COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2004

Cornelia G. Clark
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 Nos. 04-0032-CR
04-0033-CR

Cir. Ct. Nos. 03CT000090
03CM000257

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 04-0032-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DANIEL FREDRICK CADOTTE,

DEFENDANT-RESPONDENT.

NO. 04-0033-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

NORA A. CADOTTE,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Affirmed*.

¶1 CANE, C.J.[1] The State appeals orders granting a motion to suppress evidence on the grounds that Daniel and Nora Cadotte were unlawfully seized. The State argues their seizure is justified under the community caretaking function. We affirm the orders.

BACKGROUND

¶2 At the motion hearing, the Cadottes testified they left the Gillnet Bar at approximately 1:30 a.m. in their vehicle. Daniel drove north on County Highway K and then turned east on Emil Road to go home. While on Emil Road, Nora noticed a vehicle rapidly approaching. According to the Cadottes, they saw police lights, so Daniel pulled the vehicle over. Officer Lucas Cadotte[2] approached their vehicle and, without asking if they needed assistance, asked if Daniel had been drinking. After Daniel answered that he had "a few," Daniel apparently failed the one-legged stand field sobriety test.

¶3 Officer Cadotte testified he was traveling south in his marked squad car on County K at approximately 1:30 a.m. He saw a vehicle heading north on County K turn eastbound onto Emil Road. Moments later, he too turned

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] The record does not reflect whether Officer Lucas Cadotte and Daniel and Nora Cadotte are related.

eastbound on Emil Road. Cadotte testified he did not follow the vehicle to investigate any suspicion of criminal activity, and he admitted nothing about the vehicle or the manner it was being operated gave rise to a reasonable suspicion of any criminal activity. However, after traveling on Emil Road for approximately one mile, Cadotte testified the vehicle in front of him pulled over to the side of the road for no apparent reason. After seeing this, Cadotte pulled his squad car behind the vehicle and activated his emergency lights. He approached the vehicle and asked if there were any mechanical problems or if assistance was otherwise needed. Daniel answered that there were no problems, but Cadotte testified he smelled an odor of intoxicants emanating from Daniel and he asked Daniel if he had been drinking. Cadotte testified Daniel said he had six to eight beers. After failing field sobriety tests, Daniel was arrested for OWI and later charged with OWI, third offense. Cadotte also arrested Nora for obstructing an officer after she refused to allow Cadotte to search the vehicle incident to Daniel's arrest.

¶4 The Cadottes filed a motion to suppress all evidence, claiming they were unlawfully stopped. The State claimed the officer's actions were justified under the community caretaker function, but the trial court disagreed. Noting the divergent accounts of what happened, the trial court found neither side particularly credible. Nevertheless, it assumed the officer's account was plausible and evaluated his actions under a community caretaking function. The court concluded the Cadottes' seizure was not justified because the officer had other feasible and effective alternative courses of action, short of activating his emergency lights and approaching the vehicle; therefore, the court granted the Cadottes' motion to dismiss. The State appeals.

DISCUSSION

¶5 "Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact." ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. We uphold the trial court's findings of fact unless they are clearly erroneous and independently apply the law to those facts de novo. ***Id.***

¶6 "Warrantless searches and seizures are 'per se unreasonable ... subject only to a few specifically established and well-delineated exceptions.'" ***State v. Betterley***, 191 Wis. 2d 406, 429, 529 N.W.2d 216 (1995) (citations omitted). The community caretaker function is an established exception, and applies when: (1) a seizure within the meaning of the Fourth Amendment occurred; (2) the police conduct was bona fide community caretaking activity; and (3) the public need and interest outweighs the intrusion upon the privacy of the individual. ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). In evaluating the third factor, the following considerations must be balanced: (1) the degree of public interest and exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location and 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. Ultimately, the touchstone for the officer's actions is reasonableness. ***State v. Kelsey C.R.***, 2001 WI 54, ¶34, 243 Wis. 2d 422, 626 N.W.2d 777.

¶7 The parties agree a seizure occurred and they both assume the officer's conduct was bona fide community caretaking activity; that is, conduct

that was wholly divorced from any investigatory activity. *See* ***Anderson***, 142 Wis. 2d at 166. Turning to the third element—the public need and interest outweighs the intrusion upon the privacy of the individual—the State argues the balance must tip in its favor. Noting the strong public interest in safeguarding individuals, particularly late at night on rural roads, and given the limited nature and purpose of the contact, the State argues the officer acted reasonably.

¶8 The trial court observed the degree of public interest and exigency of the situation, the attendant circumstances surrounding the seizure, and the fact that an automobile was involved all weighed in favor of the seizure's reasonableness. However, it was troubled by other available, feasible and effective alternatives to the type of intrusion actually accomplished. The court noted:

> [W]hen considering that the officer easily could have continued on his patrol down Emil Road and return[ed] to the site a few minutes later to determine if a problem existed, weighs heavily against the reasonableness of the interaction. The officer could have driven by and visually viewed what was going on, or using his headlights, viewed the movement inside the vehicle as he passed. The officer could also have pulled up alongside the vehicle, and without even getting out of his vehicle, could of motioned to [Daniel] to [roll] his window down and ask if everyone was alright. None of these alternatives [were] done, but rather the arresting officer decided to immediately pull behind the vehicle and initiate his flashing lights and perform what can only be viewed in the totality of the circumstances, as an unnecessary intrusion, upon the defendants.

This court joins the trial court's analysis. We agree that the officer had far less intrusive, yet equally effective and feasible, alternatives to ensure everything was all right. Although the case is close, weighing this consideration against the others tips the balance against concluding the officer's actions were justified under the

community caretaking function. Therefore, the orders suppressing the evidence are affirmed.

By the Court.—Orders affirmed.

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