COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP240-CR **Cir. Ct. No. 2010CT41**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

RICKY O. HALVERSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] The State appeals from a circuit court order granting Ricky Halverson's motion to suppress evidence on grounds that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

officer was not acting in a community caretaker capacity prior to Halverson's arrest for operating a motor vehicle while intoxicated (OWI) and with a prohibited alcohol content (PAC). We conclude that the circuit court's findings of fact as to the contested issues are not clearly erroneous and that, based on those facts, the officer was not acting in a community caretaker capacity at the time of Halverson's arrest. We therefore uphold the circuit court's order granting Halverson's motion to suppress evidence.

BACKGROUND

¶2 Halverson was charged with second-offense OWI and PAC following an incident on January 16, 2010. Officer Jeff Cates of the Village of Fontana Police Department testified at the suppression hearing that he was on routine patrol on January 16 at 2:00 p.m. when he observed a vehicle that appeared to have lost control and crashed into pine trees along Stearns Road. Based on skid marks on the road, Cates was able to speculate that the vehicle had been traveling south on Highway 67, turned east onto Stearns Road, lost control and went into the ditch on the north side of the road. Several branches of the pine tree had broken off and a piece of the vehicle's grille had broken off and was lying on the ground. No one was present at the scene when Cates arrived. Cates observed one set of footprints in the snow coming from the driver's side of the vehicle and an open can of a "lemonade vodka type beverage" on the rear floorboard of the vehicle.

¶3 Cates then opened the driver's side of the vehicle and began to search for owner information and also for signs that the driver may have been injured in the accident. He did not locate either. Cates then contacted a tow company to remove the vehicle. He also ran the vehicle registration and determined that it was registered to Kelly Halverson of Ixonia. However, Cates

recalled having seen a similar vehicle parked at a residence on North Shore Drive in the past. He proceeded to the North Shore Drive residence, noticed that the vehicle matching the description of the one at the scene was not parked there, and knocked on the door. Halverson answered the door. Cates asked Halverson if he owned a white Chevy Blazer; Halverson replied that he did. When Cates asked where it was, Halverson replied that a friend had borrowed it and driven it into a ditch on Stearns Road. Halverson refused to provide information as to his friend's identity.

¶4 Cates recalled that in conversing with Halverson and asking him questions regarding the vehicle, Halverson stated something to the effect of, "What's the big deal? I'm home now." Halverson also changed his statement from "he had been home all day to he was a passenger []in the vehicle as it crashed on Stearns Road." Halverson refused to provide Cates with his driver's license and refused to identify himself verbally. During Cates's contact with Halverson, he detected a very strong odor of intoxicants on Halverson's breath, Halverson's eyes were glossy, his speech was slurred and he lost his balance to the point of nearly falling over. Cates testified that he believed the loss of balance could possibly be due to an injury sustained in the crash, but when Cates asked Halverson if he was injured, Halverson replied that he was not. Cates asked Halverson if he wanted medical attention, and Halverson declined. The court noted that Cates later testified that he did not ask Halverson if he was injured or in need of medical assistance. In any event, Halverson asked Cates to leave.

¶5 Cates testified:

> [B]ased on my observations of him and his condition, whether that be intoxication or injury, and the fact that there was nobody else to provide care for him, I didn't believe he was able to provide care for himself, I advised

> the subject that he was being detained and placed on a protective custody hold.

Halverson was uncooperative and attempted to move further into the house, but Cates held his arm. Cates then stepped one foot inside the residence and was just inside the doorway when he handcuffed Halverson's hands behind his back. Cates then placed Halverson in the squad car. While waiting for backup, two friends of Halverson's arrived at Halverson's residence. Cates advised them that Halverson was in protective custody due to his level of intoxication and asked whether they would take responsibility for him. They declined.

¶6 Next to arrive was a tow truck. The driver informed Cates that Halverson had contacted him to tow the vehicle. The driver stated that Halverson's speech was slurred when he called. After the tow truck driver left, two more individuals arrived. The first, Stephen Speery, informed Cates that he was a friend of Halverson's and that Halverson had contacted him to advise that Halverson had been driving on Highway 67 and turned onto Stearns Road when his vehicle's tire got caught on the edge of the road causing him to lose control and crash into pine trees. Speery stated that he and the other individual, who was driving a four-by-four truck, were there to assist in pulling Halverson's vehicle out of the ditch. At some point, Cates ran a driver's status record check and discovered that Halverson's driving status was revoked. He then placed him under arrest for operating after revocation. Speery left the scene and Cates then transported Halverson to the Fontana police department. Halverson was later arrested for OWI.

¶7 Halverson filed motions to suppress all evidence on grounds that his arrest was illegal because (1) the officer lacked the requisite probable cause at the time the officer placed him under arrest for OWI and (2) the officer's actions were

not justified by exigent circumstances related to Halverson's physical condition. Following hearings on Halverson's motion and additional briefing by the parties, the circuit court narrowed the issue to whether the officer was engaged in bona fide community caretaker activity at the time of Halverson's detention. The court determined that the officer was not and granted Halverson's motion to suppress. The State appeals.

DISCUSSION

¶8 The State contends that Cates's conduct was reasonable under the community caretaker function and therefore the circuit court erred in granting Halverson's motion to suppress.[2] In reviewing a circuit court's ruling on a motion

[2] While the record reflects that Cates described Halverson's detention as being placed in "protective custody," the State does not rely on the protective custody provision, WIS. STAT. § 51.45(11)(b), on appeal. That provision, governing the custody of individuals incapacitated by alcohol, provides that "[a] person who appears to be incapacitated by alcohol shall be placed under protective custody by a law enforcement officer." The terms "Incapacitated by alcohol" and "Intoxicated person" are defined under § 51.45(2) as follows:

> (d) "Incapacitated by alcohol" means that a person, as a result of the use of or withdrawal from alcohol, is unconscious or has his or her judgment otherwise so impaired that he or she is incapable of making a rational decision, as evidenced objectively by such indicators as extreme physical debilitation, physical harm or threats of harm to himself or herself or to any other person, or to property.
>
> ….
>
> (f) "Intoxicated person" means a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol.

Section 51.45(11)(b) provides for the involuntary seizure of individuals who are incapacitated by alcohol; however, intoxicated persons must voluntarily consent to aid. While § 51.45 does not govern the issue on appeal, it does provide guidance in assessing whether Halverson's level of intoxication warranted Cates's conduct as a community caretaker.

to suppress evidence, we will uphold the circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Sveum***, 2010 WI 92, ¶16, 328 Wis. 2d 369, 787 N.W.2d 317. However, we independently review the circuit court's application of constitutional principles to those facts. ***State v. Pinkard***, 2010 WI 81, ¶12, 327 Wis. 2d 346, 785 N.W.2d 592. "Accordingly, we independently review whether an officer's community caretaker function satisfies the requirements of the Fourth Amendment and Article I, Section 11 of the federal and state Constitutions." ***Id.*** (citation omitted).

¶9 In evaluating claims of police community caretaker functions, we employ the following test:

> [W]hen 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.

State v. Kramer, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598 (citing ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)). Here, it is undisputed that Halverson was seized within the meaning of the Fourth Amendment. As to the second determination, the State bears the burden of proving that the officer's conduct fell within the scope of a reasonable community caretaker function. ***State v. Ziedonis***, 2005 WI App 249, ¶15, 287 Wis. 2d 831, 707 N.W.2d 565. It is here that the State's argument fails.

¶10 In evaluating whether the officer was acting as a bona fide community caretaker, we carefully examine the expressed concern for which the community caretaker function was undertaken. ***State v. Ultsch***, 2011 WI App 17, ¶15, 331 Wis. 2d 242, 793 N.W.2d 505. "The question is whether there is an

'objectively reasonable basis' to believe there is 'a member of the public who is in need of assistance.'" ***Id.*** (citation omitted). Here, the State argues that "[c]oncern for Halverson's well-being, who was alone and highly intoxicated to the point of being unable to stand without losing his balance, is an objectively reasonable basis for the community caretaker function."

¶11 As to this issue, the circuit court found that Halverson was heavily intoxicated and almost fell over a number of times while Cates was talking to Halverson at the door. However, the court further found that there was nothing in Cates's testimony, the video recording of the encounter, or the testimony of a second officer at the scene to suggest that Halverson was so intoxicated as to justify Cates taking him into custody for his protection.[3] The court also noted Cates's testimony that Halverson answered his questions coherently and responsively. The court noted Cates's conflicting testimony as to whether he asked Halverson if he was injured or needed medical attention. Notably, Cates testified that he did not request the backup officer, who had fire and rescue

[3] The court stated:

> I did not see anything in the testimony … or anything I viewed on the video that suggested that [Halverson] was in such desperate straits that if he wasn't secured and put in the car at least, he might do harm to himself. And if he was in such a state, the officer should have rushed him to the hospital.

We note that the video recording reviewed by the circuit court is not in the appellate record, despite the State's contention that Cates's conduct was justified because Halverson appeared to be heavily intoxicated. As the appellant, the State had the duty to ensure the completeness of the appellate record. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). When an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the circuit court's ruling. *See* ***id.*** at 27.

training, to examine Halverson at the scene because he did not believe Halverson was injured or in need of medical attention.

¶12 The circuit court's findings as to Halverson's level of intoxication and Cates's conduct are not clearly erroneous. We agree with the circuit court that these facts do not support a determination that Halverson was so intoxicated as to be unable to care for himself in his own home. In sum, the State failed to demonstrate that Cates was engaged in bona fide community caretaker activity when he seized Halverson and removed him from his home.

¶13 We note that our conclusion is in keeping with our recent decision in ***Ultsch***. There, the police arrived at the scene of a collision involving Ultsch's vehicle and a brick building. ***Id.***, ¶2. The officers went to Ultsch's residence where they encountered an individual in the driveway of the home who informed them that the driver of the damaged vehicle was his girlfriend and that she was up at the house "possibly in bed or asleep." ***Id.***, ¶3. The officers knocked on the door and, when there was no answer, an officer entered the house, made his way to Ultsch's bedroom and found her in bed asleep. ***Id.***, ¶4. The officer woke Ultsch, questioned her and later arrested her for operating a motor vehicle while intoxicated. ***Id.***, ¶5.

¶14 This court recognized that stricter scrutiny is applied to an encounter in the home, as opposed to a police encounter with an individual in a vehicle. ***Id.***, ¶18. In concluding that there was no objective basis to believe that Ultsch was in need of assistance, this court noted that (1) the condition of the vehicle, viewed alone, "was not such as to give rise to concern for Ultsch's safety," and there was no blood or other indication of injury; (2) there was no information from the individual in the driveway that Ultsch was in a vulnerable situation or that he

observed anything to indicate an injury; and (3) the officers did not ask the individual about Ultsch's condition and "[h]e didn't mention her needing any assistance." ***Id.***, ¶¶19-20. The facts in this case, as in ***Ultsch***, lack any indication of injury or need for assistance and, therefore, do not support an objective basis for community caretaker activity. And, though we need not reach the third inquiry under ***Kramer***—whether the public need and interest in assisting Halverson outweighed the intrusion upon his privacy—we conclude, as we did in ***Ultsch***, that the public's interest in the intrusion upon Halverson, who was in his home at the time, was minimal at best and did not outweigh the substantial intrusion on his privacy. *See* ***Kramer***, 315 Wis. 2d 414, ¶21; ***Ultsch***, 331 Wis. 2d 242, ¶29.

¶15 The State now argues on appeal that even if Halverson's detention was unlawful, the circuit court erred in suppressing the statements made by the individuals Cates encountered outside of Halverson's residence while waiting for backup, namely Halverson's friends and the tow truck driver. The State contends that these statements were sufficiently attenuated from the unlawful seizure so as to be admissible. Whether evidence is the fruit of a prior constitutional violation or whether the evidence was sufficiently attenuated so as to be purged of the taint is a question of constitutional fact. ***State v. Anson***, 2005 WI 96, ¶18, 282 Wis. 2d 629, 698 N.W.2d 776. As above, we employ a two-step analysis on review. We uphold the circuit court's findings of fact unless clearly erroneous; however, we independently apply those facts to the constitutional standard. ***Sveum***, 328 Wis. 2d 369, ¶16; ***Pinkard***, 327 Wis. 2d 346, ¶12.

¶16 The question is whether the statements made by Halverson's friends and the tow truck driver were obtained by exploitation of his unlawful detention or by means sufficiently distinguishable to be purged of the primary taint. *See* ***State v. Simmons***, 220 Wis. 2d 775, 781, 585 N.W.2d 165 (Ct. App. 1998) (citing ***Wong***

Sun v. United States, 371 U.S. 471, 488 (1963)). The three factors relevant to determining whether the causal chain is sufficiently attenuated so as to dissipate the taint of the illegal conduct were set forth in ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975): the temporal proximity of the official misconduct, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct. *See* ***State v. Walker***, 154 Wis. 2d 158, 186-87, 453 N.W.2d 127 (1990) (citing the ***Brown*** analysis as the proper test in attenuation cases); ***Simmons***, 220 Wis. 2d at 781. It is the State's burden to prove attenuation. ***State v. Phillips***, 218 Wis. 2d 180, 204-05, 577 N.W.2d 794 (1998).

¶17 The circuit court found that the statements made by the tow truck driver and Halverson's friends were obtained by exploitation of Halverson's unlawful seizure. We agree. As the court noted in its decision, Halverson had the right to, and did, ask Cates to leave his property. Cates should have left upon Halverson's request but did not. Instead, Cates unlawfully seized Halverson, "gets him in the squad" and then "just stand[s] around." While standing around, Cates accumulated evidence against Halverson for OWI. The facts surrounding Cates's encounters with the witnesses support the circuit court's determination. The circuit court found that after Halverson asked Cates to leave his property, it was "quite a while" before the tow truck driver appeared at Halverson's residence. In addition, Cates testified that Halverson was detained in the squad car in his own driveway for a total of thirty to forty-five minutes. While Cates indicated a willingness to turn Halverson over to his friends due to his intoxicated condition, Cates's testimony reflects that the focus of the discussions with Halverson's friends and tow truck driver was the accident. We conclude, as did the circuit court, that the witness statements were obtained by Cates through the exploitation of Halverson's unlawful detention.

¶18 Moreover, the State failed to establish that there was a sufficient break in the causal chain between the statements and the unlawful seizure. ***Phillips***, 218 Wis. 2d at 204. Specifically, the circuit court found that, absent the unlawful seizure, there was no reason to believe that Cates would have still been at the scene or would have obtained the witness statements. While the State suggested that there was a "good chance" that the officer would have seen the witnesses arrive in the area even if Halverson had not been detained, there is no evidence in the record indicating as much. The court further found that there was "no reason to believe" that the officer would have driven off the property to "sit on the road and wait to see if anybody show[ed] up."

¶19 Finally, while the circuit court found that it was "quite a while" before the witnesses arrived (in other words there was plenty of time for Cates to leave the premises), the record reflects that Halverson was in custody and handcuffed in Cates's squad car while Cates conversed with the witnesses. There is no indication in the record of any intervening circumstances between the unlawful detention and Cates's encounters with the witnesses. As to whether Cates's conduct was flagrant, the absence of this fact alone is not enough to overcome suppression. *See* ***Walker***, 154 Wis. 2d at 187. Rather, the absence of this factor merely means that less is required in terms of intervening circumstances. ***Id.***

¶20 The circuit court suppressed the evidence based in part on its finding that, in light of the sequence of events, the witness statements would not have been obtained absent the unlawful seizure. Those findings were based both on the testimony and the video recording of the events as they transpired. Because the video recording is not part of the record, we must assume the video recording supports the circuit court's record. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10,

26-27, 496 N.W.2d 226 (Ct. App. 1993). As to our review of the testimony, there is no indication therein that the circuit court's findings are clearly erroneous.

¶21 We conclude that the evidence supports the circuit court's determination that the witness statements were obtained by exploitation of Halverson's unlawful seizure. We are further satisfied that the State otherwise failed to demonstrate a sufficient break in the causal chain between the unlawful seizure and the evidence at issue. *See* ***Simmons***, 220 Wis. 2d at 781. As such, the witnesses' statements were properly suppressed.

CONCLUSION

¶22 We conclude that Cates was not engaged in an objectively reasonable community caretaker function when he removed Halverson from his home based on Halverson's level of intoxication. There is no indication in the record that Halverson was so intoxicated as to require the aid of law enforcement. In fact, law enforcement did not render or attempt to render any aid to Halverson. We further conclude that the witness statements obtained subsequent to Halverson's unlawful detention are not sufficiently attenuated so as to escape suppression. We therefore uphold the circuit court's granting of Halverson's motion to suppress evidence resulting from his unlawful detention, including the witness statements gathered at the scene of his arrest.

By the Court.—Order affirmed.

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