FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3631

STATE OF FLORIDA,

Appellant,

v.

MICHAEL JASON BRUMELOW,

Appellee.

On appeal from the Circuit Court for Bay County.
Michael C. Overstreet, Judge.

December 20, 2019

MAKAR, J.,

In this Fourth Amendment case, the State says the trial court erred in concluding that officers performing a weekend morning check on two people slumbering in a legally parked car with its engine running went too far by ordering that the car's engine be turned off and the driver's door and window be opened, at which point the odor of marijuana emerged and searches of the car and occupants subsequently undertaken. The issue to be resolved is whether the initial officer on the scene, by ordering that the driver turn off the car and open the driver's door and window, engaged in an improper investigatory detention as to the driver, or, alternatively, that the overall circumstances, which included a non-responsive person in the passenger seat whom fire-rescue had

to access by opening the passenger car's door, made the discovery of the marijuana smell and the resulting search inevitable.

Welfare checks fall under the so-called "community caretaking doctrine," which is a judicial creation that carves out an exception to the Fourth Amendment's warrant requirement by allowing police officers to engage in a seizure or search of a person or property solely for safety reasons. *See generally Tracy Bateman Farrell, et. al.*, Exigent or emergency circumstances exception for warrantless search, generally, 14A Fla. Jur 2d Criminal Law—Procedure § 771 (2019) ("The community caretaker exception to the warrant requirement, arising from the duty of police officers to ensure the safety and welfare of the citizenry at large, functions focus on concern for the safety of the general public; thus, a warrantless search may be justified by exigent circumstances, which are those characterized by grave emergency, imperativeness for safety, and compelling need for action, as judged by the totality of the circumstances.); *see, e.g.*, *State v. Johnson*, 208 So. 3d 843 (Fla. 1st DCA 2017) (applying community caretaking doctrine to uphold seizure of cash in automobile as safeguarding property rather than as a search for incriminating evidence).

Searches and seizures conducted under the community caretaker doctrine are solely for safety reasons and must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *State v. Johnson*, 208 So. 3d 843, 844 (Fla. 1st DCA 2017) (citing *Dombrowski*). For this reason, the scope of an encounter is a limited one so that welfare checks don't become investigative tools that circumvent the constitutional protection against unreasonable searches and seizures. *See, e.g.*, *State v. Fultz*, 189 So. 3d 155, 160 (Fla. 2d DCA 2016) (holding that police department "policy of entering a home when they observe an open door and the residents fail to answer their hail is constitutionally troubling," noting that "[g]iven Central Florida's temperate weather in November, an open door at 8:00 in the morning, without more, cannot justify a warrantless entry based on a feared medical emergency or the community caretaker function.").

At issue in this case is whether officers exceeded the scope of a permissible welfare check. Responding to a 911 dispatch, the first officer arrived at the bank parking lot around 10:20a.m. on a Saturday morning, observing a male in the driver's seat and a female in the passenger seat of a running car, both apparently sleeping, the former in a reclining position. After the officer knocked on the driver's side window a few times, the male, Michael Jason Brumelow, was roused (he "kind of opened his eyes and looked at me") and began talking with the officer who tried to get him to wake up the female in the passenger seat, which Brumelow was unable to do. At that point, the officer asked Brumelow to open the window and door and turn off the car, which he did. When the door opened, the officer smelled a marijuana odor, but did not act on it until after both passengers were removed from the car and a search was then conducted that led to the discovery of illegal drugs in Brumelow's pockets and in the car.

The trial court concluded that the officer's actions in demanding that Brumelow turn off the car and open its window and door violated the limited scope of a welfare check as to Brumelow. The trial court reasoned that after the officer succeeded in awakening Brumelow the "need for a welfare check had been eliminated." It stated that "[n]o evidence was presented to suggest that at the time of her directive" to Brumelow that the officer "had a reasonable belief that [Brumelow] or his passenger were either intoxicated or experiencing medical problems." Indeed, the officer testified that she saw no suspicious or criminal activity. The trial court thereby concluded that the officer's directive to Brumelow to turn off the car and open its window and door "elevated the encounter to an investigatory stop without any suspicion that criminal activity had been committed, was being committed, or was about to be committed." For that reason, Brumelow's motion to suppress the evidence found in the subsequent searches was granted. *See*, *e.g.*, *Greider v. State*, 977 So. 2d 789, 794 (Fla. 2d DCA 2008) (officer had a duty to check on driver but "once it was determined that [the driver] was 'okay' and not involved in any criminal activity, the officer lacked the proper authority to order [the driver] to lower his window.").

This case is not a "single passenger" case, like *Greider*, because the welfare check involved not only Brumelow's well-being

but that of his female passenger, who was far more difficult to rouse. Contrary to the trial court's view, at the time the first officer directed Brumelow to turn off the car and open its window and door, it was indeterminate why the passenger was non-responsive. While it may be true that no evidence existed that the passenger was "intoxicated or experiencing medical problems," it was equally true that her physical or medical well-being was both unknown and questionable. A reasonable officer could believe that the passenger's welfare was in doubt and required further inquiry. The first officer, closely followed by a second officer on the scene, were both concerned about the female passenger and unable to communicate with her or get her to respond. One asked Brumelow to awaken her, but he was unable to do so. Fire-rescue personnel, who are dispatched as a matter of course for welfare checks in Bay County, arrived soon after the officers and had to open the car's door and thereafter take approximately 20-30 minutes to get the female passenger—who was "completely unresponsive"—to become cognizant enough to react by nodding or shaking her head.

Under these circumstances, where the record shows that the car had to be opened without delay to access and attend to the unresponsive female passenger, the smell of marijuana emanating from within the vehicle was unavoidable and the discovery of illegal contraband inevitable. *Nix v. Williams*, 467 U.S. 431, 444 (1984) ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received."). Much like the volunteers' search in *Nix*, the lawful actions of fire-rescue personnel in opening the car door to attend to the non-responsive passenger made the likelihood of discovery of illegal drugs in Brumelow's car and possession all but certain. Moreover, the legitimate safety concerns of the officers and fire-rescue personnel, i.e., that the female passenger remained non-responsive, were sufficient to prolong the welfare check under the circumstances. *Dermio v. State*, 112 So. 3d 551, 556 (Fla. 2d DCA 2013) (concern for the safety of driver "had not yet been alleviated because [the driver] continued to be incoherent and 'out of it.' Consequently, the deputy's requests for [the driver] to roll down the window did not transform the consensual encounter into an investigatory stop.").

REVERSED.

LEWIS and ROWE, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Ashley Moody, Attorney General, and Benjamin Louis Hoffman, Assistant Attorney General, Tallahassee, and Beverly McAllister-Brown, Assistant State Attorney, Panama City, for Appellant.

Mark V. Murray, Law Offices of Mark V. Murray, Tallahassee, and James Heath, Heath Law Firm, P.A., Destin, for Appellee.