COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP682-CR **Cir. Ct. No. 2005CT1001**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GINO T. GUMPHREY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

¶1 BROWN, J.[1] Gino Gumphrey appeals his conviction for operating under the influence of alcohol and the circuit court's order rejecting his motion to suppress evidence. Gumphrey contends that the police violated his Fourth Amendment rights when, upon discovering his crashed and empty vehicle, they used a cell phone found in the vehicle to locate and contact his former wife. The former wife told the police that Gumphrey's mother lived near the scene of the crash and this information allowed the police to quickly find Gumphrey, arrest him, and administer a blood test confirming his intoxication. Gumphrey argues that had the police not searched his cell phone, they would not have located him in time to administer the test and that its result and other related evidence should therefore be suppressed. Because we find that the police search of the cell phone was justified as a means to ensure Gumphrey's safety, we affirm.

¶2 On the night of May 6, 2005, two Muskego police officers responded to a report of a one-car accident. Arriving on the scene, the officers observed a truck resting in a ditch against a culvert, along with several mailboxes that the truck had apparently struck before coming to rest. The truck showed damage to its front and underside and also a cracked or "spidered" windshield on the driver's side.

¶3 One of the officers spoke with a witness, who said that she had heard an impact and had come outside her house to find a man standing next to the truck. She described the man's appearance and said that he had walked away from the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

truck and that he was staggering and acting disoriented. She said that she had asked the man if he was okay and that he had responded that he was.

¶4 The officers ran the truck's license plates and found that it was registered to a contracting company. After failing to locate a representative of the company, they entered the truck. In it, they found mail addressed to Gumphrey, as well as two cell phones. The officers turned on and scrolled through one of the phones for identifying information, and found recently dialed calls to "Jen" or "Jennifer." One of the officers called the number for "Jen," and spoke with a woman who turned out to be Gumphrey's former wife. She told him that Gumphrey's mother lived in the area, and the officers obtained the mother's address through dispatch. Arriving at the mother's house, the officers found Gumphrey asleep on the porch. When the officers awoke Gumphrey, he had a laceration above his left eye and appeared intoxicated. The witness identified Gumphrey as the man she had seen walking from the truck, and Gumphrey was arrested. He eventually submitted to a blood test, confirming his intoxication.

¶5 Gumphrey moved to suppress his blood test and other evidence obtained by the officers as a result of their use of the cell phone to contact his former wife. At the suppression hearing, Officer Craig Simuncak, who had searched the cell phone, testified that his reasons for using the phone to try to quickly locate the truck's driver were "two fold." He was "primarily" concerned about a possible head injury, based upon the windshield damage and the driver's disoriented behavior. Simuncak testified that he also wished to find the driver because the driver might have committed a crime by leaving the scene of the accident. After the court rejected his suppression motion, Gumphrey pled guilty to OWI, third offense. He now appeals the denial of his suppression motion.

¶6 When we review the denial of a suppression motion, we will uphold the factual findings of the trial court unless clearly erroneous. ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). Whether the facts, as found, satisfy constitutional requirements is a question of law, which we review de novo. ***Id.***

¶7 Under both the United States and Wisconsin Constitutions, a warrantless search is per se unreasonable, and evidence derived from it will be suppressed, subject to certain exceptions. ***State v. Williams***, 2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834. Gumphrey does not challenge the officers' initial search of his vehicle, agreeing with the State that the officers acted legitimately within their community caretaker function, one such exception.[2] Gumphrey and the State part company, however, as to the search of the cell phone, which the State contends was a legitimate action whose fruits are admissible under the emergency doctrine.

¶8 Under the emergency doctrine, an officer may enter an area in which a person has a privacy interest if there are reasonable grounds to believe that an emergency exists. ***State v. Boggess***, 115 Wis. 2d 443, 451, 340 N.W.2d 516 (1983). For a search to fall under this exception, there must exist "specific facts

[2] The community caretaker doctrine creates an exception to the warrant requirement where a police officer is performing a duty "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). The State argues that the officers' search of the cell phone is also valid under this doctrine, a position which Gumphrey disputes strenuously. The parties also dispute whether Gumphrey abandoned his interest in the cell phone by leaving it in the vehicle, and whether his blood test should be admitted as an "inevitable discovery." Because we uphold the search under the emergency doctrine, we need not resolve these issues.

that, taken with the rational inferences from those facts, reasonably [warrant] the intrusion." ***Id.***[3]

¶9 The officers at the scene knew or could reasonably infer the following facts: that a truck had left the highway with enough speed to knock down several mailboxes before hitting the culvert; that the windshield was cracked in a location where a driver's head might have hit it in a crash, particularly if the driver had not been wearing a seatbelt; that a witness had seen the driver acting disoriented after the crash; and that the driver had staggered off, leaving possessions including two cell phones in the vehicle. It is beyond doubt that these facts could lead a reasonable person to believe that the driver might have suffered a serious head injury and might be in urgent need of medical care. We have no difficulty in holding that this situation constituted an emergency that amply justified the officers' use of Gumphrey's cell phone to find his former wife's number.

¶10 Gumphrey points to other facts in the officers' possession: that the driver responded that he was "O.K." when the witness inquired and that there was no evident blood or other tissue on the windshield. Gumphrey further argues that the police could not know that the cracked windshield was caused by the crash. Of course, if there had been a great deal of blood on the scene or if Gumphrey had not answered the witness as he did, there would be even stronger grounds to

[3] ***Boggess*** described a second subjective element of the emergency exception test, which asked whether the searching officer was "actually motivated by a perceived need to render aid or assistance." ***State v. Boggess***, 115 Wis. 2d 443, 450, 340 N.W.2d 516 (1983). However, in ***State v. Richter***, 2000 WI 58, ¶30, 235 Wis. 2d 524, 612 N.W.2d 29, the supreme court applied a purely objective test to determine whether exigent circumstances justified a warrantless home entry. We have since held in ***State v. Leutenegger***, 2004 WI App 127, ¶7, 275 Wis. 2d 512, 685 N.W.536, that we are bound to apply the same test in emergency exception cases.

believe that Gumphrey needed immediate medical assistance; one can imagine further hypothetical facts that would make it impossible to believe otherwise. However, such airtight certainty is not required. The courts have recognized that officers must often make "prompt assessment of sometimes ambiguous information concerning potentially serious consequences." ***Id.*** The officers here did so, and we cannot say that their assessment was unreasonable.

By the Court.—Judgment and order affirmed.

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