY CROSS,
400 DeWitt St., Portage, Wisconsin 53901.

The Defendant, TODD LEE KRAMER,
appearing in person.

Attorney STEVEN EISENBERG, 308 E.
Washington Ave. PO Box 1069, Madison,
Wisconsin 53701 representing the Defendant.

Marjorie Kurtz
Branch 2 Court Reporter

Columbia County

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1 (Proceeding commenced at 9:05 a.m.)

2 THE COURT: On the record in the matter of State of
3 Wisconsin versus Todd Lee Kramer, 06-CF-329. Appearances please.

4 MR. CROSS: State by Assistant District Attorney Troy
5 Cross.

6 MR. EISENBERG: Todd Kramer appears in person with
7 attorney Steven Eisenberg.

8 THE COURT: All right. This matter is on my calendar
9 today. There has been motions filed on behalf of Mr. Kramer for the
10 suppression of evidence in this case, and I believe it is on the basis of
11 the stop and arrest; is that correct?

12 MR. EISENBERG: Actually, just the stop. We are
13 arguing there is no reasonable suspicion for a stop, and I think the
14 State's going to claim that there was community caretaker exception,
15 and those are the issues, Your Honor.

16 THE COURT: Thank you. Is State prepared to proceed?

17 MR. CROSS: State is.

18 THE COURT: And Defense?

19 MR. EISENBERG: Yes, sir.

20 THE COURT: All right. You may proceed.

21 MR. CROSS: State would call Deputy Wagner.

22 THE COURT: Deputy, come forward to be sworn, then
23 take the stand to the left.

24 TODD WAGNER, called as a witness,
25 having been first duly sworn, testified as follows:

1 DIRECT EXAMINATION BY MR. CROSS:

2 Q Would you state your name, spell your last name for the record.

3 A Deputy Todd Wagner W-A-G-N-E R.

4 Q Who are you working for?

5 A Columbia County Sheriffs Department.

6 Q How long have you been with the Columbia County Sheriffs
7 Department?

8 A Approximately six and a half years.

9 Q Were you working for the Columbia County Sheriffs
10 Department on August 26th 2006?

11 A Yes.

12 Q And in that time did you come into contact with an individual
13 who was identified to you as Todd Kramer?

14 A Yes.

15 Q And the individual you contacted on that day, is he in the
16 courtroom today?

17 A Yes, he is.

18 Q Tell me where he's seated and what he is wearing.

19 A He's seated at the defendant's table wearing a checkered shirt
20 and tie.

21 THE COURT: Record will reflect identification.

22 Q Do you recall about what time of day you came into contact
23 with Mr. Kramer on August 26, 2006?

24 A It was about 8:45 p.m.

25 Q And you recall where you had contact that took place?

1 A It was on County Highway J west of the Township of Lodi.
2 Q Is that Columbia County?
3 A Yes, it is.
4 Q What brought you into contact with Mr. Kramer at that time?
5 A I was traveling southbound on County Highway J. I observed
6 his vehicle parked on the shoulder of the roadway with the four-
7 way hazards on.
8 Q You didn't see any driving?
9 A No.
10 Q He was just sitting there?
11 A Yes.
12 Q And hazard lights on?
13 A Yes.
14 Q What did you do?
15 A I turned around, and I pulled over to make contact with the
16 driver, check to see if there actually was a driver, offer any
17 assistance.
18 Q Why did you do that?
19 A Because typically when a car is on the shoulder on the side of
20 the road with their hazards on, there is typically vehicle
21 problems. And it's not a normal place for a vehicle to just be
22 parked.
23 Q Did you have to do a U-turn?
24 A Yes, I did.
25 Q Did you activate your emergency lights?

1 A Yes, I did.

2 Q Do you recall when you activated your emergency lights?

3 A I don't recall when.

4 Q Was it before the U-turn, during the U-turn or after the U-turn?

5 A I don't recall if it was during or after.

6 Q Why did you activate your emergency lights?

7 A Safety considerations so other traffic could see me.

8 Q Did you make a videotape of this stop?

9 A Yes.

10 Q And do you recall when it starts?

11 A It starts as soon as my emergency lights are activated.

12 MR. EISENBERG: I think we only have to play the first

13 part because I'm not challenging probable cause.

14 (Videotape playing)

15 Q Is this the videotape?

16 A Yes.

17 Q And this is you, what are you doing?

18 A This is me pulling up to the rear of the vehicle.

19 Q Now, that was, it looked like that when you pulled in behind it

20 with the hazards blinking?

21 A Yes.

22 Q And they were blinking when you pulled up from the other

23 way?

24 A Yes.

25 Q Now, that's you?

1 A Yes.

2 Q What are you doing here?

3 A Approaching the vehicle.

4 Q And why are you doing that?

5 A Because to see if there is any occupants in the vehicle.

6 Q Did you hear that on the videotape?

7 A Yes.

8 Q Is that the first words you uttered to Mr. Kramer when you
9 made contact with him?

10 A Yes.

11 Q And those were what?

12 A I believe it was "Can I help you?"

13 Q And was Mr. Kramer the one in the vehicle?

14 A Yes.

15 Q Was he the only one in the vehicle?

16 A Yes.

17 Q Where was he seated?

18 A In the driver's seat.

19 Q Was the vehicle running?

20 A Yes.

21 Q Did you notice anything about him when you spoke to him?

22 A His speech was slurred. I could smell an odor of intoxicants
23 coming from within the vehicle.

24 MR. CROSS: No further questions.

25 (Videotape rewound and replaying)

1 CROSS-EXAMINATION BY MR. EISENBERG:

2 Q Watch again please, Officer. So it's 20:43, about 7 when you
3 stopped?

4 A Yes.

5 Q Let me try and clarify that again. This was tough to hear. ~~First~~
6 ~~of all, you walked up with your hand on your gun?~~

7 A Yes.

8 Q Why?

9 A I always do that for safety considerations. I don't know who is
10 in the vehicle or what the situation dictates. I am just at the
11 ready.

12 Q ~~You also shined your light in the back of the truck?~~

13 A Yes.

14 Q Why?

15 A So I could see in the vehicle.

16 Q Just see for safety concerns?

17 A Correct.

18 Q Were you concerned at all even a little bit that a crime might
19 have been going on?

20 A ~~It was in my mind. I'm not sure any time I come upon a~~
21 ~~vehicle, what the situation is so that's the situation, yes.~~

22 Q Were you concerned a little, even little bit that maybe the driver
23 was drunk?

24 A I don't believe that was in my mind at that point.

25 Q Were you concerned at all even a little bit that maybe someone

1 was doing something illegal in the car?

2 A I wasn't sure what was being done in the car. So like I said,
3 any of those situations were always in my mind.

4 Q Could have been doing drugs?

5 A Could be anything.

6 Q And I think what you said when you walked up was, "Hi. Can I
7 help you with something? Is that right?

8 A That's what I got from the tape. I don't know what the first
9 words were, first couple words before that.

10 Q Who spoke the first words, you or Todd?

11 A I'm not positive of that because I don't know what the initial
12 words that I had said. I don't know if I was responding to him
13 saying anything or not.

14 Q And you thought what? I got from there you said there was
15 something out there. I think he said hey or something to you,
16 but then I heard you say "Hi. Can I help you with something?"
17 He said no, and then you said "Just making sure no vehicle
18 problems." Did he make comments about using the phone as
19 well then?

20 A I did respond by just asking, making sure there were no vehicle
21 problems, yes.

22 Q Where were you patrolling on that night?

23 A I was assigned to the Township of Lodi.

24 Q So where do you patrol? Where does that end?

25 A The entire township of Lodi. They contract with the Sheriffs

1 Department. I was assigned to that township.

2 Q So how many miles outside of Lodi is your radius that you

3 patrol? How many miles outside of it? The township of Lodi,

4 how big is that?

5 A Really, I can't answer that. I don't know.

6 Q So we have the City of Lodi and so how far out from the City of

7 Lodi were you going in any one direction when you patrol the

8 Township?

9 A I don't patrol the city. The City and Township are separate. I

10 must be misunderstanding.

11 Q So is the township five-mile radius, four-mile radius, within

12 five miles of the same spot when you patrol the township?

13 MR. CROSS: Objection as to relevance.

14 MR. EISENBERG: It's going to relevance later I hope in

15 determining other alternatives he could have pursued.

16 THE COURT: Well, I'm not exactly sure where that's

17 going. I will give you a little leeway, but I don't see any particular

18 relevance.

19 A To be honest, I don't know how to answer that. I really don't

20 know the size of the Township of Lodi.

21 Q You were on a county trunk highway?

22 A Yes, I was.

23 Q What's the road the last time you stopped Mr. Kramer that you

24 were on?

25 A That I don't know.

1 Q You were driving southbound on J, you saw the pickup truck
2 parked as it was in the video; right?
3 A Correct.
4 Q How fast were you going when you first saw it?
5 A I don't recall. I didn't look. I wouldn't look at my
6 speedometer.
7 Q What is the speed limit out there?
8 A 55.
9 Q Probably going the speed limit?
10 A If not less when I saw the vehicle.
11 Q So you immediately came, went behind it and either put your
12 lights on while you were making a U-turn or after you parked?
13 A Correct.
14 Q And then you stayed in your car I think about 20 to 30 seconds
15 before you came up to Mr. Kramer's car?
16 A I didn't pay attention to the time.
17 Q Sound about right?
18 A Roughly, yeah.
19 Q So the whole incident from first seeing the car to reaching his
20 door is anywhere from a minute to minute and a half?
21 A Roughly, yes.
22 Q How long was the truck there before you came up on it?
23 A I don't know.
24 Q Could have been there a minute and a half?
25 A Maybe. May well have been.

1 Q Any calls or comments about the truck?
2 A No.
3 Q Was the truck impeding traffic?
4 A No.
5 Q Was the truck in a damaged or what appeared to be a disabled
6 condition other than the flashers were on?
7 A No.
8 Q Did the truck in any way jeopardize the public safety or
9 movement of traffic?
10 A No.
11 Q And the truck was legally parked; correct?
12 A Yes.
13 Q Officer, when you passed the truck, did you see an occupant in
14 it when you were going southbound before you did your U-
15 turn?
16 A No, I did not see inside the vehicle.
17 Q Did you at all when you walked up on Mr. Kramer – strike that.
18 When you were behind him, could you see an occupant in the
19 vehicle?
20 A No.
21 Q Officer, could you have continued down the road, down
22 Highway J southbound and returned to the area a minute or two
23 or five minutes later?
24 MR. CROSS: Objection as to relevance.
25 THE COURT: I mean, I think the answer is self-evident.

1 He could have driven to Madison and got on a plane and flown to
2 New York and come back a day or two later. For what it's worth, I
3 will allow the question.

4 A Can you re-ask it?

5 Q You were concerned with the car there was a problem with the
6 vehicle; right?

7 A Vehicle, right.

8 Q But you could have continued on and came back and checked
9 later?

10 A Yes.

11 Q And when you returned, when you went past it southbound
12 before you did your U-turn, did you slow down at all to look in
13 the car?

14 A Yes.

15 Q Did you slow down, were you slowing down to look in there to
16 see everything was all right as well, or slowing down so you
17 could make a U-turn when you went past it so you could – did
18 you not see anything in it?

19 A No, I did not.

20 Q Did you roll down your window and yell "Hey, is there a
21 problem?"

22 A No.

23 Q Was there, was his window open when you went past it?

24 A When I went past it, I don't know.

25 Q When you turned around and parked behind it, did you think at

1 all maybe I could just pull along side and yell and say
2 everything okay?

3 A I wouldn't do that.

4 Q Did you think at all before you stopped and got out of your car
5 that maybe the gentleman was looking at a map or on a cell
6 phone?

7 A I had no idea what was going on inside the vehicle. Could have
8 been any number of reasons why.

9 Q Could have been checking the glove compartment, could have
10 been picking up something off the ground, anything.

11 A Could have been.

12 Q Did Mr. Kramer at all flag you down?

13 A No.

14 Q And after you stopped him, walked up to the car, what led you
15 to believe further investigation was necessary, the odor?

16 A I didn't stop him.

17 Q When you put your red lights on, got out of the car, walked up
18 to him, what led you to believe there was further investigation,
19 odor?

20 A Slurred speech and odor.

21 Q That's when you asked him for a driver's license?

22 A I was going to ask for it anyway, but I asked for that during that
23 course of conversation. Kind of all happened during the same
24 back and forth conversation that we had.

25 Q And when you flipped your lights on, pulled behind him, Mr.

1 Kramer was not free to leave at this point, was he?

2 A No.

3 Q If he had put his car in gear and taken off, you would have went

4 off after him, pulled him over?

5 A Yes.

6 Q And the car was running when you passed it?

7 A I don't know when I passed. When I approached it, it was.

8 Q You didn't hear it turn on. You assumed it had been on?

9 A Correct.

10 Q The headlights were on?

11 A Yes. I think they were.

12 Q And you didn't see any bad driving or anything like that?

13 A I didn't see any driving, no.

14 Q Officer, in your mind did you think you had less intrusive

15 alternatives to insure everything was all right other than

16 actually getting out of the car and walking up to the window?

17 Was there anything else you could have done?

18 A No.

19 Q You could have just driven past and came back and checked

20 later; right?

21 A I could have, yes.

22 Q And there was nothing about a flat tire or anything else you saw

23 wrong with the tire other than the hazards on?

24 A Correct.

25 Q Were the dome lights in the truck on when you went past it or

1 when you approached it?

2 A I don't recall.

3 Q When you approached him at the side of the truck, did he have

4 his cell phone in his hand?

5 A I don't recall if he had it in his hand or not.

6 Q I'm sorry.

7 A I don't recall if he had it in his hand or not.

8 Q But he said he was using the cell phone?

9 A He said, yeah. He stopped to make a call.

10 Q Was he talking on it?

11 A Not when I approached him, I don't believe so.

12 Q Was he in -- when you approached him, was he sitting normally

13 in the driver's seat? He wasn't all slumped over?

14 A No.

15 Q So he was sitting normally?

16 A Yes.

17 MR. EISENBERG: One second, Your Honor. Then I'm

18 done. Thank you. That's all.

19 REDIRECT EXAMINATION BY MR. CROSS:

20 Q What is your function as patrol officer?

21 A Enforce the laws of State of Wisconsin, assist people with any

22 problems that they may have, assist motorists, several

23 functions.

24 Q Are you to serve the community?

25 A Yes.

1 Q Have you seen cars parked on the side of the road with their
2 four-way hazards on previously?

3 A Yes.

4 Q How many times?

5 A I don't know that number in my head. Several times.

6 Q Do you always turn around and pull behind them?

7 A Yes.

8 MR. EISENBERG: Objection, relevance.

9 THE COURT: Overruled.

10 Q Why?

11 A Why do I pull behind them?

12 Q Yes.

13 A So I can check on the vehicle and occupants inside.

14 Q See if they need help?

15 A Correct.

16 Q When you pulled up behind Mr. Kramer on this evening, did
17 you have any inclination that there was any crime being
18 committed?

19 A No.

20 Q Did you have any inclination that there was any traffic law
21 being broken?

22 A No.

23 MR. CROSS: No further questions.

24 RECROSS-EXAMINATION BY MR. EISENBERG:

25 Q I just want to make sure. I think you said when I questioned

1 you earlier that at least in your mind was concern that
2 something criminal could be going on?
3 A Yes. Any point, anything could be going on.
4 Q Thank you.
5 A But I have no specific knowledge of anything going on.
6 MR. EISENBERG: Okay. Thank you.
7 THE COURT: Thank you. You are excused.
8 MR. CROSS: State would ask Court accept the tape
9 that's not yet been marked as an exhibit.
10 MR. EISENBERG: No objection.
11 THE COURT: All right. Exhibit 1 will be the tape. To
12 the extent it was played, the short segment that Court saw will be
13 admitted into evidence.
14 MR. CROSS: And State has no further evidence at this
15 time.
16 MR. EISENBERG: Todd Kramer please, very briefly.
17 THE COURT: Mr. Kramer, come forward to be sworn.
18 TODD KRAMER, called as a witness,
19 having been first duly sworn, testified as follows:
20 DIRECT EXAMINATION BY MR. EISENBERG:
21 Q State your name please.
22 A Todd Kramer.
23 Q What do you do for a living?
24 A Self-employed sider.
25 THE COURT: Before we go any further, I do think I

1 Q How far a drive was it from Lodi to home?
2 A Six, seven miles.
3 Q How far from Lodi were you when you pulled over?
4 A Roughly two.
5 Q Why did you pull over?
6 A Phone call.
7 Q Make one, get one? What?
8 A I had one. At the bottom of the hill reception out there is really
9 bad. Get to the top of the hill, the reception comes in.
10 Q How long were you sitting there before Officer Wagner pulled
11 his car behind you and
12 A Roughly a minute.
13 Q When did you first see Officer Wagner's car?
14 A I saw headlights coming toward me.
15 Q Did you know it was a police car then?
16 A No.
17 Q When did you first realize it was a police car?
18 A When the lights came on behind me.
19 Q The red and blue lights?
20 A Right.
21 Q When did those go on?
22 A I'm thinking they came by, he flipped them on as he came
23 around.
24 Q As he did his U-turn?
25 A Yes.

1 Q At the point the red and blue lights came on, did you think you
2 could drive away?
3 A No.
4 Q Did you flag the officer down or ask for help?
5 A No.
6 MR. EISENBERG: That's all I have.
7 CROSS-EXAMINATION BY MR. CROSS:
8 Q Why did you put your hazards on?
9 A Because of the hill.
10 Q What about the hill?
11 A It's kind of a blind if there is a car sitting there.
12 Q You wanted to be seen?
13 A From other vehicles, yes.
14 Q That would include sheriffs' vehicles?
15 A I suppose.
16 Q You were about five miles from home?
17 A Roughly yes.
18 Q You had cell phone reception at home?
19 A Not all the time.
20 Q You got a home phone at home?
21 A Yes.
22 Q You could have called the person back at home?
23 A Yes.
24 MR. CROSS: Okay. No further questions.
25 MR. EISENBERG: I have none, sir.

1 THE COURT: Thank you. You are excused.

2 MR. EISENBERG: I have no other witnesses, sir.

3 MR. CROSS: Nothing on rebuttal.

4 THE COURT: All right. Any argument?

5 MR. CROSS: Yeah. State would ask the Court dismiss
6 the motion. Deputy Wagner had no inclination there was any crime
7 being committed here. He said anything is possible. He chose the
8 path of safety when he walked up with his hand on his weapon and
9 shined the flashlight in the topper, in the box of the truck. But you
10 have a vehicle sitting on the side of the road with its four-way hazards
11 on at 8:45 in the evening.

12 It's dark out. If Deputy Wagner sees this, can't see if there is
13 anyone in the vehicle, he does the logical thing for a patrol officer to
14 do. He turned around and pulls over, makes contact.

15 Mr. Kramer admitted that he put his hazards on because it's a
16 hill. He wants traffic to be able to see him including sheriffs' traffic.
17 Deputy Wagner does the same thing when he turns his emergency
18 lights on so people can see him.

19 Deputy Wagner goes up to see what is going on to see if Mr.
20 Kramer needs any assistance. That is part of Deputy Wagner's job.
21 As the Court mentioned, Deputy Wagner could have driven to
22 Madison, gotten on a plane, flown to New York and come back in a
23 couple days to see if the vehicle was still there. But that's not what
24 he's out there to do.

25 Simply, we don't have a stop here. Mr. Kramer stopped

1 himself. Deputy Wagner was just making contact to see what if
2 anything was wrong, if he could render assistance. Therefore, the
3 State would ask that the motion be denied.

4 THE COURT: Mr. Eisenberg.

5 MR. EISENBERG: Your Honor, I believe what the State
6 is arguing is that there is a community caretaker exception to the
7 warrant requirement.

8 Secondly, I believe they are arguing there was no stop, which I
9 think is the same as there is no seizure. That's the issue here. I think
10 there was a seizure one, and two, I don't think there was community
11 caretaker exception.

12 The State bears the burden of proving the argument community
13 caretaker exception applies. That's State v. Ziedonis, 2005 WI App
14 249 at paragraph 15. Seizure conducted under the community
15 caretaker function still must satisfy the reasonableness requirement of
16 the Fourth Amendment.

17 Court then has to conduct a test to determine whether a seizure
18 conducted under community caretaker function is reasonable, and
19 Court must balance the public need and interest furthered by the
20 police conduct against the degree of and nature of the intrusion upon
21 the privacy of the citizen. And there is a three-part test that was
22 established in State v. Anderson, 142 Wis. 2d. at 167-168.

23 Court must determine one, that a seizure within the meaning of
24 the Fourth Amendment has occurred; not a stop, a seizure. A seizure
25 occurred here based on State v. Young, which is 2006 WI 98 and

1 specifically paragraph 32 and Young talks about Mendenhall, 446
2 U.S. 544 that says a seizure occurs only if in view of all of the
3 circumstances surrounding the incident a reasonable person would
4 have believed he was not free to leave.

5 All the cases, Mendenhall, Chester, Nutt, Bostick, all United
6 States Supreme Court cases, make clear either physical force – none
7 here, I agree – or a show of authority is sufficient to give rise to a
8 belief in a reasonable inference that he is not free to leave, although
9 either physical force or show of authority is necessary for a seizure.

10 I think we have a show of authority when those red and blue
11 lights go on. And even the officer testified, but it's an objective test,
12 not really subjective one. From the officer's viewpoint would
13 objectively a reasonable person believe they are not free to leave?

14 Clearly, it's what an objective person in Mr. Kramer's situation
15 would believe he was not free to leave. So we do have a show of
16 authority. We do have a seizure when those lights go on.

17 The second part of the test is whether the police conduct was
18 bona fide community caretaker function or activity. And community
19 caretaker doctrine creates an exception to the warrant requirements
20 where a police officer is performing a duty "totally divorced from the
21 detection, investigation or acquisition of evidence relating to the
22 violation of a criminal statute."

23 Now, I didn't write down. It's one of my problems when I
24 question people I don't write it down, but I know it's in the transcript,
25 and if we have to look at it, I will. But Officer Wagner said that he

1 was concerned even if it's just a little bit that maybe a crime was
2 going on.

3 He did have a concern maybe there was a drunk driver. He had
4 all those things going on so it is not totally divorced from the
5 investigation or acquisition of conduct related to the violation of a
6 criminal statute.

7 So he fails the number one test. There is a seizure. Two, he
8 fails the second test. The police conduct was not bona fide
9 community caretaker activity because it wasn't totally divorced from
10 the detection of crime. And then the third test, when the public need
11 and interest outweigh the intrusion upon the privacy of the individual.
12 And that's where that third part of the test breaks down into another
13 four-part test. And that's where also I believe that there were less
14 intrusive means for this officer to have pursued rather than see the
15 vehicle pull over right away and see if anything was wrong.

16 And that four-part test, this is out of Anderson as well, and
17 evaluating the third factor the following considerations must be
18 balanced: degree of the public interest and exigency of the situation.
19 He was legally parked. He was not impeding traffic. He was not a
20 threat to other motorists.

21 It was 8:45 at night, not 3 in the morning. His flashers were on.
22 He could be seen by everybody, so there is no exigency in the
23 situation that requires the public interest to have Mr. or Officer
24 Wagner stop him.

25 The second part, the attendant circumstances surrounding the

1 seizure, including time, location, and degree of overt authority and
2 force displayed. The time was 8:45; location, he was legally parked.
3 There was, as we said, a degree of overt authority; red and blue lights.
4 That's authority to pull him over. There was no force displayed.

5 Finally, third, whether an automobile is involved. There was,
6 and that weighs against Mr. Kramer, and the fourth one, availability,
7 feasibility and effectiveness of alternatives to the type of intrusion
8 actually accomplished.

9 And that's when I asked him those questions about what could
10 he have done. The officer could have continued down the road, could
11 have went down Highway J, returned a minute, five minutes, six
12 minutes later to determine if a problem existed. Mr. Kramer could
13 have been on the phone. He could have been looking at a map. He
14 could have been checking the glove compartment. The officer could
15 have driven by, viewed what was going on and used his headlights or
16 a spotlight to see if anything was wrong, kept going.

17 The officer could have pulled along side the car, rolled down
18 his window, "everything okay? Sure, everything's okay." None of
19 that was done, and the fact that it wasn't done is in violation of
20 Anderson, which says -- hold on just a second.

21 Overriding this entire process is the fundamental consideration
22 that any warrantless intrusion must be as limited as is reasonably
23 consistent with the purpose justifying it in the first place. This is not
24 as limited as is reasonably possible.

25 Mr. Kramer has a right of privacy, right to pull over the side of

1 the road legally and sit there if he wants. This was not as limited an
2 intrusion as could have been done because he went, could have went
3 past the car, came back, done a number of things rather than approach
4 the car.

5 Officer Wagner had far less intrusive yet equally effective and
6 feasible alternatives to investigate what was going on short of getting
7 out of his car within a minute of seeing Mr. Kramer's car, walking up
8 to him and questioning him.

9 Mr. Kramer, as I said, has a right to pull over for one minute,
10 make a phone call without being questioned and confronted by a
11 police officer. One more minute, Your Honor.

12 Mr. Kramer was not engaged in any behavior that would lead
13 you to believe assistance was necessary. No fixing a flat, no hood up,
14 no driving, no bad driving, no ambiguous driving, no observations by
15 Officer Wagner. There was no awkward body position. There was no
16 visual need of assistance.

17 As I said, I should be able to pull my car over for a minute or
18 two minutes or three minutes, put my flashers on and sit there without
19 being asked what's wrong. Mr. Kramer has an expectation of privacy.
20 Case law talks about expectation of privacy. I just have one more
21 thing, and that's the privacy issue. As I already discussed, community
22 caretaker, in such a case there is a balancing of the public needs and
23 interest furthered by the police conduct. Again, the degree and nature
24 of intrusion upon the privacy of the citizen. This test requires an
25 objective assessment of the intrusion upon the privacy of the citizen.

1 It is fundamental law that we are always entitled to privacy, and
2 Officer Wagner whether he did so in the best interests of what he
3 thought was correct under the law, he was not. For those reasons that
4 I have set forth, and we all enjoy this right of privacy, I think Officer
5 Wagner breached that right of privacy. Thank you.

6 THE COURT: All right. I've listened to the testimony
7 in this case, and I've seen the tape. I have listened to the arguments of
8 counsel, and I clearly understand the constitutional ramifications that
9 are being argued in this case in terms of right of privacy.

10 I have to admit as I'm listening to the arguments and the
11 testimony in this case my mind conjures up a vehicle pulled to the
12 side of the road. Someone is having a heart attack. The officer drives
13 by, keeps on going and subsequently, the Columbia County Sheriffs
14 Department is sued for not doing their caretaker duty.

15 The officer is not going to be – no officer is going to be
16 clairvoyant. They don't know what is happening, but I did see the
17 tape, and these are the factors that I see when reviewing the tape. It is
18 8:45 at night on a county highway. There is a vehicle pulled over
19 with his four-way flashers on.

20 Now from Mr. Kramer's perspective, if he's pulling over to use
21 his phone, he's doing everything absolutely right, but from Officer
22 Wagner's point of view, he has no idea why that vehicle is pulled
23 over. But most vehicles I would think that are pulled over on a
24 country road with their flashers going in the dark aren't people using a
25 phone. For whatever reason it is something that an officer on patrol I

1 think has a right in the interest of service to the community to at least
2 check and inquire about.

3 And in this particular case, the evidence that's before me is that
4 he turned around, put on his emergency lights and his lights. And I
5 would agree 100 percent that when that occurred, there is some
6 authority involved in it. But that's the nature of a police car. That's
7 what it's equipped with. When he pulls over and those lights are
8 flashing, it's warning everyone around as is Mr. Kramer's own
9 flashers that there is a vehicle and there may be activity going on.

10 And while if I was pulled over and an officer came up behind
11 me, wouldn't consider turning my car on or gunning it and taking off
12 because now there is somebody behind me, and I know it's flashing
13 lights. I know its authority. I don't have this or get the impression
14 that this is a circumstance that would leave one to believe that they are
15 under immediate concern for arrest.

16 What I have here is it's at nighttime. It's dark. The four-way
17 flashers are on and the officer pulls over, and in his own words simply
18 to check and see what the circumstance is. I don't think that's
19 unreasonable. I don't think that is a violation of one's right to
20 privacy.

21 I did hear the testimony from the officer that he when he
22 approached the vehicle didn't know what was going on. So there was
23 a thought well, you know, is there a crime going on? Is there a drunk
24 driver? I don't know what we have here. But I don't think it's
25 reasonable to empty an officer's head of every thought in the whole

1 world except maybe he has a flat tire, maybe hit a deer, maybe answer
2 the phone. I better check this out.

3 I don't think you can do that. I think any reasonable officer is
4 going to have a number of things going on in their head at that time. I
5 think I just read in the paper or saw on TV. about an officer that was
6 killed down around Kenosha area.

7 An officer doesn't know, but an officer when he sees a vehicle
8 on the side of the road I think in a public caretaker position should
9 have an obligation to at least find out if there is some kind of
10 circumstance that requires further action by the officer. As you have
11 indicated in Anderson, the degree of public interest and the exigency
12 of the situation.

13 This doesn't appear to be an emergency type situation, but the
14 officer doesn't know unless he inquires. It could be a person on the
15 phone, could be a person with a heart attack, could be any number of
16 things that have gone on. Person could be out of gas, any number of
17 different things. When he pulled over in his interest of safety, he has
18 a flashlight, his hand on the gun, but this I don't think is an excessive
19 show of force.

20 I think it's a responsible means of proceeding considering that
21 he does not know what the circumstance is. He's got a concern for his
22 own welfare as well. Obviously, in the decision by our Supreme
23 Court, if an automobile was involved, they gave some credence to that
24 circumstance, and I think that has to be there because I don't think
25 automobiles pulled to the side of the road with four-way flashers is an

1 every moment occurrence that people just do this for the heck of it.

2 And lastly, we discussed the feasibility and effectiveness of
3 alternatives. There are all sorts of alternatives. We can sit here and
4 second guess until the cows come home, but the fact of the matter is,
5 again, as the officer passes, it would appear to me if there is a public
6 service that's going to be performed, driving down the road and
7 coming back ten minutes later without knowing what if any problem
8 is existing can only make the problem worse.

9 I see nothing within this scenario, the testimony, or the video
10 that has been before me to believe that there has been a constitutional
11 violation, and I therefore deny the motion to suppress. We are in
12 recess.

13 (Proceeding concluded at 9:49 a.m.)
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1 STATE OF WISCONSIN)

2 COUNTY OF COLUMBIA)

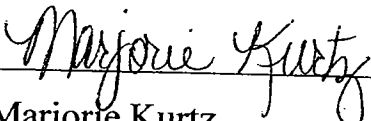
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Transportation Synthesis Report

Research and Communication Services
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Cell Phones Behind the Wheel: Recent Research and Guidance for Curbing Employee Use

Prepared for
Division of Business Management
Bureau of Business Services

Prepared by
CTC & Associates LLC
WisDOT Research and Communication Services Section
November 7, 2006

Transportation Synthesis Reports (TSRs) are brief summaries of currently available information on topics of interest to WisDOT technical staff. Online and print sources include NCHRP and other TRB programs, AASHTO, the research and practices of other state DOTs, and related academic and industry research. Internet hyperlinks in TSRs are active at the time of publication, but changes on the host server can make them obsolete.

Request for Report

Two recent trends highlight the importance of employers adopting cell phone use policies for employees who drive. First, states have taken an increasingly active role in addressing the relationship between driver cell phone use and traffic safety. While these laws do not directly address employer liability, they have the potential to increase employer exposure for cell phone-related accidents. Second, there are a growing number of lawsuits involving employer liability for traffic accidents caused by employees talking on cell phones.*

[*Steering Clear of Liability When Employees Use Cell Phones While Driving, Workplace Trends, July 2004.]

Wisconsin Department of Transportation drivers log 25 million miles per year. WisDOT's Bureau of Business Services asked us to locate research studies that investigate the link between cell phone use and driving risk. BBS is especially interested in studies that clearly identify a relationship between cell phone use and increased crashes and injury, and examples of best practice by employers to control cell phone use by employees while driving.

Summary

We present our research results in two sections.

Recent Research:

- Researchers at Lincoln University-New Zealand and Bentley College determined that all cell phone conversation, either hands-free or hand-held, significantly affects driver attention.
- Researchers at Wayne State and Bradley universities found that test subjects who used cell phones while driving had significantly lower average speeds, significantly higher proportions of improper lateral placement and twice as many crashes.
- University of Calgary and University of Minnesota researchers determined that driving events requiring urgent responses may be influenced by in-vehicle conversations.

Liability Issues and Guidance:

- Practical suggestions and best practices for employers to control employee cell phone use while driving include:
- Clearly limit job scope so that it prohibits cell phone use that is unreasonably dangerous – develop written rules in employee contracts, handbooks or personnel policies that prohibit cell phone use while driving or allow cell phone use only if it complies with state and/or local rules. (*Robert Nelson, Nelson Law Group*)
 - Prohibit cell phone use in adverse weather or difficult traffic conditions, require employees to pull over to take phone calls, restrict driver cell phone use to brief conversations, instruct employees to avoid or terminate stressful or emotional phone conversations. (*Garen Dodge, Wiley Rein & Fielding LLP*)

- Provide drivers with a call answering service or forwarding option. Hold workers responsible for paying fines or other costs from traffic infractions resulting from cell phone use, ban cell phone use for drivers who accumulate infractions. (*Catherine Rosenberry, Mobile Office Consultant*)
- Consider issuing two-way text pagers rather than cell phones to employees who need only short sound-byte communications. Require drivers to make appointments or report status to supervisors while on location and before getting back on the road. (*Mark Hansen, The St. Paul Travelers Companies Inc.*)
- Drivers who use a hands-free device should position it where it is easy to see and reach, and attach all hands-free accessories properly before driving. Drivers should use speed dial options – if they know they will need to call an unprogrammed number, they should dial the number before starting off and send the call at their convenience. (*University of Victoria Campus Security Services*)

Recent Research

Driving and Cell Phones: Perhaps we should be licensed to do both

Prof. Jake Rose, Lincoln University- Christchurch, New Zealand

Lincoln University News, Oct. 27, 2005

<http://www.lincoln.ac.nz/story2148.html>.

Recent research by Lincoln University and Bentley College, Massachusetts, indicates that all cell phone conversation, either hands-free or hand-held, significantly affects driver attention, because cell phone conversations lack non-verbal cues. While the study suggests a new regulatory response to the use of phones while driving, the findings suggest a possible alternative to a ban on using cell phones behind the wheel: driver education specifically aimed at training drivers to converse on a cell phone while safely handling a moving vehicle.

Assessing Driver Distractions from Cell Phone Use While Driving - A Simulator-Based Study

[Hand-held cell phone research]

Schattler, K.; Pellerito, J.; McAvoy, D.; Datta, T.: 2005

TRB 85th Annual Meeting Compendium of Papers CD-ROM, Paper No. 06-0931.

From the Abstract: A study was conducted to compare the relative driving performance of a group of 37 drivers in a controlled laboratory environment to assess how cell phone use impacts driver performance on urban arterials and local roads. Researchers found that when the subjects used cell phones while driving their performance scores were significantly lower, average speeds were significantly lower, and significantly higher proportions of improper lateral placement were observed. In addition, twice as many crashes were observed when the subjects were operating cell phones while driving, as compared to the control condition, which was also a statistically significant finding. Thus, distractions caused by answering a call using a hand-held cell phone and engaging in a conversation had significant negative impacts on driving performance as observed in this controlled laboratory experiment.

The Effect of Passenger and Cellular Phone Conversations on Driver Distraction

[Hands-free cell phone research]

Laberge, J.; Scialfa, C.; White, C.; Caird, J.: 2003

TRB 83rd Annual Meeting Compendium of Papers CD-ROM, Paper No. 04-4745.

From the Abstract and Conclusions: This study compared the distracting effects of a simulated conversation with passengers and over hands-free cellular phones. The driving performance data found that while lane and speed maintenance may be time-shared effectively with a concurrent conversation task, driving events that require urgent responses may be influenced by in-vehicle conversations. The researchers suggest that some thought should go into educating and training drivers about the hazards of both cellular phone and passenger conversations.

Liability Issues and Guidance

Eyes and Ears on the Road: Employees' Hands Should Be on the Wheel

Robert Nelson, Nelson Law Group, October 2006

<http://www.workforce.com/section/03/feature/24/55/31/index.html>.

Nelson is founder of the Nelson Law Group, a San Bruno, California-based law firm specializing in labor and employment matters, and regularly drafts policies governing employee cell phone use. His article includes practical discussion regarding "vicarious liability." From the article:

Under the principle of vicarious liability, the employer generally is held liable for any loss or damage caused in the normal course and scope of the employee's work... Vicarious liability works best when job scope can be neatly contained, such as when employees work set times in set locations doing set job duties: employers can monitor, control and correct employee behavior, limiting their own risk of vicarious liability. Problems arise when job scope

expands beyond employer control, and few things cause job scope to expand faster and more completely than modern technology, including cell phones... If employers encourage or allow employees to take their work in the car with them, then the employers can theoretically be held vicariously liable whenever the work causes or contributes to accidents.

What should employers do to limit their exposure to vicarious liability from employee cell phone use? Clearly limit job scope so that it prohibits cell phone use that is unreasonably dangerous. That can be done through written rules -- in employee contracts, handbooks or personnel policies -- that either prohibit cell phone use while driving altogether or allow cell phone use only if it complies with state and/or local rules... Even in states where hands-free legislation has not been passed, employers would be wise to include compliant provisions in their respective cell phone policies. If employees cause accidents because of cell phone use that does not comply with established guidelines, employers can theoretically defend themselves by arguing that the employees exceeded their respective job scope. As with all workplace policies, cell phone rules will only hold up if employers actively enforce them.

Steering Clear of Liability When Employees Use Cell Phones While Driving

Garen Dodge, Partner- Wiley Rein & Fielding LLP, July 2004

http://www.wrf.com/publication_newsletters.cfm?sp=newsletter&year=2004&ID=13&publication_id=10999&keyword=

Dodge litigates in federal and state courts, has helped shape national employment policy and regularly assists companies in establishing workplace best practices and programs. From the article:

New Laws Increase Employer Liability. There are generally two theories that plaintiffs can use to hold employers liable for cell phone-related accidents. Under the theory of respondeat superior, an employer may be liable for any damages caused by an employee who is acting within the scope of his employment. Consequently, if an employee gets into an accident while making a business call, the employer could be liable. A second ground for employer liability is negligence. Based on this theory, an employer could be liable for permitting employees to use cell phones without first providing proper training or adopting appropriate cell phone use policies. Generally, when a car accident involves a party using a cell phone, the plaintiff must prove that the use of the cell phone caused the crash. This additional layer of proof has afforded employers some degree of protection to date; however, recent cell phone legislation may change this.

What Should Employers Do? While there is no guaranteed defense to liability, developing appropriate policies, training and enforcement mechanisms can help limit potential liability. Some companies prohibit employees from using cell phones while driving on company time. In contrast, other companies adopt cell phone safety guidelines and focus on training and enforcement. Each company should determine whether the benefits of employee cell phone use outweigh the risks. Some examples of cell phone use policies include:

- Requiring employees to use hands-free devices while driving.
- Requiring employees to pull over to take phone calls.
- Instructing employees to avoid or terminate phone calls involving stressful or emotional conversations.
- Limiting the scope of certain employees' job descriptions so that it is clear that their positions do not include using cell phones while driving.
- Prohibiting cell phone use in adverse weather or difficult traffic conditions.
- Restricting driver cell phone use to brief conversations.

Regardless of the policy each company adopts, all employers should double check their insurance coverage, train employees on how to use cell phones safely, and make it clear that failure to comply with company guidelines may result in disciplinary action.

Cell Phones and Highway Safety: 2005 State Legislative Update

Matt Sundeen, Program Principal- National Conference of State Legislatures (NCSL)

<http://www.ncsl.org/print/transportation/cellphoneup805.pdf>

The NCSL has released a report that examines state crash data, academic studies of risks, and public opinion associated with cell phone use and other driver distraction issues. The effectiveness of enforcement and driver education activities is also examined, as are legal liability issues. From the report:

Multiple Behaviors (page 9). An emerging trend in legislation is to address multiple behaviors -- not only cell phone use -- on the road. An ordinance passed by the District of Columbia in 2004 prohibits several potential distracting

driver behaviors, including reading, writing, personal grooming, interacting with unsecured cargo, using personal communications technologies, or engaging in other activities that cause distractions (2004 D.C. Stat., Chap. A15-0311)*. Connecticut's cell phone bill, which passed in June 2005, includes a broad distraction provision that prohibits drivers from engaging in any activity not related to the actual operation of a motor vehicle in a manner that interferes with the safe operation of such vehicle on any highway (2005 Conn. Acts, P.A. 159 Reg. Sess.)*.

*More detail concerning this law may be viewed at <http://www.ncsl.org/programs/transportation/cellphone05apdA.htm>

Top 7 Cell Phone Safety Tips

Catherine Rosenberry, Mobile Office Consultant

<http://mobileoffice.about.com/od/usingyourphone/tp/cellphonesafety.htm>.

Rosenberry has worked in the mobile environment 20 years and advises companies and individuals on the deployment and administration of mobile work teams. She suggests that employers can create cell phone safety policies to outline situations and repercussions for those who fail to follow the policies. Rosenberry's safety tips include:

- **Warnings in Company Vehicles.** Notices should be put in all company vehicles reminding remote employees that the main function of the vehicle operator is to safely arrive at locations. Passengers should be responsible for handling the cell phone or the driver should pull over before using a cell phone.
- **Let Employees Take Responsibility.** Any remote workers charged with traffic infractions as a result of the use of a cell phone will be responsible for paying any fines or other associated costs. If a remote worker accumulates a certain number of charges, then stricter discipline may be required.
- **Driver Safety Training.** Require that all remote workers attend a driver safety course prior to being allowed to use a company vehicle. Some driver safety courses can be brutally honest in demonstrating the results of driver inattention due to the distraction of cell phones.
- **Provide an Answering Service or Forwarding Option.**
- **Shut It Off.** It should be a condition of operation of any company vehicle that the driver's cell phone is turned off. Including any passengers in this clause may also be appropriate.
- **No Cell Phones Allowed.** Banning completely the use of any company-owned or personal cell phone while operating a company-owned vehicle or personal vehicle while doing company business. It would be appropriate to apply this to those remote workers who have had numerous traffic infractions resulting from unsafe cell phone use.

How to Ban Cell Phone Use by Employees While Driving

Mark Hansen, Director of Risk Control / Oil and Gas Unit- The St. Paul Travelers Companies Inc.

http://safety1st.gsfc.nasa.gov/safetynet/legal_content/articles/how_to_ban_cell_phone_use_of_employees_while_driving.html.

Hansen, a veteran safety consultant, outlines an approach for restricting behind-the-wheel cell phone use by employees, and provides a downloadable model cell phone use policy for the workplace. From the article:

Cell Phones and Safety. Employers generally don't mind that employees use cell phones in the course of duty, and in fact see it as a positive -- a form of multitasking that maximizes productivity. This presents one of the biggest challenges to developing a workplace policy for limiting employee cell phone use behind the wheel: getting both the employer and the employee to recognize the real danger posed by using cell phones while driving.

Persuading Employers. Plaintiff attorneys can, and do, subpoena cell phone records after motor vehicle accidents to determine if employee drivers were conducting business at the time of the accident. Their goal is to implicate the employer -- the deep pockets.

Tips to Help Employees Adapt. Restricting cell phone use behind the wheel requires changing some habits. To help employees adapt to a new phone policy, encourage them to:

- Make appointments or report status to supervisors while on location and before getting back on the road.
- Check messages at rest stops.

Employees who need only short sound-byte communications should consider a two-way text pager rather than a cell phone. This also saves on employer cell phone bills.

Cell Phone Safety: General Guidelines for Drivers

University of Victoria, British Columbia; Campus Security Services

<http://web.uvic.ca/security/security/cellphone.html>.

Campus Security has posted the following tips for members of the university community who use cell phones and drive. The tips include:

- If you are expecting an important call, let someone else drive.
- Use a speakerphone or a hands-free device. Make sure your hands-free device is positioned where it is easy to see and reach, and that all hands-free accessories are properly attached before you start driving.
- Don't answer the phone until you have checked that it is safe to do so. Assess the driving conditions or hazards that are likely to be experienced in the next 30 seconds or so.
- Use speed dial options. If you know you will need to call an unprogrammed number, dial the number before starting off and send the call at your convenience.
- Let the caller know you are driving and, if possible, keep the call short.
- Ask the caller to hold during maneuvers that require extra attention, such as turning in traffic, or until you can park. Alternatively say that you'll return the call as soon as it's safe to do so.
- Don't take notes or look up phone numbers while driving. Pull over and stop.
- When reporting an emergency situation from a cell phone, pull over and ensure you are not in the flow of traffic.

STATE OF WISCONSIN
IN SUPREME COURT

No. 2007AP1834-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TODD LEE KRAMER,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A DECISION OF
THE COURT OF APPEALS, AFFIRMING A
JUDGMENT OF CONVICTION AND AN ORDER
DENYING SUPPRESSION MOTION, ENTERED IN
THE CIRCUIT COURT FOR COLUMBIA COUNTY,
THE HONORABLE JAMES O. MILLER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

SUPPLEMENTAL STATEMENT OF FACTS

Plaintiff-respondent State of Wisconsin ("the State") offers these facts to supplement the facts provided by defendant-appellant-petitioner Todd Lee Kramer ("Kramer"). *See* Wis. Stat. § 809.19(3)(a).

Columbia County Deputy Sheriff Todd Wagner ("Wagner") testified that, after he saw Kramer's vehicle parked on the shoulder of the roadway with its headlights and four-way hazards on, he turned around and pulled over to make contact with the driver to offer assistance, if

needed (30:4-5, 16). Wagner said that he approached “[b]ecause typically when a car is on the shoulder on the side of the road with their hazards on, there is [sic] typically vehicle problems. And *it’s not a normal place for a vehicle to just be parked*” (30:5) (emphasis added). Wagner explained that he activated the emergency lights for “[s]afety considerations so other traffic could see me” (30:6). Kramer himself testified that he had stopped at the top of a hill in order to get cell phone coverage, but that he activated his hazards because it was a blind area and he wanted other vehicles to be able to see him (30:22).

As Wagner approached Kramer’s vehicle, he checked to see if there were any occupants inside (30:7). After Wagner reached the vehicle, his first words to Kramer were, “Can I help you?” (30:7, 9). When Kramer answered “no,” Wagner said: “Just making sure no vehicle problems” (30:9). When asked whether he thought he had less intrusive alternatives than approaching Kramer’s window, Wagner said, “No” (30:16).

Wagner testified that, when he spoke to Kramer, he noticed Kramer’s speech was slurred, and could smell an odor of intoxicants coming from within the vehicle (30:7, 15), thereby justifying probable cause to arrest Kramer.¹

When asked whether he was “concerned at all even a little bit that a crime might have been going on,” Wagner said: “It was in my mind. I’m not sure any time I come upon a vehicle what the situation is so that’s the situation, yes” (30:8). When asked whether he was “concerned at all even a little bit that maybe someone was doing something illegal in the car,” Wagner testified: “*I wasn’t sure what was being done in the car*” (30:8-9); later adding, “*I had no idea what was going on inside the vehicle*. Could have been any number of reasons why” (30:15) (emphasis added).

¹The only issue on appeal is the initial encounter; Kramer does not dispute that probable cause arose from the initial encounter to justify the subsequent arrest (30:6).

Wagner said his function as a patrol officer is to “[e]nforce the laws of [the] State of Wisconsin, assist people with any problems that they may have, assist motorists, several functions,” and to serve the community (30:17).

Wagner testified that when he sees cars parked on the side of the road with their four-way hazards on, he always pulls in behind them to check on the vehicle and occupants inside to see if they need help; and when he pulled behind Kramer that evening, he did not have any inclination that any crime was being committed or any traffic law being broken (30:18). He also testified that anything—including something criminal—could be going on; but added: “*But I have no specific knowledge of anything going on*” (30:19) (emphasis added).

SUMMARY OF ARGUMENT

Both the circuit court and court of appeals properly recognized that the key legal issue here is not whether the police encounter was a seizure; but whether the encounter was justified under the community caretaker doctrine. Although the State contends that no seizure occurred, this court can—and should—still address the community caretaker issue as the key legal issue.

The initial encounter in this case was not a seizure implicating the Fourth Amendment, because under the totality of the circumstances, a reasonable innocent motorist in Kramer’s situation would have felt free to leave, after having invited the brief police contact by activating his own four-way hazards on the side of the road.

Even if the initial encounter was a seizure, however, it was justified under the community caretaker doctrine. This court should not require law enforcement’s community caretaking role to be “totally divorced” from

its investigatory function, because *Cady*² never required such a rule; and creating such a rule renders the officer's subjective intent dispositive of the inquiry—a result that is completely inconsistent with the Fourth Amendment's touchstone of objective reasonableness under the totality of the circumstances.

This court should instead adopt a “predominates” or “primary motivation” test, because that test renders the police's subjective intent relevant, but only as one factor within the objective reasonableness inquiry. This court should also reject Kramer's other proposed brightline rules in favor of the State's reasonableness approach, and find that Deputy Wagner's community caretaker acts were objectively reasonable under the totality of the circumstances.

ARGUMENT

I. THE INITIAL ENCOUNTER WAS NOT A SEIZURE IMPLICATING THE FOURTH AMENDMENT.

Kramer argues that he was “seized,” because a reasonable person would not have felt free to leave under the circumstances (Kramer's brief at 7-14). In making this argument, Kramer argues at length that neither the trial court (*id.* at 9-11) nor the court of appeals (*id.* at 11-14) made the “required” showing that a seizure had occurred.

This “fail[ure],” however, is not a “sidestep[],” as Kramer argues (*id.* at 11); but rather, a proper recognition that the key legal issue in the case was whether the police encounter was justified under the community caretaker doctrine. That the lower courts did not expressly make the finding of a seizure does not—and should not—preclude this court from finding that Deputy Wagner's actions were justified as reasonable. As the Wisconsin Court of

²*Cady v. Dombrowski*, 413 U.S. 433 (1973).

Appeals wisely stated in *State v. Ellenbecker*, 159 Wis. 2d 91, 95, 464 N.W.2d 427 (Ct. App. 1990):

Frankly, we doubt there was a seizure of Ellenbecker given the particular circumstances of this case. The contact between the police and Ellenbecker resulted not from an investigative stop but from a motorist assist, which is a valid police-citizen contact.

(Emphasis added.) The *Ellenbecker* court then properly went on to assume that a seizure occurred, but that it was justified. *Id.* at 95-98.

A. Standard of review.

This court has stated the two-part standard by which an appellate court reviews a circuit court's determination of whether a person was seized under the Fourth Amendment:

Whether a person has been seized is a question of constitutional fact. As such, we accept the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous, but we determine independently whether or when a seizure occurred.

State v. Young, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729 (internal citation omitted).

B. The “free to leave” test determines whether an encounter with the police is consensual or a seizure.

Not all encounters with law enforcement officers are “seizures” under the Fourth Amendment. *State v. Williams*, 2002 WI 94, ¶20, 255 Wis. 2d 1, 646 N.W.2d 834. A seizure occurs only when the officer “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Florida v. Bostick*, 501 U.S. 429, 434 (1991). The test for a seizure is

“whether, taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’” *Id.* at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). The United States Supreme Court has stated:

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 554 (1980).

Questioning by law enforcement officers, however, does not alone effectuate a seizure. *Florida v. Royer*, 460 U.S. 491, 497 (1983). Unless the surrounding conditions are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, the questioning does not result in a detention. *Williams*, 255 Wis. 2d 1, ¶22.

The *Mendenhall* test for determining whether a seizure has occurred is an objective one, focusing not on whether the defendant himself felt free to leave; but whether a reasonable person, under all the circumstances, would have felt free to leave. *Id.*, ¶23. Further, the reasonable person test presupposes an innocent person. *Bostick*, 501 U.S. at 438. The objective reasonable innocent person standard ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual questioned by the officer, and permits the police to know in advance whether the contemplated conduct will implicate the Fourth Amendment. *Chesternut*, 486 U.S. at 574. Moreover, that most citizens will respond to a police request—and do so without being told they are free not to respond—hardly eliminates the consensual nature of the response.

Williams, 255 Wis. 2d 1, ¶23; *State v. Griffith*, 2000 WI 72, ¶53, 236 Wis. 2d 48, 613 N.W.2d 72 (officer's mere posing of question does not constitute seizure even though individual is likely to feel some pressure to respond).

In sum, the Fourth Amendment requires consideration of the totality of the circumstances, because what constitutes restraint on liberty can vary, not only upon the particular police conduct at issue, but also upon the setting or context in which the conduct occurs. *Chesternut*, 486 U.S. at 573.

In finding that a “display” of authority does not necessarily constitute a seizure, this court followed the rationale behind *Chesternut*'s holding:

[N]ot every display of police authority rises to a “show of authority” that constitutes a seizure. As both *Mendenhall* and *Hodari D.* teach, not every police action, initiative, display of authority, or interaction with a citizen would cause a reasonable person to believe that he was not free to leave. *A police officer's actions must be assessed in view of all the circumstances surrounding the incident.*

Young, 294 Wis. 2d 1, ¶65 (emphasis added).

C. In the “motorist assist” context, most courts have found that emergency lights alone do not constitute a seizure.

The following cases clearly illustrate why the courts must consider the context in which the police encounter occurs.

1. In the “motorist assist” context, activation of emergency lights does not constitute a seizure.

For example, in *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993), the Minnesota Supreme Court rejected the notion that turning on emergency lights always renders the encounter a seizure. Rather, a reasonable motorist would understand that the officer was stopping to help, and that the flashing lights were used to warn other traffic:

A reasonable person would have assumed that the officer was not doing anything other than checking to see what was going on and to offer help if needed. A reasonable person in such a situation would not be surprised at the use of the flashing lights. It was dark out and the cars were on the shoulder of the highway far from any town. A reasonable person would know that while flashing lights may be used as a show of authority, they also serve other purposes, including warning oncoming motorists in such a situation to be careful.

Similarly, in *State v. Baldonado*, 847 P.2d 751, 752 (N.M. Ct. App. 1992), the New Mexico Court of Appeals held that the police pulling up behind a stopped car and turning on the flashing lights did not always, as a matter of law, create a seizure; reasoning that it could:

conceive of many situations in which people in stopped cars approached by officers flashing their lights would be free to leave because the officers would be simply communicating with them to ascertain that they are not in trouble. Under such circumstances, depending on the facts, the officers may well activate their emergency lights for reasons of highway safety or so as not to unduly alarm the stopped motorists. *We are loathe to create a situation in which officers would be discouraged from acting to help stranded motorists, from acting in the interest of the safety of the travelling public, or from acting in the interest of their own safety.*

Id. at 754 (emphasis added). The court also concluded no seizure occurs “whenever officers pull up behind a stopped car, activate their lights, and approach the car in a

deferential manner asking first whether the occupants need help.” *Id.* at 755.

In *State v. Blair*, 14 P.3d 660, 662 (Or. Ct. App. 2000), after noticing a van stopped on the side of the road with its hazard lights flashing, the officers pulled up behind the van and activated the flashing emergency lights to make sure that passing traffic could see them. The Oregon Court of Appeals found no seizure, because a reasonable motorist in their position would not have believed that the police stopped behind their vehicle for anything more than a brief encounter resulting in an insignificant intrusion. *Id.* at 667.

The *Blair* court also noted that the van’s use of the hazard lights “announce[d]” that the van was disabled or hazardous; and that if a police car came over, a reasonable motorist would appreciate the officer’s concern:

Given that announcement, any reasonable motorist in defendants’ place would perceive the officers to be stopping behind them for the purpose of inquiring whether something was wrong and perhaps warning them of the safety problem they posed. The officers . . . activated their overhead lights for safety purposes only. . . . In the case of police vehicles and tow vehicles, *their overhead flashing lights often are activated, alerting other drivers to their presence and to the fact that a hazard exists at the roadside. . . . There is nothing uncommon or psychologically intimidating about such a setting generally, nor was there anything that made it so here. A reasonable motorist under the circumstances likely would appreciate an officer’s concern, even if the motorist in fact was not having car trouble. . . .* But in all events, an encounter of this kind, *reasonably* perceived does not significantly intrude on the motorist’s freedom of movement.

Id. at 665-66 (internal citations and footnotes omitted; emphasis added except for “reasonably”).

The State also notes these other cases which found no seizure in the motorist assist context:

- *Martin v. State*, 104 S.W.3d 298, 301-02 (Tex. Ct. App. 2003) (overhead lights did not convert encounter into detention when lights were used to let defendant know an officer was behind him and to alert other traffic to patrol car and defendant's vehicle);
- *Commonwealth v. McDevitt*, 786 N.E.2d 404, 407 (Mass. App. Ct. 2003) (no seizure when officer stopped to assist; officer's use of emergency lights did not change encounter into seizure);
- *State v. Marler*, 797 So. 2d 706, 709-10 (La. Ct. App. 2001) (motorist not seized when officer turned on emergency lights to assist; officer was only stopping to check physical condition of motorist or to render roadside assistance to a possibly stranded motorist, and use of emergency lights was "very prudent" course of action for safety of officers, defendant, and anyone else who might have come upon scene);
- *People v. Crocker*, 641 N.E.2d 1237, 1240 (Ill. App. Ct. 1994) (when the police act in same way as any private citizen would in that situation, encounter is not a seizure).

As noted above, at least one Wisconsin case in the motorist assist context has reasoned, in *dicta*, that motorists are probably not seized just because officers have activated their emergency lights. *Ellenbecker*, 159 Wis. 2d at 95 ("we doubt there was a seizure" because it was a motorist assist, which is a valid police-citizen contact).

Further, in *State v. Goebel*, 103 Wis. 2d 203, 208, 307 N.W.2d 915 (1981), although there was no claim of a seizure and no emergency lights activated; the *Goebel* court found that an officer contacting a motorist stopped on the side of the road to see whether he was having car

trouble was not only authorized, but also constituted “an important duty of law enforcement officers.”

2. In other contexts, activation of emergency lights may constitute a seizure.

Numerous cases in other jurisdictions have found seizures when police activate emergency lights in other contexts where there was no apparent reason to stop, other than to investigate some matter. *See, e.g.,*

- *Hammons v. State*, 940 S.W.2d 424, 425-26 (Ark. 1997) (officer stopped behind defendant’s car and turned on lights to investigate illegal drug or alcohol consumption);
- *State v. Morris*, 72 P.3d 570, 573-74, 577 (Kan. 2003) (officers investigating methamphetamine lab and car not parked on highway);
- *Lawson v. State*, 707 A.2d 947, 949 (Md. Ct. Spec. App. 1998) (defendant sitting in legally parked car in area known for its high drug activity and officer stopped to ask what business defendant had in the area);
- *Wallace v. Commonwealth*, 528 S.E.2d 739, 740-41 (Va. Ct. App. 2000) (officer followed car to determine whether motorist was driving while intoxicated; officer pulled in behind car to conduct investigation after car stopped in private driveway).

Thus, the context in which the contact arises is an important aspect of the seizure determination.

D. Kramer was not seized, because under the totality of the circumstances, a reasonable innocent person would have felt free to leave.

In arguing that a seizure occurred, Kramer relies primarily upon the fact that Deputy Wagner activated his emergency lights behind Kramer's stopped vehicle (Kramer's brief at 11-14). When considered in light of all of the other circumstances, however, this one fact does not render the encounter a seizure.³ Further, Kramer minimizes one key fact: that Kramer himself, by activating his own four-way hazards, had essentially invited the police (or anyone else) to pull over to see if he needed assistance. *Blair*, 14 P.3d at 665-66 (defendant's activation of hazard lights announced that emergency or hazard existed; any reasonable motorist in defendant's place would perceive officers to be inquiring whether something was wrong). Indeed, it was a dark August night, and even though Kramer was legally parked, his headlights were on (30:16, 29-30), also signaling to officers that he might have needed help.

1. When a reasonable innocent driver activates hazard lights, that driver would welcome the police contact and feel free to leave if an officer arrives to assist.

Kramer argues (Kramer's brief at 9) that he did not feel free to leave when Deputy Wagner pulled over to assist him (30:22). What Kramer himself believed, however, is irrelevant, because the "free to leave" test is

³Indeed, Kramer concedes, as he must, that Deputy Wagner did not "stop" him, because he was already stopped on the side of the road when Deputy Wagner arrived (Kramer's brief at 8-9).

objective (i.e., what a “reasonable innocent person” believed), not subjective (i.e., what the defendant himself believed). *Williams*, 255 Wis. 2d 1, ¶23; *Bostick*, 501 U.S. at 438. By applying an objective (i.e., reasonable innocent person) standard here, this court will ensure that the scope of Fourth Amendment protection will not vary with the state of mind of the particular individual questioned. *Chesternut*, 486 U.S. at 574.

Kramer also argues (Kramer’s brief at 8-9) that a reasonable person would not feel free to leave, because Kramer was not free to leave, per Wagner’s testimony (30:15-16). But the police are not required to tell people they are free to leave for the contact to be considered consensual. *Ohio v. Robinette*, 519 U.S. 33, 35, 39-40 (1996); *State v. Gaulrapp*, 207 Wis. 2d 600, 607-608, 558 N.W.2d 696 (Ct. App. 1996).

Moreover, the record belies Kramer’s assertions that Deputy Wagner “knew” he was conducting a seizure or that the motorist assist situation is a “false analogy” (Kramer’s brief at 12-13). In making these assertions, Kramer ignores Deputy Wagner’s actual testimony that, although it is always in his mind that a crime might be occurring (30:8-9), he did not think that any crime was being committed or any traffic law was being broken that night (30:18).

And that particular night, Deputy Wagner went to see what was going on, because Kramer’s car was not parked in a “normal” place (30:5), and Kramer’s own testimony indicated it was an unsafe, blind place to park at the top of the hill (30:22). Wagner also explained that he had activated the emergency lights for “[s]afety considerations so other traffic could see me” (30:6). Indeed, it was already dark outside (30:29-30). After reaching Kramer’s vehicle, Wagner’s first words to Kramer were, ““Can I help you?”” (30:7). When Kramer answered “no,” Wagner said: ““Just making sure no vehicle problems”” (30:9).

Finally, even assuming that what Kramer believed is somehow relevant (Kramer's brief at 5-6), Kramer takes into account certain facts which Kramer himself did not know; and therefore, could not have been considered by a reasonable innocent person. Kramer argues that Deputy Wagner immediately made a U-turn, and walked towards the rear of Kramer's car with his hand on his gun, shining his flashlight in the rear cab window (30:8, 11-12).

These facts, however, cannot be relevant to the analysis, because there is no evidence that Kramer actually saw Deputy Wagner do any of these things. Kramer testified that he saw the police car turn on its emergency lights; but he never testified that he saw Wagner approach the truck with his hand on his gun or that he saw Wagner shine his light into the truck (30:19-22). If a person is not aware of something, it cannot affect his perception of his freedom to act.

All that is left, then, is the argument that he was seized because Deputy Wagner had activated his emergency lights behind Kramer's truck. Considering the totality of the circumstances, this fact in and of itself does not constitute a seizure, because in the context of a motorist assist situation, Kramer, in essence, had invited the police to check on him by sitting on the side of the road with his headlights on and hazard lights on. *Blair*, 14 P.3d at 665-66.

Kramer minimizes these facts, but they are crucial to context. *Young*, 294 Wis. 2d 1, ¶65. A reasonable innocent person will not usually feel free to leave when flashing emergency lights of a police car are directed at him in the process of being pulled over. But where, as here, an officer turns on the emergency lights in response to an already-stopped motorist's hazard signals on the side of the road, that person would not feel seized.

Kramer argues that the emergency lights constitute "the clearest indicator to a motorist that the police are exercising authority over a vehicle" (Kramer's brief at

12), such that “every reasonable motorist [would] know[] that ... [he or she] is not free to leave” (*id.* at 11). But Kramer fails to appreciate that not every “display” of police authority—such as activating emergency lights—rises to the “‘show of authority’” that constitutes a seizure. *Young*, 294 Wis. 2d 1, ¶65; *Marler*, 797 So. 2d at 710.

A reasonable innocent motorist in Kramer’s situation would know that law enforcement’s purpose of activating emergency lights is not always a “show of authority” to initiate a stop implicating the Fourth Amendment; and would perceive at least two other reasons for a police vehicle to activate its emergency lights. First, police emergency lights can signify an emergency. *See* Wis. Stat. §§347.25(1) and (1m) (police lights serve two functions—to signify an emergency or to pursue an actual or suspected violator of the law).

Second, police lights can also be activated for safety. Wisconsin statutes ascribe safety protections to officers (and other vehicles) by requiring motorists to change lanes or slow down when they see police vehicles on the side of the road with emergency lights activated. *See* Wis. Stat. §§340.01(3)(a); 346.072(1). Indeed, law enforcement officers often activate their emergency lights for the safety purpose alone, to warn other vehicles that they are approaching a police car on the side of the road. *McDevitt*, 786 N.E.2d at 406; *Marler*, 797 So. 2d at 710; *Hanson*, 504 N.W.2d at 220; *Baldonado*, 847 P.2d at 754; *Blair*, 14 P.3d at 666; *Martin*, 104 S.W.3d at 302. Deputy Wagner’s undisputed testimony (30:5-6) was that safety was the only purpose for the emergency lights here.

In addition to signifying a safety precaution for the officer and other oncoming motorists, flashing emergency lights also enable the already-stopped motorist to know that the car stopped behind him is a law enforcement officer, such that the motorist will not be alarmed by the sudden presence of another car behind him. *State v. Walters*, 934 P.2d 282, 287 (N.M. Ct. App. 1996); *Blair*, 14 P.3d at 665-66.

A reasonable innocent motorist in Kramer's situation—after having essentially invited the contact by turning on his hazards and sitting on the side of the road with headlights on in the dark—would not feel seized by an officer who approaches, activates his emergency lights, and inquires briefly, in a neutral, non-threatening way, if the motorist needs help. Instead, a reasonable innocent motorist would welcome the contact; or at the very least, would not feel intruded upon, because he would simply feel as though the officer was merely inquiring about whether he needed help.

Although Kramer argues that there was no other indication that he needed help—for instance, because his car was legally parked, not impeding traffic, and did not appear disabled in any way (Kramer's brief at 5, 13)—Kramer's four-way hazards in and of themselves sufficed to signify to law enforcement that someone might need help. *Blair*, 14 P.3d at 665 (recognizing that hazard lights alone can indicate a problem with the vehicle or the motorist). Indeed, as discussed below, this court should reject Kramer's brightline rule that officers may only stop to assist when the automobile is physically obstructing the road or clearly disabled, or when the motorist explicitly requests assistance. It is against public policy to discourage law enforcement, of their own accord, from checking on people on the side of the road. *Baldonado*, 847 P.2d at 754 (court should be loathe to create situation in which officers would be discouraged from acting to help motorists).

No seizure occurred here, because reasonable motorists, after having activated their own hazard lights, would not have believed that police stopped behind their vehicle for anything more than a brief encounter resulting in an insignificant intrusion. The emergency lights here are just one factor in the totality of the circumstances, and do not create a seizure as a matter of law.

2. The existence of the fleeing statute does not render the initial encounter a seizure.

Kramer also argues that he was seized, because had he left the scene, he would have been arrested for fleeing under Wis. Stat. § 346.04(3), leading to an “absurd result” (Kramer’s brief at 12). The mere existence of the fleeing statute, however, does not—in and of itself—create a seizure.

Taken to its logical end, Kramer’s argument would render all police encounters seizures. In essence, Kramer is arguing that the mere possibility of being charged with fleeing (or, by extension, the mere possibility of being charged with virtually any other criminally proscribed conduct) is itself a basis for finding seizure. This entirely speculative reasoning cannot be a basis for finding a seizure under the Fourth Amendment.

If Kramer had left the scene, he could have been charged with fleeing. But the mere fact that Kramer could have been charged with fleeing (or any other crime) if he had fled the scene (or if he had committed some other speculative crime at the scene) does not mean that the initial encounter itself was a seizure in the first instance. To hold that a seizure existed just because someone can be charged with a crime—if they committed it, at that time—does not make logical sense, nor is such a proposition legally supportable.

Moreover, the State submits that Kramer may not have been charged with fleeing in any event, because Kramer arguably did not “receive[] a visible or audible signal” from a police vehicle, the event which triggers criminal liability under the fleeing statute. Wisconsin Stat. § 346.04(3), provides:

No operator of a vehicle, *after having received a visual or audible signal* from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful

or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

Although undisputed that Deputy Wagner activated his emergency lights, this alone does not necessarily mean that Kramer had "received" a "visible signal" from police, as required by the fleeing statute. No case law construes what it means to "receive" a "visual signal," but Wis. Stat. § 346.04(2t) suggests that both criminal fleeing statutes—Wis. Stat. §§ 346.04(2t) and (3)—are meant to apply only when a person is pulled over by the police, rather than when the person is already stopped on the side of the road. *See* Wis. Stat. § 346.04(2t) (no operator of a vehicle, *after having received a visual or audible signal* from a traffic officer *to stop* his or her vehicle, shall knowingly resist by *failing to stop*).

Although Wis. Stat. § 346.04(3) does not contain subsection (2t)'s "stop" and "failing to stop" language, subsection (3) should nevertheless be construed to require the defendant to ignore a signal to pull over before criminal liability is triggered. *See* Wis. Stat. §§ 346.17(2t) (misdemeanor); 346.17(3) (felony). If the misdemeanor fleeing statute requires a "stop" to trigger liability, it logically follows that the felony fleeing statute does too.

In contrast, where an already-stopped person flees after seeing the lights, presumably only non-criminal (*i.e.*, forfeiture) fleeing could be charged; either because the person "fail[ed] or refuse[d] to comply" with the lights under Wis. Stat. § 346.04(1); or because the person "disobey[ed]" a police's signal under Wis. Stat. § 346.04(2). *See* Wis. Stat. §§ 346.17(1) and (2). *See also State v. Sterzinger*, 2002 WI App 171, ¶¶17, 23, 256 Wis. 2d 925, 649 N.W.2d 677 (purpose of subsection (3) is to criminalize risk-creating behavior, removing the behavior out of the non-criminal or misdemeanor realm, and instead making it a felony).

In that sense, it is not a foregone conclusion that Kramer would automatically be charged with criminal fleeing if he had left the scene. A more likely scenario would be that, if Kramer had left the scene after seeing police emergency lights, reasonable suspicion would have arisen, thereby justifying a subsequent *Terry*⁴ stop. *State v. Kelsey C.R.*, 2001 WI 54, ¶43, 243 Wis. 2d 422, 626 N.W.2d 777 (flight from police itself creates reasonable suspicion that criminal activity is afoot).

But even though Kramer could have been charged, if he had fled, the original encounter is still not a seizure. In the hypothetical scenario that Kramer proposes, Kramer's actions are analogous to *Kelsey C.R.*, because there would not have been any yield to the "display" of police authority (in Kramer's case, emergency lights; in *Kelsey C.R.*'s case, the police mandate to "stay put"); and the Fourth Amendment would not have been implicated until the police demonstrated a "show" of authority by catching up to him after the flight. *Id.* at ¶¶32-33 (citing *California v. Hodari D.*, 499 U.S. 621 (1991)).

This court should conclude that, under the totality of the circumstances, Kramer was not seized. When Deputy Wagner activated his emergency lights behind Kramer's already-stopped vehicle with its headlights on and hazard lights flashing, Deputy Wagner's first words to Kramer were to ask if Kramer needed help. A reasonable innocent motorist in this situation would not feel seized in this situation; but would welcome the assistance from the officer, and would also welcome the safety of flashing emergency lights to alert other motorists to the presence of vehicles along the side of the road.

⁴*Terry v. Ohio*, 392 U.S. 1 (1968).

II. EVEN IF THE INITIAL
ENCOUNTER WAS A SEIZURE,
IT WAS JUSTIFIED BY THE
COMMUNITY CARETAKER
DOCTRINE, BECAUSE IT WAS
REASONABLE UNDER THE
TOTALITY OF THE
CIRCUMSTANCES.

Assuming, *arguendo*, that this court finds that the initial encounter in this case was a seizure—or, if this court (like the circuit court and court of appeals) assumes without deciding that the initial encounter was a seizure—it was justified under the Fourth Amendment, because it was a reasonable community caretaking activity.

The State will first provide a brief discussion of the development of the community caretaker doctrine, because clarifying the legal underpinnings of the three distinct sub-areas illustrate why Kramer's concerns of undue expansion are unwarranted.

Second, the State will discuss why this court should reject the “totally divorced” rule, and adopt a rule that the community caretaking function “predominate” or be the “primary motivation for” the encounter.

Finally, the State will discuss why this court should adopt a reasonableness standard in community caretaker cases, and reject the brightline rules that Kramer advocates. Under the totality of the circumstances here, the seizure was reasonable.

A. Three sub-areas of the
community caretaker doctrine
have developed, but only the
“public servant” sub-area
applies here.

Three distinct lines of cases have developed, all under the rubric of the community caretaker function:

1) automobile impoundment/inventory; 2) emergency aid; and 3) public servant. See Mary Elisabeth Naumann, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 Am. J. Crim. L. 325, 330-341 (1999) (hereinafter "*Naumann*"). Parsing out these sub-areas will illustrate why most of the cases that Kramer cites (Kramer's brief at 14-31) are inapplicable here, and why Kramer's concerns of overreaching are unwarranted.

1. Vehicle impoundment and inventory.

The vehicle impoundment/inventory function is exemplified by *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973), wherein the United States Supreme Court held that warrantless seizures (*i.e.*, impoundments) and subsequent searches (*i.e.*, inventory) of automobiles were valid under the community caretaking functions of protecting the public from a nuisance, and safeguarding personal property found inside the vehicle.

The United States Supreme Court later cemented the validity of the impoundment/inventory function in *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976), noting three justifications for warrantless inventory searches: 1) the protection of the owner's property; 2) the protection of the police department from claims over lost property; and 3) the protection of police from danger. This court has twice upheld impoundments and subsequent inventory searches under the *Cady/Opperman* rationale. *State v. Prober*, 98 Wis. 2d 345, 352, 297 N.W.2d 1 (1980), *overruled on other grounds by State v. Weide*, 155 Wis. 2d 537, 455 N.W.2d 899 (1990); *State v. Callaway*, 106 Wis. 2d 503, 518-19, 317 N.W.2d 428 (1982).

Because this sub-area under *Cady* involves fairly extensive searches of vehicles, some concern has arisen over its expansion into other areas. See *Naumann* at 358. But as commentators have recognized, this sub-area is so

well-established in United States Supreme Court precedent, and so narrowly circumscribed by the unique and narrow factual circumstances of the cases, that undue expansion is unlikely to occur. *Id.*

More importantly here, the impoundment/inventory sub-area is completely distinguishable from Kramer's facts. That is why, for example, the cases of *Clark*, *Callaway*, *Class*, *Knowles*, *Cardwell*, and *Goebel* (Kramer's brief at 20-21, 26-27, 31),⁵ are inapposite.

Although Kramer attempts to analogize the cases by arguing that they all involve vehicles, it is abundantly clear that vehicles cannot be the common denominator, because none of those cases involved the motorist assist situation or the "public servant" function (discussed below); but involved a traffic stop leading to impoundment of the vehicle and a subsequent inventory search. As the court of appeals in this case so aptly stated:

Kramer relies on *State v. Clark*, 2003 WI App 121, ¶ 27, 265 Wis.2d 557, 666 N.W.2d 112, where we stated that a citizen can reasonably expect to leave a vehicle legally parked without the vehicle being towed. *But the obvious pertinent distinction between towing a legally parked vehicle and checking on a vehicle stopped alongside a highway needs no explanation.*

State v. Kramer, 2008 WI App 62, ¶24, ___ Wis. 2d ___, 750 N.W.2d 941 (emphasis added).

2. Emergency aid.

The second line of cases that have developed under the community caretaker doctrine involve situations where the police render emergency aid. *See Naumann* at 331-

⁵*State v. Clark*, 2003 WI App 121, 265 Wis. 2d 557, 666 N.W.2d 112; *Callaway*, 106 Wis. 2d 503; *New York v. Class*, 475 U.S. 106 (1986); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Goebel*, 103 Wis. 2d 203.

334. This emergency aid function was recognized in *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1975), wherein the United States Supreme Court found no Fourth Amendment violation when officers reasonably believed that someone needed immediate attention. The Wisconsin courts have also recognized this “emergency aid” community caretaker function. *State v. Ferguson*, 2001 WI App 102, ¶¶13-19, 244 Wis. 2d 17, 629 N.W.2d 788 (adopting emergency aid doctrine in holding that police entry was justified by possibility that underage incapacitated drinkers inside the home needed assistance); *State v. Horngren*, 2000 WI App 177, ¶¶11, 15, 238 Wis. 2d 347, 617 N.W.2d 508 (police dispatch to possible suicide threat was exigent and of utmost public concern).

Some confusion has arisen in this area, because the emergency aid function under the community caretaker doctrine can be remarkably similar to the “exigent circumstances” warrant exception to the Fourth Amendment. See *Naumann* at 332. See also *Ferguson*, 244 Wis. 2d 17, ¶¶16-19 (interchanging terms “exigent circumstance” and “emergency doctrine”). Again, however, the nature of the emergency aid function—a rather specific set of circumstances involving exigency or danger to life—leaves this sub-area less open to undue expansion or encroachment on individual rights. See *Naumann* at 358.

3. Public servant.

The third sub-area under the community caretaker doctrine is the “public servant” function. *Id.* at 338. This area perhaps best exemplifies the term “community caretaking,” but is also what most divides the courts. *Id.* at 343.

Local police have many responsibilities, only one of which is the enforcement of criminal law; and police spend a good deal of their time in community caretaking

functions, and relatively less time than is commonly thought investigating crime. See Debra Livingston, *Police, Community Caretaker, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 261-62 (1998) (hereinafter "*Livingston*"). This wide range of police functions includes: rendering aid to motorists, responding to citizen complaints, caring for people who cannot take care of themselves, and even serving as "surrogate parent, or other relative, ... social workers, housing inspectors, attorneys, physicians, and psychiatrists." *Id.* at 272-73 (quoted source omitted).

But in comparison to impoundment, the court system has had fewer opportunities to consider the public servant sub-area, because police engaged in community caretaking functions in this sub-area rarely uncover evidence of crimes that defendants move to suppress; or if they do, it is happenstance and not an intentional ferreting out of crime. *Id.* at 273-74. Moreover, under this historically-anchored "watchman's role," police performing public servant functions cannot secure a warrant in advance to search the premises, even if they tried; because they cannot specify, with probable cause, "the persons or things to be seized," having no idea in advance who or what they might encounter. *Id.* at 275 (quoting the warrant clause).⁶

One criticism of the public servant sub-area is that police might overreach by applying the community caretaker doctrine to justify a subsequent encounter (such as a search or frisk), after the initial community caretaker function has been fulfilled, but for which a separate Fourth Amendment justification is required. See *Naumann* at 329-330. This appears to be Kramer's concern as well; he argues that "without any discernible limits on the community caretaker doctrine, officers could

⁶This is why the State refers to the community caretaker "doctrine" rather than the community caretaker "exception," even though various Wisconsin cases have couched the doctrine as an exception to the warrant requirement. See, e.g., *State v. Ziedonis*, 2005 WI App 249, ¶¶13-15, 287 Wis. 2d 831, 707 N.W.2d 565.

circumvent reasonable suspicion by citing community caretaker as justification for a warrantless search or seizure” (Kramer’s brief at 26). In essence, Kramer worries that the community caretaker doctrine will grow so broad as to eviscerate the Fourth Amendment’s protections.

But this concern is unwarranted if all community caretaker encounters are divided into two parts: an initial encounter (which may or may not be justified by the community caretaker doctrine) and a subsequent intrusion or investigation (which may or may not be justified by probable cause, reasonable suspicion, or the community caretaker doctrine). *Terry v. Ohio*, 392 U.S. 1, 22-27 (1968) (dividing police encounters into two parts for purposes of analyzing constitutionality). Moreover, this concern is not present here, because Kramer concedes that the subsequent seizure (*i.e.*, the arrest) was justified by probable cause arising during the initial encounter (30:6).

In the public servant sub-area, the Wisconsin courts have upheld various police encounters as being reasonable under the Fourth Amendment. *See, e.g., Bies v. State*, 76 Wis. 2d 457, 471-72, 251 N.W.2d 461 (1977) (citizen noise complaint); *Ziedonis*, 287 Wis. 2d 831, ¶34 (loose dogs); *Kelsey C.R.*, 243 Wis. 2d 422, ¶¶36-37 (potential juvenile runaway); *Ellenbecker*, 159 Wis. 2d at 95-98 (motorist assist).

Kramer cites two Wisconsin cases—*State v. Dull*, 211 Wis. 2d 652, 565 N.W.2d 575 (Ct. App. 1997) and *State v. Paterson*, 220 Wis. 2d 526, 583 N.W.2d 190 (Ct. App. 1998)—to support his contention that the seizure in his case was not justified under the community caretaker doctrine (Kramer’s brief at 29). Both *Dull* and *Paterson* did involve the public servant sub-area in the initial encounter where police responded to citizen reports or complaints. *Dull*, 211 Wis. 2d at 659 (noise complaint); *Paterson*, 220 Wis. 2d at 529 (citizen report of suspicious activity or possible burglary). But those cases are distinguishable, because both *Dull* and *Paterson* also

involved a subsequent entry into a home, rejected as being an unreasonable community caretaking function under the totality of the circumstances. *Dull*, 211 Wis. 2d at 660-61; *Paterson*, 220 Wis. 2d at 538.

In other words, both cases held that the public servant function that existed at the outset had concluded; and the subsequent entry into defendants' homes—an area where privacy concerns are paramount—was not reasonable, particularly because other alternatives existed. *Paterson*, 220 Wis. 2d at 536 (residences “invoke[] the highest level of privacy expectation”); *Dull*, 211 Wis. 2d at 660 (court was “too uncertain about why the deputy so quickly concluded that he had to enter this house”). In contrast here, the public servant function was ongoing, and did not involve a subsequent, invasive home entry.

In sum, if this court considers the three distinct sub-areas of the community caretaker doctrine that have developed, it becomes apparent why Kramer's concerns of overreaching are unwarranted, and why many of the cases Kramer cites are distinguishable. Applying the community caretaker doctrine here will not give the police or the courts *carte blanche* to justify all encounters. Rather, the totality of the circumstances must still be considered in determining whether the initial encounter (and any subsequent intrusion, if any) was justified as reasonable.

- B. This court should reject the “totally divorced” rule; and adopt a rule that the community caretaker function “predominate” or be the “primary motivation for” the encounter—thereby rendering the police’s subjective intent relevant, but not dispositive.

Kramer argues at length that the community caretaker doctrine has only been applied when police were clearly not investigating criminal activity, and that the doctrine requires that the law enforcement function must be “totally divorced” in order for the community caretaker doctrine to justify the intrusion (Kramer’s brief at 19, 25-26, 33-35). A close reading of *Cady*, however, reveals that *Cady* did not hold that the encounter must be “totally divorced.”

More importantly, this court should not require that the encounter be “totally divorced” from the law enforcement function of the police, because creating such a requirement renders the police officer’s subjective intent dispositive of the community caretaker analysis. This court should instead adopt a “predominates” or “primary motivation” test, which properly frames the police’s subjective intent as only one of many factors within the objective reasonableness inquiry.

1. *Cady* did not require that the encounter be “totally divorced” from the law enforcement function.

Contrary to what Kramer asserts, the *Cady* decision never required that the community caretaker encounter be “totally divorced” from police’s law enforcement function. Rather, the United States Supreme Court simply noted that police engage in citizen contacts which, “for

want of a better term,” could be described as community caretaking functions, that are “totally divorced” from law enforcement or crime investigating functions. *Cady*, 413 U.S. at 441. The Court explained:

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, *for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.*

Id. (emphasis added).

As a concurring justice in the Illinois Court of Appeals explained in *People v. Cordero*, 830 N.E.2d 830, 841 (Ill. Ct. App. 2005) (O’Malley, P. J., concurring):

[Our] error in ... these other cases is rooted in a misunderstanding of the language from *Cady*. ... *Cady* was noting that many police-citizen encounters *have nothing to do with crime, not requiring that they must have nothing to do with crime* Notably, *Cady* did not require the police officers in that case to have had a certain subjective state of mind in order to justify their search of the defendant’s car. ... However, what *Cady* ... intended as descriptive has been transformed into a prescription in this district’s cases, culminating in [our] subjectivist error.

Id. (internal citations omitted; emphasis added) (quoted in *Kramer*, 2008 WI App 62, ¶37).

Moreover, even if *Cady*'s holding can be construed as requiring the "totally divorced" rule, any such holding is limited to *Cady*'s facts in the inventory/impoundment context, and should not be extended into the emergency aid/public servant contexts, which have different underpinnings in public policy. See *Livingston* at 300 (although officer in *Cady* had identified clear community caretaking purpose, the Court has never explored its implications in different areas of police activities).

2. The "totally divorced" rule improperly renders the police's subjective intent dispositive of the community caretaker analysis.

In arguing that this court must require police encounters to be "totally divorced" from the law enforcement purpose (Kramer's brief at 19, 25-26, 33-35), Kramer essentially transforms the subjective intent of the police into a condition precedent for the community caretaker doctrine. In other words, Kramer's "totally divorced" rule renders the police officer's subjective intent dispositive of the inquiry.

For example, suppose that a police officer—like Deputy Wagner here—testified that he was mostly motivated by an intent to help another person, but that he also has in mind at all times that a crime could be occurring. Under Kramer's "totally divorced" rule, the police officer's scintilla of another intent (besides helping others) would end the inquiry and preclude the community caretaker doctrine from applying. No other factors would need to be considered.

Thus, the "totally divorced" rule renders the officer's subjective intent dispositive—a result that has never been required, and is not workable, under Fourth Amendment law. *State v. Kyles*, 2004 WI 15, ¶¶24, 34,

39, 269 Wis. 2d 1, 675 N.W.2d 449 (officer's subjective fear not dispositive of validity of frisk; but can be considered as one factor of objective reasonableness under totality of circumstances). As the court of appeals so aptly stated here: "well-settled Fourth Amendment law provides that a search or seizure may not be found legal or illegal *because of* an officer's subjective motives or thoughts." *Kramer*, 2008 WI App 62, ¶35 (emphasis supplied).

Moreover, to hold that officers can never have any other intent (other than to help people) while executing their community caretaking functions would effectively prevent police officers from doing their jobs, or at least dissuade them from assisting others. *Ziedonis*, 287 Wis. 2d 831, ¶15; *Horngren*, 238 Wis. 2d 347, ¶18 (both cautioning against taking a too-narrow view of whether community caretaking function is present); *Baldonado*, 847 P.2d at 754 (court should be loathe to create situation in which officers would be discouraged from acting in the interest of public safety). As the Wisconsin Court of Appeals reasoned in *Horngren*:

An officer less willing to discharge community caretaking functions implicates seriously undesirable consequences for society at large: In that event, we might reasonably anticipate the assistance role of law enforcement ... in this society will go downhill. ... In the future police will tell such concerned citizens, "Sorry. We can't help you. We need a warrant and can't get one."

Horngren, 238 Wis. 2d 347, ¶18 (quoted source and internal quotations omitted).

Further, to hold that officers cannot have an iota of any other intent would essentially preclude the community caretaker doctrine from ever applying, because officers are always alert to the possibility of danger that exists when executing their duties—danger that is especially evident when approaching a car, because the officer has no idea why the car is stopped, who might be inside, or

what their state of mind is. *Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997) (traffic stops are dangerous); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (it is “too plain for argument” that officer safety is both “legitimate and weighty”; and the Court has specifically recognized the inordinate risk confronting an officer as he or she approaches a person seated in a vehicle). *See also* Charles Remsberg, *THE TACTICAL EDGE, SURVIVING HIGH-RISK PATROL* 271-72 (Calibre Press, Inc. 1988) (most officers who die making vehicle stops are executing so-called “low-risk” stops; unlike in other settings, officers approaching vehicles cannot reliably draw conclusions about threat level, because officers will seldom have prior knowledge of personal history, personality or current state of mind of driver or passengers).

When executing community caretaker functions, law enforcement officers should not be forced to put crime-investigating functions out of their minds or ignore potential dangers or crimes that could occur at any time. Nor should they be forced to make on-the-spot determinations as to which function—community caretaking or law enforcement—is being served in order to determine whether they can proceed with a citizen encounter.

3. A “predominates” or “primary motivation” test properly frames the officer’s subjective intent as one factor within the objective reasonableness inquiry.

A better test is one that considers whether the community caretaking function is the primary motivation for the citizen encounter, predominating over any other law enforcement purpose that was also present. *See Livingston* at 303. Such a test encourages officers to serve

the community caretaking function, while simultaneously protecting privacy rights. *Id.* at 300.

Such a test also properly frames the officer's subjective intent as one of many factors in determining the objective reasonableness of the encounter. As this court reasoned in *Kyles*, 269 Wis. 2d 1, ¶39:

[A] court may consider an officer's [subjective] fear or belief that his or her safety or that of others was in danger in determining whether the objective standard of reasonable suspicion was met under the totality of the circumstances. An officer's legal and subjective conclusions are, however, not determinative of the validity of the frisk; a court applies an objective standard to the facts known to the officer. The officer's fear or belief that the person may be armed is but one factor in the totality of the circumstances that a court may consider in determining whether an officer had reasonable suspicion to effectuate a protective weapons frisk. Sometimes an officer's perceptions will help sustain the objective reasonableness of an officer's frisk. Other times, these perceptions may undercut a conclusion of reasonableness.

The *Kramer* court used similar reasoning *in dicta*, discussing the *Cordero* case:

[W]hether a seizure is justified on community caretaking grounds does not depend on the officer's subjective purposes in effecting the seizure so long as his actions are objectively reasonable under the circumstances. ... [The "totally divorced" rule] is improper. The test for determining whether a seizure is justified is objective, the question being whether the facts and circumstances known to the officer at the time of the seizure warranted his action. *An officer's testimony is relevant not for what it reveals about his inner thoughts, but for what it discloses about the objective circumstances of the encounter.*

Kramer, 2008 WI App 62, ¶37 (internal citations omitted; emphasis added).

Further, creating a rule that the community caretaker function “predominate” or be the “primary motivation for” the encounter—rather than being “totally divorced” from the law enforcement function—properly recognizes that community caretaking functions and law enforcement functions are often intertwined or overlapping, and cannot always be clearly delineated. See *Livingston* at 262, 302 (because purposes are sometimes entangled, community caretaking sphere should not be limited to circumstances where no law enforcement interest is present at all). See also *Paterson*, 220 Wis. 2d at 534 n.1 (implying that community caretaking functions might be blended with law enforcement functions); *Ferguson*, 244 Wis. 2d 17, ¶¶28-29 (Schudson, J., dissenting) (implication that community caretaking can be “so certainly segmented” is problematic, and causes serious problems in “real world of policing”).

Indeed, as the court of appeals noted here, it is not always clear which function the officer is serving:

[O]ur [past] interpretation[s] of the “totally divorced” language in *Cady* suggests that a bona fide community caretaker activity may not simultaneously involve a law enforcement activity. We wonder whether the two are mutually exclusive. For example, is an officer acting to assist person A, while simultaneously investigating person B, necessarily not acting in a community caretaker capacity with respect to person A because the officer’s activity is not totally divorced from law enforcement activity?

Kramer, 2008 WI App 62, ¶40.

As in the *Kyles* reasonable suspicion context, adopting a “predominating” or “primary motivation” test in the community caretaking context properly frames the officer’s subjective intent as one factor—not dispositive, but relevant—in determining the objective reasonableness of the encounter under the totality of the circumstances. *Kyles*, 269 Wis. 2d 1, ¶39. Contrary to *Kramer*’s assertions that pretextual “good faith” or “mere hunch”

assertions of the officer would eviscerate *Terry* or circumvent the reasonable suspicion requirement (Kramer's brief at 21-22, 25-26), the "predominates" or "primary motivation" test would guard against pretextual reliance on community caretaking interests, because such a test takes into account both the officer's subjective intent and whether that subjective intent was objectively reasonable under all of the circumstances. As this court noted in *Kyles*, sometimes the officer's subjective intent will help sustain a reasonableness determination; but other times, it will undermine it. *Kyles*, 269 Wis. 2d 1, ¶39.

C. This court should adopt a "reasonableness under the totality of circumstances" test—and reject Kramer's brightline rules—in determining whether a seizure is justified under the community caretaker doctrine.

This court first adopted a reasonableness standard in community caretaker cases over 30 years ago in *Bies v. State*, 76 Wis. 2d 457, which the court of appeals later developed in *State v. Anderson*, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987). Indeed, this court in *Bies* properly recognized that community caretaking functions fall into the "rubric of police conduct" which historically could not be subjected the warrant procedure, but instead must be tested against the Fourth Amendment's general proscription against unreasonable searches and seizures. *Bies*, 76 Wis. 2d at 466 (citing *Terry*, 392 U.S. at 15).

A reasonableness standard is good public policy, because it sets objective limits on police authority, thereby preserving individual rights; while at the same time, encouraging police to serve and protect others. *Id.* at 469 (reasonableness test entails balancing of public needs and interests furthered by police conduct against degree and

nature of intrusion upon defendant's privacy rights). *See also Anderson*, 142 Wis. 2d at 168 (this is essentially the *Terry* test but applied in community caretaker setting). A "reasonableness under the totality of the circumstances" standard also properly takes into account the setting or context in which the police conduct occurred. *Young*, 294 Wis. 2d 1, ¶65. Therefore, this court should reject Kramer's brightline rules (discussed below) in favor of the State's more flexible reasonableness approach.

What is reasonable necessarily depends on the facts of each case; but a good starting point is *Anderson's* three-pronged test, which in turn is based on this court's reasonableness formulation set forth in *Bies*. *Anderson*, 142 Wis. 2d at 169-70.

1. Whether a "seizure" occurred.

As discussed above, this court should reject Kramer's contention (Kramer's brief at 9-14) that absent an explicit finding of seizure, the courts are precluded from applying the community caretaker doctrine. Indeed, *Anderson's* first factor is probably cumulative, as it is already encompassed within the third prong of the reasonableness calculus—the circumstances surrounding the seizure.

2. Whether the police conduct was a bona fide community caretaker activity.

As discussed above, this court should reject Kramer's brightline "totally divorced" rule (Kramer's brief at 19, 25-26, 33-35), and adopt the State's "predominates" or "primary motivation" test in determining whether the police contact was a "bona fide" community caretaker activity.

3. Weighing the public
need and interest
against the intrusion.

This factor includes considerations such as: a) the degree of the public interest and exigency of the situation; b) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; c) whether an automobile is involved; and d) the availability, feasibility, and effectiveness of alternatives to the type of intrusion actually accomplished. *Anderson*, 142 Wis. 2d at 169-70.

a. Public interest
and exigency.

Kramer argues that there was “no significant indication here that immediate assistance was needed” (Kramer’s brief at 30), essentially setting forth a brightline rule that exigency is required, or that a certain amount of time needs to pass, in order for the community caretaker doctrine to apply. But this argument only takes into account law enforcement’s “emergency aid” function, and ignores the other “public servant” function which police officers perform regularly in the course of their duties. Although exigency might be the impetus for law enforcement to act when it is clear that someone is injured or sick, this court should not require exigency. Whether exigency exists is only one factor to be considered within the totality of the circumstances. *Ferguson*, 244 Wis. 2d 17, ¶¶13-20.

Moreover, it is not always apparent to law enforcement whether exigency exists until after the community caretaking encounter. Law enforcement must sometimes initiate contact—as was the case here—to even discern what the situation entails. Requiring the police to wait to find out if an emergency exists would subject police to liability if they did not act soon enough to prevent harm. *Id.*, ¶24 (Fine, J., concurring).

With respect to the public interest—and related to his exigency argument—Kramer also argues that there must be an express request for assistance, some response to a citizen complaint, some definite need for assistance, or some public safety hazard, in order for the community caretaker doctrine to apply (Kramer’s brief at 13, 17, 19-21). Again, however, these brightline rules fail to take into account that it might not be apparent whether help is required until after police initiate the encounter. Further, requiring an explicit request for help or a definite public safety hazard does not comport with a totality of the circumstances approach, and also contravenes public policy by discouraging police from attempting to render aid in situations where it is unclear whether help is needed.

Moreover, as discussed above, by activating his own hazard lights, Kramer—whether he intended to or not—did indeed provide a signal to law enforcement that he might have needed assistance. Law enforcement should not be precluded from assisting motorists on the side of the road simply because there is “no other indication” (aside from the hazards) that assistance was needed. The hazard lights in and of themselves were a sufficient impetus for Deputy Wagner to act in his community caretaking capacity. That hazard lights can also signal that a motorist is merely using a cell phone (Kramer’s brief at 30-31) does not mean that police should be precluded from inquiring as to why the person is stopped and whether he or she needs help.

Finally, as discussed above, the cases that Kramer cites about public safety hazards such as blocking the roads—*Callaway* and *Cady* (Kramer’s brief at 19-20)—are both impoundment/inventory cases and have no application here. *Ellenbecker* is the controlling motorist assist case; but *Ellenbecker* did not, as Kramer asserts, require an explicit request for assistance. Rather, *Ellenbecker* simply held that the public interest in police assisting others outweighed the momentary, minimal

intrusion upon the defendant's privacy. *Ellenbecker*, 159 Wis. 2d at 97-98.

b. Attendant
circumstances.

In considering the “attendant circumstances surrounding the seizure” and “whether an automobile is involved,” the courts should take into account the extent of the intrusion. For example, where, as here, it is even unclear whether there was a seizure at all because the vehicle was already stopped—or at the very least the intrusion was minimal because people have a lesser privacy expectation in vehicles—this factor would support the State. In contrast, in the home entry cases, as in *Dull* or *Paterson*, this factor might support the defendant, because the intrusion into privacy is greater. *Dull*, 211 Wis. 2d at 660-61; *Paterson*, 220 Wis. 2d at 538.

c. Other
alternatives.

Kramer faults both the trial court (Kramer's brief at 23-24) and the court of appeals (*id.* at 32) in finding that no other alternatives for law enforcement existed. But both courts properly found that none of Kramer's proposed alternatives were as reasonable as the course of action that Deputy Wagner took. *Kramer*, 2008 WI App 62, ¶¶25-28. As the court of appeals sagely noted, Kramer's proposed alternatives might have aggravated a time-sensitive inquiry, or placed the officer in danger in the lane of traffic. *Id.* at ¶27. Moreover, although the reasonableness of the encounter is a question of law, the existence or non-existence of alternatives is a fact-inquiry, to be reviewed on appeal for an erroneous exercise of discretion. *Young*, 294 Wis. 2d 1, ¶17. Here, the circuit court properly found that there were no other alternatives more reasonable than what Deputy Kramer actually did (30:16, 31-32). This court should uphold this mixed factual/legal determination.

Kramer's brightline rules do not comport with the Fourth Amendment's mandate of reasonableness under the totality of the circumstances. This court should instead adopt the State's reasonableness approach, an approach that is consistent with this court's long-held view of the community caretaking function, and will ameliorate concerns of overreaching by utilizing an objective standard.

- D. Deputy Wagner's actions were justified by the community caretaker doctrine, because his actions were objectively reasonable under the totality of the circumstances.

As discussed throughout the brief, Deputy Wagner's actions were objectively reasonable under the totality of the circumstances. The community caretaking purpose clearly predominated Deputy Wagner's actions, even though police are always alert to the possibility of danger or crime. Deputy Wagner properly exercised an important police role when he initiated contact with a vehicle on the side of the road in order to determine whether that motorist needed help.

Further, as the court of appeals properly found, the public interest in assisting motorists who might need help clearly outweighs the minimal, momentary intrusion into Kramer's privacy interests (namely, the mere "May I help you?" question). Moreover, Kramer's privacy interests were diminished, because he was inside his vehicle, not his home. The fact that Kramer did not, in fact, need help should not preclude officers from initiating contact with vehicles on the side of the road, especially when those vehicle have their hazards activated. Such a result is completely contrary to public policy. Further, Kramer ignores the every day, "real world" of policing by disingenuously suggesting that other reasonable alternatives existed for Deputy Kramer.

This court should find that Deputy Wagner's actions were justified as reasonable under the community caretaking doctrine.

CONCLUSION

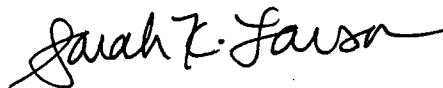
Not only was there no seizure in this case, but Deputy Wagner's actions were also justified under the community caretaking doctrine. This court should adopt the State's "reasonableness under the totality of the circumstances" approach, and reject Kramer's brightline rules. In particular, this court should reject Kramer's "totally divorced" rule, and adopt a rule that the community caretaker purpose "predominate" or be the "primary motivation for" the encounter. Any other result is contrary to public policy and ignores the "real world" of policing.

Therefore, the State respectfully requests that this court affirm Kramer's conviction.

Dated this 13th day of August, 2008.

Respectfully submitted,

J. B. VAN HOLLEN
Attorney General



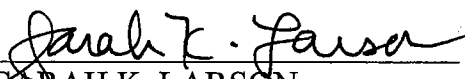
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,955 words.


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STATE OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Appeal No. 07-AP-1834-CR

TODD LEE KRAMER,

Defendant-Appellant-Petitioner.

ON APPEAL FROM THE DECISION OF THE COURT OF
APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT
OF CONVICTION ENTERED IN COLUMBIA COUNTY,
THE HONORABLE JAMES O. MILLER PRESIDING,
TRIAL COURT CASE NO. 06-CF-329

**REPLY BRIEF OF
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ARGUMENT

I. KRAMER WAS SEIZED WHEN THE OFFICER ACTIVATED HIS EMERGENCY LIGHTS AND PULLED BEHIND KRAMER'S VEHICLE.

The State cites foreign precedent in which no seizure was found within a “motorist assist” context. However, the instant case is not a “motorist assist” case. Furthermore, Wisconsin - the only jurisdiction that matters in this case - has already held that brief and limited detentions of individuals during traffic stops constitute “seizures” of “persons” within the meaning of the Fourth Amendment. State v. Gaulrapp, 207 Wis.2d 600, 605, 558 N.W.2d 696 (1996). Finally, for every foreign jurisdiction that supports the State’s argument, Kramer can assert another one that does not.

A. Kramer’s Case Is Not A “Motorist Assist.”

The State cites cases that describe motorist assist contexts, but they are all distinguishable from the present case. Initially, the facts in State v. Hanson, 501 N.W.2d 677, 678 (Minn. App. 1993), are much different than the facts in Kramer’s case. According to the court of appeals, Hanson’s van was stopped on the shoulder of the highway at night with no lights on. Hanson was standing near the front-right tire. The officer didn’t know what Hanson was doing. The officer made a u-turn, activated his emergency lights, and parked behind Hanson. By then, Hanson had returned to his car and was sitting in the driver’s seat.

In Kramer’s case, his hazard lights were activated to warn other drivers that he was parked at the side of the road. (R.30:4-5.) He was not standing outside of his vehicle to indicate that he was in need of any help. In fact, Deputy Wagner testified that, aside from the hazard lights being displayed, Kramer’s vehicle did not appear to be damaged or disabled, nor was his vehicle jeopardizing traffic or public safety. (R.30:13.) Deputy Wagner also testified that Kramer’s vehicle was legally parked. (R.30:13.)

Finally, the Minnesota Supreme Court in Hanson never held that this was not a seizure; it merely reversed the Court of Appeals holding that “*whenever* an officer turns on a squad car’s flashing red lights before getting out and approaching an already stopped vehicle, the officer turns the encounter into a seizure.” 504 N.W.2d at 220. Hanson

acknowledged that in many situations, the officer's use of the flashing lights likely would signal to a reasonable person that the officer is attempting to seize the person for investigative purposes." Id.

The State cites State v. Baldonado, 847 P.2d 751 (N.M. Ct. App. 1992). Again, the facts in Baldonado are distinguishable. In Baldonado, the officer noticed a vehicle parked by a vacant lot in a business district at approximately one o'clock in the morning. The vehicle's lights were not displayed, nor was the engine running. The officer noticed one defendant leaning into the backseat of the vehicle, and thought perhaps the vehicle was "broken down or that something suspicious was occurring, so he pulled up behind the car and turned on his emergency lights." Baldonado at 752.

In the instant case, however, Kramer was not parked suspiciously in a business district in the early hours of the morning. Nor was he attempting to diminish his vehicle's visibility by turning its lights off. Nor did Deputy Wagner observe him outside of his vehicle at any time. (R.30:13.) Deputy Wagner had no reason to believe that Kramer's vehicle was disabled, aside from seeing the vehicle's hazard lights displayed. Hazard lights, however, are not necessarily an indicator that a vehicle is disabled, and Deputy Wagner should have obtained more information before performing an immediate seizure.

With respect to Fourth Amendment implications, Baldonado appears to hold that flashing lights do not always constitute a seizure. However, truly understanding Baldonado requires understanding State v. Stroud, 634 P.2d 316 (Wash. Ct. App. 1981).

In Stroud, officers stopped behind a parked car and activated their emergency lights without observing anything illegal. Id. The Washington Court of Appeals agreed that Stroud was seized at the moment the officers activated emergency lights. Id. at 318. Had Stroud attempted to leave after being signaled, he could have been charged with fleeing under a Washington statute. Id.

In Baldonado, the New Mexico Court of Appeals recognized Stroud as a situation in which a reasonable stopped motorist would not feel free to leave. 847 P.2d at 754. Therefore, the true holding of Baldonado is that when officers stop behind a parked car and activate emergency lights, and state law prohibits driving a parked car away after being

signaled, a reasonable person in the parked car would not feel free to ignore the officers and leave.

Under the true holding of Baldonado, Kramer was seized because by state law and Deputy Wagner's own testimony, Kramer was not free to leave. (R.30.15-16.) Under Wis. Stat, § 346.04, Kramer was not free to "flee or attempt to elude" Deputy Wagner once he received a visual or audible signal from him. In this case, Deputy Wagner signaled to Kramer with his squad car's emergency lights. Upon seeing those lights, Kramer was not free to leave the scene. If he had, Deputy Wagner would have pulled him over, presumably for fleeing. (See R.30:15-16.)

The State also cites State v. Blair, 14 P.3d 660, 662 (Or. Ct. App. 2000), which is distinguishable. The State's brief mistakenly claims that Blair's van was already "stopped." But the court found Blair's van was rolling slowly forward and stopped only after police activated emergency lights. Blair erroneously suggests that the police could stop moving cars even without reasonable suspicion. But, in Wisconsin:

The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment.

State v. Gaulrapp, 207 Wis.2d 600, 605, 558 N.W.2d 696 (1996).

While the State asserts that the present case involves a "motorist assist," Deputy Wagner did not know whether Kramer was in need of any assistance. Kramer did not exhibit the behavior of the motorists in the State's cited cases. Kramer merely displayed his hazard lights to warn other drivers that he was at the side of the road to use his cell phone. Kramer did nothing illegal. Furthermore, he did not step out of his vehicle or put the vehicle's hood up or wave down any other driver for help. This case should not be equated with a true motorist assist case. Most importantly, the law in Wisconsin is that even temporary detentions of individuals during traffic stops are seizures within the meaning of the Fourth Amendment.

B. The State Cites Foreign Precedent In Support Of Its Position, But Kramer Can Cite An Equal Amount Of Foreign Precedent That Does Not.

The State cites out-of-state cases in support of its no-seizure argument. But for every foreign case cited by the State in support of its position, there is another case that supports Kramer's position, rendering the State's cases moot:

Citation From State's Brief:

Martin v. State, 104 S.W.3d 298, 301-02 (Tex. Ct. App. 2003) ("overhead lights did not convert encounter into detention when lights were used to let defendant know an officer was behind him and to alert other traffic to patrol car and defendant's vehicle"). Brief of Plaintiff-Respondent at p. 10.

Commonwealth v. McDevitt, 786 N.E.2d 404, 407 (Mass. App. Ct. 2003) ("no seizure when officer stopped to assist; officer's use of emergency lights did not change encounter into a seizure"). Brief of Plaintiff-Respondent at p. 10.

State v. Marler, 797 So.2d 706, 709-10 (La. Ct. App. 2001) ("motorist not seized when officer turned on emergency lights to assist; officer was only stopping to check physical condition of

Counter-Precedent:

State v. Williams, 185 S.W.3d 311, 318 (Tenn. 2006) (officer may have subjectively intended to activate his blue lights for his safety and safety of others, but litmus test is the objective belief of a reasonable person in defendant's position, not position of officer.)

State v. Donahue, 742 A.2d 775, 779 (Conn. 1999) ("The sergeant... turned his flashers on, largely for his own protection but to a reasonable person that indicates a police stop.")

State v. Burgess, 163 Vt. 259, 261 (Vt. 1995) ("Courts have long held that a show of authority tending to inhibit a suspect's departure from the scene is sufficient to constitute stop, even though the vehicle is already stopped at the time

motorist or to render roadside assistance to a possibly stranded motorist, and use of emergency lights was 'very prudent' course of action for safety of officers, defendant, and anyone else who might have come upon scene"). Brief of Plaintiff-Respondent at p. 10.

People v. Crocker, 641 N.E.2d 1237, 1240 (Ill. App. Ct. 1994) ("when police act in same way as any private citizen would in that situation, encounter is not a seizure"). Brief of Plaintiff-Respondent at p. 10.

of an approach by police"; "A 'stop' is shorthand way of referring to a seizure....")

Hrezo v. State, 780 So.2d 194 (Fl. Ct. App. 2001) (use of takedown lights for safety understandable, but encounter was a stop and not consensual; reasonable person would expect to be stopped for...fleeing and eluding if he or she drove away; motion to suppress granted since officer had no reason to believe defendant had committed or was about to commit a crime when he activated emergency lights.)

The State also asserts that Kramer himself concedes he was not stopped by Deputy Wagner. While Kramer was not "stopped" in the traditional sense (meaning, he was not pulled over by Deputy Wagner), he was seized by Deputy Wagner under the Mendenhall test. As stated in Kramer's original brief, United States v. Mendenhall, 446 U.S. 544 (1980), established the test for a seizure, which is whether a reasonable person, under the circumstances, would not feel free to leave. Mendenhall at 554.

In the present case, no reasonable person in Kramer's position would have felt free to leave. By submitting to Deputy Wagner's show of authority, Kramer was seized. See State v. Young, 2006 WI 98, 295 Wis.2d 1, 717 N.W.2d 729 (Mendenhall test appropriate when subject of police attention is subdued or submits to a show of authority).

II. THE OFFICER WAS NOT PERFORMING A "WATCHMAN'S ROLE" WHEN HE UNREASONABLY SEIZED KRAMER.

The State asserts that the community caretaker doctrine is divided into three areas, one of them being public service. According to the State, police officers who perform public service tasks "rarely uncover evidence of crimes that defendants move to suppress; or if they do, it is happenstance and not an intentional ferreting out of crime." Brief of Plaintiff-Respondent at p. 24.

In the instant case, however, it is not mere "happenstance" that Deputy Wagner uncovered evidence of a crime. By his own testimony, Deputy Wagner concedes that Kramer was not free to leave once Deputy Wagner pulled behind him and turned on his emergency lights. (R.30.15-16.) Why is this? Why did Deputy Wagner perform an immediate seizure?

If Deputy Wagner was only concerned with whether Kramer's vehicle was disabled or if Kramer needed other assistance, then he could have simply displayed the squad car's hazard lights to alert other traffic of the squad car's presence. However, Deputy Wagner was not simply concerned about Kramer's well-being, which is why he immediately seized Kramer's vehicle by making a u-turn and pulling up behind it with the squad car's emergency lights activated. (R.30.12.) In doing this, Deputy Wagner communicated in no uncertain terms that Kramer was not to go anywhere. These are not the actions of an officer concerned about a possibly disabled vehicle. An officer merely concerned with a disabled vehicle would not display this degree of authority.

Furthermore, Deputy Wagner testified that he did not know "what was being done in the car." (R.30.9.) He stated that there were "any number of reasons why" Kramer was pulled over. (R.30.15.) He conceded that Kramer could have been looking at a map, using a cell phone, or looking in his glove compartment. *Id.* Kramer could have been doing something illegal. (R.30.8-9.) Deputy Wagner did not see any signs that the vehicle was damaged or disabled, and he did not

have any reason, aside from the hazard lights, to believe anyone in the vehicle was in distress. (R.30.11-13.)

All of these facts lead to the conclusion that any of these possibilities were equally probable. Since all were equally probable, it is impossible for Deputy Wagner to state unequivocally that the community caretaker function “predominated”¹ his encounter with Kramer.

III. THE SEIZURE WAS NOT JUSTIFIED BY PROBABLE CAUSE ARISING DURING THE INITIAL ENCOUNTER.

The State claims that Kramer concedes his arrest was justified by probable cause arising during the initial encounter. However, Kramer only concedes that probable cause arose during his conversation with Deputy Wagner.

The State misidentifies the “initial encounter.” The actual initial encounter in this case occurred when Deputy Wagner spotted Kramer’s vehicle at the side of the road. At that point, Deputy Wagner did not have reasonable suspicion to perform a seizure. Nor was the seizure of Kramer’s vehicle reasonable under the circumstances, since Deputy Wagner could have simply activated his squad car’s hazard lights if he was truly motivated only by a desire to help and not by a desire to investigate a possible crime.

Since Deputy Wagner did not have reasonable suspicion or probable cause to perform the initial seizure of Kramer’s vehicle, Kramer’s subsequent arrest was not justified by probable cause arising during the initial encounter. Under Terry v. Ohio, 392 U.S. 1, 22 (1968), a seizure is justified only if the facts available to the officer at the moment of the seizure would warrant a reasonable person to believe that the action taken was appropriate. In the present case, the facts available to Deputy Wagner at the moment of the seizure were not sufficient to justify it.

¹The State proposes that this Court reject the “totally divorced” rule that was established in 1973, and instead hold that the community caretaker function should “predominate” or be the “primary motivation for” a police-citizen encounter.

IV. CADY REQUIRES COMMUNITY
CARETAKER ACTIVITIES TO BE
TOTALLY DIVORCED FROM THE
DETECTION OF CRIME.

The State asserts that Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) does not require community caretaker functions to be totally divorced from the detection of crime. On the contrary, this is exactly what Cady requires, and this is the way Wisconsin has interpreted the Cady rule.

In Cady, the United States Supreme Court stated that police often engage in “community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” Cady at 441. While the court did not state that community caretaking functions *must* be totally divorced from the detection of crime, this is precisely what the totally divorced rule requires. If the “totally divorced” rule does not require this, then officers may perform warrantless searches and seizures without reasonable suspicion under the justification of “community caretaker.” And, if this Court adopts the State’s “predominates” rule, police officers will have free reign to seize anything or anyone they want to, regardless of reasonable suspicion.

For instance, under the State’s proposed rule, the court of appeals in State v. Dull, 211 Wis.2d 652, 565 N.W.2d 575 (Ct. App. 1997) might have upheld the officer’s actions under community caretaker, since his primary motive for entering the defendant’s home was not to investigate a crime, but to place the defendant’s juvenile brother into the defendant’s custody after the juvenile was cited for underage drinking. However, the Dull court upheld the Cady rule, which was reiterated in State v. Anderson, 142 Wis.2d 162, 166, 417 N.W.2d 411 (Ct. App. 1987). The Dull court stated:

In Anderson, we defined the community caretaking function as being ‘totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.’

Dull at 659. The Anderson court correctly interpreted Cady, and this court should hold accordingly.

V. THE STATE'S "PREDOMINATES" RULE IS NOT REASONABLE.

The "totally divorced" rule of Cady has been law for 35 years. The State would now like this Court to overturn that law and institute a new rule in Wisconsin. The problem with this proposed "predominates" rule is that the United States Supreme Court established the Cady rule. The State of Wisconsin cannot offer citizens less protection than the Fourth Amendment and the United States Supreme Court offer.

Furthermore, Wisconsin should not broaden police power. Many exceptions to the Fourth Amendment already exist, including consent, exigent circumstances and community caretaker. Now, the State would like this court to create a further exception, which would allow officers to circumvent reasonable suspicion.

The State asserts that in addition to an officer's law enforcement duties, a wide array of police functions exist, from providing aid to motorists to serving as attorneys, physicians, and psychiatrists. Brief of Plaintiff-Respondent at 24. Given the vast range of police functions and the enormous amount of power they already possess under Fourth Amendment exceptions, this Court should be wary of broadening the government's power.

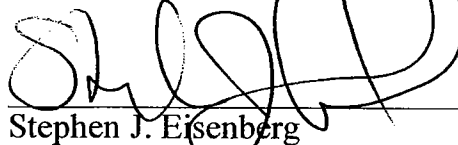
As Justice Antonin Scalia so wisely held in Arizona v. Hicks, 480 U.S. 321, 329, 107 S.Ct. 1149 (1987), "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." In the present case, this Court should be more concerned with the privacy of Wisconsin citizens rather than with the aforementioned criminality of a few.

CONCLUSION

For all the foregoing reasons, Kramer asserts that he was seized in violation of his constitutional rights. Accordingly, all evidence seized subsequent to the stop should be suppressed pursuant to Wong Sun v. United States, 371 U.S. 471 (1963). Kramer respectfully requests that this Court vacate the Judgment of Conviction and remand the case for further proceedings consistent with this Court's opinion.

Dated this 2nd day of September, 2008.

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A handwritten signature in black ink, appearing to read 'Stephen J. Eisenberg', is written over a horizontal line.

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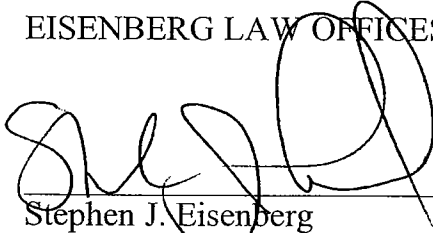
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,992 words.

Dated this 11th day of July, 2008.

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