

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 30, 2011

A. John Voelker
Acting 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 No. 2011AP395

Cir. Ct. No. 2010TR3467

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF MICHAEL P. PARIZANSKI:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL P. PARIZANSKI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
DAVID M. REDDY, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Michael Parizanski appeals from a circuit court order deeming unreasonable his refusal to submit to a chemical test of intoxication under WIS. STAT. § 343.305(10). The primary issue on appeal is whether the arresting officer’s detention of Parizanski was justified as a community caretaker activity. Given the totality of circumstances, we conclude that it was. We further conclude that the circuit court properly exercised its discretion when it denied for purposes of the refusal hearing Parizanski’s request to exclude the evidence stemming from the stop because it was conducted outside of the officer’s jurisdiction. We therefore affirm the circuit court’s order finding Parizanski’s refusal unreasonable.

BACKGROUND

¶2 Village of Fontana police officer Aaron West testified at a refusal hearing as to the facts underlying Parizanski’s detention. In the early morning hours of September 1, 2010, West observed a vehicle pulled over on the side of Highway 67 near the intersection of Stearns Road. West noted that the vehicle lights were on. West observed the vehicle “for a few seconds” and then “stopped to check to see if the driver needed any assistance.” West drove behind the vehicle, activated his overhead emergency lights and notified dispatch that he would be checking on the vehicle and the driver.

¶3 The driver of the vehicle, later identified as Parizanski, had lowered his window approximately three inches. West asked the driver if everything was all right; Parizanski responded that he had run out of gas. It was at this point that

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

West noted “the odor of intoxicants emitting from the vehicle” and observed “that the driver’s eyes were red bloodshot and glassy and ... his speech was slurred.” West also noted that Parizanski fumbled and “had difficulty” pulling his identification out of his wallet and operating his window. When asked, Parizanski admitted to having two beers.

¶4 West returned to his squad car, requested backup and proceeded to administer field sobriety testing. Parizanski’s performance caused West to believe he was impaired. West placed Parizanski under arrest and transported him to the Fontana police department. When asked to submit to an evidentiary test of his blood, Parizanski responded by requesting to speak to a lawyer or a family member and refused to further respond to West’s requests.

¶5 The circuit court held a refusal hearing at which West testified. Parizanski raised issues related to whether West was acting outside of his jurisdiction at the time of the stop and whether he was engaged in bona fide community caretaker activity when he detained Parizanski. After additional briefing, the circuit court held a second hearing at which both the State and Parizanski presented extensive argument on both issues. The circuit court ultimately determined that (1) West’s initial detention of Parizanski was justified community caretaker activity and (2) the fact that West was approximately 200 feet outside of his jurisdiction when he approached Parizanski did not negate the valid community caretaker activity. Parizanski appeals.

DISCUSSION

¶6 A circuit court conducting a refusal hearing may consider “whether the [defendant] was lawfully placed under arrest” and thus, may inquire into whether the defendant was lawfully stopped.² *State v. Anagnos*, 2011 WI App 118, ¶21, ___ Wis. 2d ___, ___ N.W.2d ___ (citing WIS. STAT. § 343.305(9)(a)5.a.). While we will uphold findings of historical fact unless they are clearly erroneous, WIS. STAT. § 805.17(2), the circuit court’s conclusion regarding the nature and reasonableness of an officer’s conduct are legal issues subject to independent review, *State v. Dull*, 211 Wis. 2d 652, 658, 565 N.W.2d 575 (Ct. App. 1997).

¶7 Officers may exercise two types of functions: law enforcement functions and community caretaker functions. *State v. Pinkard*, 2010 WI 81, ¶18, 327 Wis. 2d 346, 785 N.W.2d 592. An officer exercises a community caretaker function “when the officer discovers a member of the public who is in need of assistance.” *Id.* (citing *State v. Kramer*, 2009 WI 14, ¶32, 315 Wis. 2d 414, 759 N.W.2d 598). In such situations, an officer may conduct a seizure within the meaning of the Fourth Amendment, provided that the seizure based on community caretaker function is reasonable. *State v. Anderson*, 142 Wis. 2d 162, 167-68, 417 N.W.2d 411 (Ct. App. 1987).

[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

² In light of this court’s holding in *State v. Anagnos*, 2011 WI App 118, ___ Wis. 2d ___, ___ N.W.2d ___, we need not address the State’s contention that the issues to be determined at a refusal hearing do not include whether the community caretaker function justified the detention.

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.

Id. at 169, 417 N.W.2d 411. Here, the State asserts that West was acting in a community caretaker capacity when he approached Parizanski's vehicle. The State does not dispute that a seizure occurred. As did the *Kramer* court, we assume for purposes of our review that a seizure occurred. See *Kramer*, 315 Wis. 2d 414, ¶22. We therefore turn to the second and third inquiries under *Anderson*.

¶8 In looking to whether West was engaged in bona fide community caretaker activity, we examine whether, under the totality of circumstances, West "had an objectively reasonable basis for deciding that a motorist may have been in need of assistance" when he stopped behind Parizanski's vehicle. See *Kramer*, 315 Wis. 2d 414, ¶¶30, 37. In doing so, we look to the supreme court's decision in *Kramer* for guidance. There, the supreme court considered whether a police officer's stopping of his squad car behind a vehicle legally parked on the side of the road with its hazard lights on was conduct falling within the scope of the community caretaker function. *Id.*, ¶2.

¶9 In determining that the officer was engaged in community caretaker activity, the *Kramer* court noted the following facts: the vehicle was parked on the side of a highway after dark with its hazard flashers operating; it was the officer's experience that when a vehicle is parked on the side of the road with its hazard flashers operating, typically there is a vehicle problem; the officer did not know what was going on inside the vehicle, or whether there was a driver present; the officer's first contact with the driver was to offer assistance. *Id.*, ¶¶37-38.

¶10 Here, West testified that Parizanski’s vehicle was pulled over onto the partially paved shoulder of a two-lane highway. It was in the early morning hours, dark out, and Parizanski’s “lights were on.” West testified that, according to the map presented at the hearing, the vehicle was stopped outside of the village of Fontana borders. That same map indicates that there were no side streets off of that stretch of Highway 67 where Parizanski was stopped. As did the officer in *Kramer*, West identified a concern that Parizanski may be in need of assistance. He testified, “Often we see cars pulled over and I wanted to check to see if he needed any assistance I felt I wouldn’t have been diligent in my job if I didn’t check to see if the person needed assistance.” Indeed, West’s first inquiry upon approaching Parizanski’s vehicle was whether everything was all right.

¶11 Based on the totality of circumstances in this case, particularly the location of the stop—on a country highway outside of the village center and the early morning hour, we conclude that West had an objectively reasonable basis to decide that Parizanski may have been in need of assistance. *See Kramer*, 315 Wis. 2d 414, ¶¶30, 37. We therefore turn to whether West’s exercise of that community caretaker function was reasonable or, in other words, whether public need and interest furthered by West’s conduct outweighed the intrusion upon Parizanski’s privacy. *Id.*, ¶¶40-41.

¶12 In balancing the public need against the individual’s privacy, we consider: (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.

¶13 As to the first factor, we note the *Kramer* court’s observation that “the public has a substantial interest in ensuring that police assist motorists who may be stranded on the side of the highway, especially after dark and outside of an urban area when help is not close at hand.” *Id.*, ¶42. These facts, present here, weigh in favor of reasonableness. Our consideration of the second factor—the time, location and degree of overt authority displayed—also weighs in favor of reasonableness. The circuit court found that West first observed Parizanski’s vehicle at 1:13 a.m. on the shoulder of a state highway outside the village borders. Although West activated his emergency lights, he did so for safety reasons, and in making contact with Parizanski, West simply asked whether everything was all right. This sort of contact, stopping to offer assistance to motorists, is “not only authorized, but constitute[s] an important duty of law enforcement.” *Id.*, ¶42 (citation omitted). As to the third factor, the community caretaker activity did involve the stop of an automobile. Again, we note the *Kramer* court’s observation that this approach—walking up to the vehicle and asking whether assistance is needed—is a reasonable exercise of a community caretaker function when a vehicle is parked on the side of a highway. *Id.*, ¶44.

¶14 Turning to the final factor, the feasibility and availability of alternatives, we acknowledge Parizanski’s objection to the fact that West observed his vehicle for only a few moments and, in that time, did not see Parizanski signal for assistance or indicate he was in any kind of physical distress. However, the *Kramer* court considered and rejected the suggestion that the officer should have driven past the car, left Kramer alone for a few minutes and returned later. The court concluded that it is more reasonable to simply check on the vehicle than to risk that the driver, if stopped due to a health problem, would have needed prompt medical attention or that the driver, if stopped due to a vehicle problem, would exit

the vehicle to walk along a dark highway in search of assistance. *Id.*, ¶45. When an officer has an objectively reasonable belief that an individual may be in need of assistance, the officer is not required to take a wait and see approach by driving around (leaving the individual alone) and returning later. *See id.* We are satisfied, based on West's initial observations and the location of the stop, that stopping briefly to make contact with Parizanski was the only reasonable means of determining whether he was in need of assistance. This fourth factor, like the others, weighs in favor of concluding that West reasonably performed his community caretaker function.

¶15 We conclude, under the totality of the circumstances, that West was engaged in bona fide community caretaker activity when he approached Parizanski's vehicle and that his performance of that community caretaker function was reasonable.

¶16 As a final matter, we address Parizanski's contention that he is entitled to the suppression of evidence because West was acting outside his jurisdiction and contrary to WIS. STAT. § 175.40³ when he stopped Parizanski's

³ WISCONSIN STAT. § 175.40 governs police arrests and assistance. It provides in relevant part:

(6)(a) A peace officer outside of his or her territorial jurisdiction may arrest a person or provide aid or assistance anywhere in the state if the criteria under subds. 1. to 3. are met:

1. The officer is on duty and on official business.
2. The officer is taking action that he or she would be authorized to take under the same circumstances in his or her territorial jurisdiction.
3. The officer is acting to respond to any of the following:

(continued)

vehicle. The record reflects that while West was in his jurisdiction when he first saw Parizanski's vehicle, Parizanski was actually parked 200 feet outside of West's jurisdiction.

¶17 Both parties cite to *State v. Popenhagen*, 2008 WI 55, ¶¶68, 70, 309 Wis. 2d 601, 749 N.W.2d 611, for the proposition that, even if there were a statutory violation, the suppression of evidence is within the discretion of the court. *See also State v. Keith*, 2003 WI App 47, ¶9, 260 Wis. 2d 592, 659 N.W.2d 403 (suppression not required merely because an officer acts outside of his or her jurisdiction). The parties disagree as to whether suppression is appropriate in this case. However, the circuit court determined that West was engaged in bona fide community caretaker activity when he approached Parizanski's vehicle. The court further determined that the fact that West was outside of his jurisdiction by 200 feet at the time of the stop did not negate the validity of the initial stop. In light of its determination that West was engaged in a reasonable community caretaker function when he stopped Parizanski's vehicle, the circuit court did not erroneously exercise its discretion in denying Parizanski's request to exclude evidence stemming therefrom for purposes of the refusal hearing.⁴

-
- a. An emergency situation that poses a significant threat to life or of bodily harm.
 - b. Acts that the officer believes, on reasonable grounds, constitute a felony.

⁴ Parizanski does not challenge his subsequent arrest under WIS. STAT. § 175.40.

CONCLUSION

¶18 We conclude that the stop of Parizanski's vehicle fell within the scope of West's community caretaker function. We further conclude that the circuit court properly exercised its discretion when it denied Parizanski's request to exclude the evidence stemming from the stop due to the fact that West was acting outside of his jurisdiction. We therefore affirm the order deeming Parizanski's refusal unreasonable.

By the Court.—Order affirmed.

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

