COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP280 **Cir. Ct. No. 2007TR3097**

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

WASHINGTON COUNTY,

PLAINTIFF-RESPONDENT,

V.

STEVEN P. PALMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] This is a Fourth Amendment community caretaker case. Steven P. Palmer appeals from a circuit court judgment convicting

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(g) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

him of operating a motor vehicle while under the influence of an intoxicant. On July 17, 2007, at 10:48 p.m., sometime after Palmer pulled his vehicle over to the side of a highway with its hazard lights flashing, a police officer passed by. The officer decided to check on the stopped vehicle. The officer pulled in behind the vehicle to see if Palmer needed assistance. The police squad car's red and blue emergency lights were activated simultaneous to Palmer activating his left-turn signal. Palmer then deactivated his left-turn signal and reactivated his hazard lights. The officer's inquiry led to the discovery that Palmer was intoxicated. Palmer argues that he was unlawfully seized by the time the officer approached Palmer'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.

¶2 Palmer moved to suppress evidence of his intoxicated operation of a motor vehicle obtained after the officer pulled up behind his vehicle with his squad car's red and blue emergency lights on. At a hearing on the motion, the arresting officer testified that he was on patrol on a state highway when he observed a parked vehicle on the side of the road with its four-way hazard lights on. The vehicle was facing eastbound, while the officer was traveling westbound. It was 10:48 p.m. and dark outside.

¶3 The vehicle was legally parked and was not obstructing traffic or otherwise endangering public safety. The officer observed nothing that would suggest a crime was being committed or that any traffic law was being broken. The vehicle was parked under a street lamp, and the officer said he could see the image of a person behind the steering wheel.

¶4 The officer made a U-turn, activated his vehicle's emergency lights, and pulled behind Palmer's vehicle to see if assistance was needed. Simultaneous to the officer activating his vehicle's emergency lights, Palmer turned on his left-turn signal. Palmer then turned off his left-turn signal and reactivated his four-way hazard lights. The officer called in to dispatch to report that he was checking on a possible disabled vehicle. The officer then approached the vehicle on the driver's side. Palmer was subsequently arrested for operating under the influence of an intoxicant, a violation of WIS. STAT. § 346.63(1)(a).

¶5 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.***

¶6 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 [must] 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.

¶7 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."

¶8 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. In fact, the Wisconsin Supreme Court has stated, "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). Additionally, we have previously cautioned against taking a too-narrow view in determining whether the community caretaker function is present:

> 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…. The police cannot obtain a warrant for … entry. [W]ithout a warrant, the police are powerless. 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 (quoting ***People v. Ray***, 981 P.2d 928, 939 (Cal. 1999)).

¶9 In order to be a community caretaker activity, the officer's actions must be "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) (quoting ***Anderson***, 142 Wis. 2d at 166 (quoting ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973))).

¶10 Palmer argues that once he activated his turn signal, the officer's actions were no longer totally divorced from the detection, investigation or

acquisition of evidence related to the violation of a criminal statute. Palmer believes that activating his turn signal eliminated any rational basis for the officer to think that Palmer might be in distress and, thus, the officer may have been motivated by subjective concerns that criminal activity was taking place in the vehicle. We reject this argument.

¶11 "Totally divorced" does not mean that an officer must have subjectively ruled out all possibility of criminal activity in order to act in a community caretaker capacity. ***State v. Kramer***, 2008 WI App 62, ¶15, __ Wis. 2d __, 750 N.W.2d 941. If this were the case, carrying out community caretaker activities would be unreasonably difficult. This court has previously cautioned against a "too-narrow view" of the community caretaker function so that police officers will not be discouraged from fulfilling that function. ***State v. Ziedonis***, 2005 WI App 249, ¶15, 287 Wis. 2d 831, 707 N.W.2d 565. An officer's subjective concern that the innocent-seeming situation he or she faces might turn out to involve criminality does not prevent the officer's activity from being a bona fide community caretaker activity. *See* ***Kramer***, 750 N.W.2d 941, ¶¶15-17.

¶12 The facts of this case are almost identical to ***Kramer***. In both cases the defendant pulled his vehicle to the side of the highway with its hazard lights on. *See* ***id.***, ¶1. In both cases, the police officer spotted the vehicle, did a U-turn, pulled in behind the vehicle with the patrol car's emergency lights activated. *See* ***id.***, ¶4. In both cases, the police officer approached the defendant's window with his flashlight on and asked if the defendant needed assistance. *See* ***id.*** In both cases, the police officer then observed that the defendant showed signs of intoxication. *See* ***id.***, ¶5. In ***Kramer***, we held that the officer was acting in a community caretaker role. *See* ***id.***, ¶1. Palmer argues that the brief activation of

his left-turn signal makes his case distinguishable from ***Kramer***. We reject this argument.

¶13 Palmer's case is not legally distinguishable from ***Kramer***. Like the officer in ***Kramer***, the officer here was acting in a bona fide community caretaker role when he approached the vehicle. Activating hazard lights is often used as a distress signal. When a police officer witnesses this possible distress signal, investigating in his or her role as a community caretaker is reasonable.

¶14 Here, Palmer briefly activated his left-turn signal *simultaneous* to the officer activating his vehicle's emergency lights, subsequently deactivated his turn signal and then reactivated his hazard lights. Palmer's actions were not sufficient to eliminate the reasonableness of the officer's investigation as a bona fide community caretaker activity.

¶15 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). Palmer makes several arguments concerning these factors. We address and reject each of these arguments.

¶16 Under the first ***Anderson*** factor, Palmer argues that the degree of public interest in the police conduct was extremely low and no exigency existed.

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." ***Goebel***, 103 Wis. 2d at 208 (officer stopped to see if a motorist who had pulled to the side of the road was in need of assistance).

¶17 Palmer argues that this public interest was not involved in this situation because the vehicle was legally parked, did not pose a risk to others, and activating his turn signal demonstrated he was not in distress. This argument is not persuasive. Motorists with disabled vehicles or who themselves are in need of assistance often pull to the side of the road and activate their hazard lights without taking additional steps to request assistance. Consequently, we conclude that this portion of the first factor favors the public interest.

¶18 Also under the first factor, Palmer argues that there was no evidence of exigent circumstances. We agree that there was no sign that immediate aid was required. However, one explanation for the stopped vehicle was that the driver or passenger might be in distress. This portion of the first factor slightly favors Palmer's privacy interests but, as we will explain, it is not enough to outweigh the public interests at issue.

¶19 Under the second ***Anderson*** factor, Palmer comments that the officer made a display of authority by activating his emergency lights. We agree that this is a show of authority, but it is also a reasonable caretaker measure. Activating the emergency lights minimizes the danger inherent in having motorists passing nearby. We thus conclude that this factor favors the public interest.

¶20 Under the third factor, we consider whether an automobile is involved. Palmer admits that a person in an automobile has a lesser expectation of privacy than if in a residence, but even so he argues that the public interest is outweighed in this case. To support this argument, Palmer relies on ***State v. Clark***, 2003 WI App 121, ¶27, 265 Wis. 2d 557, 666 N.W.2d 112. In ***Clark***, we stated that a citizen can reasonably expect to leave a vehicle legally parked without the vehicle being towed. ***Id.*** There is a clear difference between the facts in ***Clark*** and the facts in this case. The vehicle in this case was not merely legally parked, but was also pulled to the side of the highway, late at night, with its hazard lights on. The activation of hazard lights by a car pulled to the side of the road can reasonably be considered an invitation to bystanders to come closer to investigate whether a problem exists. This factor clearly favors the public interest.

¶21 Under the fourth factor, we examine the availability, feasibility, and effectiveness of alternatives to the type of intrusion the officer used. Palmer argues that the officer should have simply deactivated his emergency lights and allowed Palmer to leave. Since we have already concluded that the officer's conduct was a bona fide community caretaker function, we believe merely letting Palmer leave was not an effective alternative. The intrusion in this case was limited to the police officer approaching the vehicle and asking if everything was all right. Under the circumstances, this seems like the most effective option the officer had. Thus, this factor also favors the public interest.

¶22 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 Palmer's privacy.

By the Court.—Judgment affirmed.

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