COURT OF APPEALS
DECISION
DATED AND RELEASED

January 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1983-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OWEN JOHNSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed*.

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Owen Johnson appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS. He raises a Fourth Amendment issue by asserting that a police officer illegally searched his truck and found evidence that he was driving while intoxicated. We conclude that the officer was acting in a community caretaker function and, therefore, the search and seizure of evidence did not violate the Fourth Amendment. We, therefore, affirm.

BACKGROUND

On October 27, 1993, at about 12:40 a.m., Dane County Deputy Sheriff Todd L. Huppert received a report that an occupied vehicle was parked at the side of a road in the Town of Middleton. Deputy Huppert went to the location and saw a man who appeared to be sleeping in a truck. Deputy Huppert attempted to contact the man to check on his welfare, thinking there could have been an accident, that he could be ill, that he might be sleeping, or that he might be intoxicated. He knocked on the window and the man did not respond. He then opened the door and noticed a strong odor of intoxicants. He spoke to the man and received no response. He shook the man for about five to ten minutes, finally arousing him.

After awakening the man, Deputy Huppert asked him to step out of the truck. The man did so, and identified himself as Owen Johnson. Johnson was eventually charged with OMVWI. After a suppression hearing, he pleaded no contest to OMVWI. Johnson appeals.

DISCUSSION

Johnson asserts that the search of his truck violated the Fourth Amendment because it was conducted without probable cause. He notes that sleeping in a motor vehicle is not a crime, and that this is all Deputy Huppert knew before the search began.

But there is an exception to the warrant requirement of the Fourth Amendment which we recognized in ***State v. Anderson***, 142 Wis.2d 162, 417 N.W.2d 411 (Ct. App. 1987), which is applicable to this case.[1] The exception is called the "community caretaker" exception and it was described in ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973). In ***Cady***, the Supreme Court noted that state police officers have functions which are unrelated to detecting crime. The Court said:

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[1] Wisconsin also recognizes an "emergency" exception to the warrant requirement. *See* ***State v. Dunn***, 158 Wis.2d 138, 144, 462 N.W.2d 538, 540 (Ct. App. 1990).

> 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.

In ***Anderson***, we set out the following test for determining whether the community caretaker exception to the Fourth Amendment is applicable:

> when a community caretaker function is asserted as justification for the seizure of a person, the trial court must determine: (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) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.

Anderson, 142 Wis.2d at 169, 417 N.W.2d at 414.

Assuming that a Fourth Amendment seizure occurred when Deputy Huppert opened the door and began shaking Johnson,[2] the facts lead to only one conclusion: Deputy Huppert's conduct was bona fide community caretaker activity. But Johnson points to Deputy Huppert's testimony that when he observed what appeared to be a sleeping man, one of the things he considered was the possibility that the man might be an intoxicated driver. He argues: "Police cannot, however, justify actions upon a community caretaker basis when their motivations are, even in part, investigatory."

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[2] The parties do not argue, and we do not consider, whether opening the truck's door constituted a valid stop under § 968.24, STATS., and ***Terry v. Ohio***, 392 U.S. 1 (1968).

Johnson's view of the community caretaker exception is overly broad. Reasonableness is the foundation of Fourth Amendment questions. If the mere possibility of criminal liability defeats the community caretaker exception, that exception will be narrowed to the point of being non-existent. Whenever a police officer approaches an accident or an ambiguous situation, there will be a possibility, however small, that evidence of a crime will surface. Police officers are trained to detect crime, and cannot help but be attentive to evidence of crime. It is not reasonable to interpret the community caretaker exception as does Johnson.

The third factor, whether the public need and interest outweigh the intrusion upon the privacy of the individual, has four elements. Those are:

> (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.

Id. at 169-70, 417 N.W.2d at 414 (footnotes omitted). In ***State v. Ellenbecker***, 159 Wis.2d 91, 96, 464 N.W.2d 427, 429 (Ct. App. 1990), we said:

> In a community caretaker case, reasonableness is determined by balancing the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen.

This balance is heavily weighted in favor of permitting inquiries of the sort done by Deputy Huppert. The public has a strong interest in protecting persons who become ill or are injured while in their automobiles. That interest can only be satisfied if police officers may investigate circumstances which might lead to the discovery of an injured or ill motorist. The risk to the motorist is slight. The inconvenience of a knock on the window and further inquiry, if

that produces no response, is far outweighed by the benefit to those motorists who become ill or injured while in their automobiles and need help.

From the evidence produced at Johnson's suppression hearing, it is apparent that Deputy Huppert was engaged in bona fide community caretaker activity. He did not know what to expect when he approached Johnson's truck. His actions were totally divorced from gathering evidence to support a criminal conviction because he was not specifically conducting an investigation. Even though he considered the fact that the driver could be intoxicated, that consideration was nonspecific. He had no idea until he opened the door that intoxication was anything more than one of the possibilities which might explain a sleeping or comatose occupant of a parked truck. We conclude that Deputy Huppert's actions which led to Johnson's arrest and conviction did not violate the Fourth Amendment. We, therefore, affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.