

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 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. 2011AP904

Cir. Ct. No. 2010TR3122

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN B. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

¶1 REILLY, J.¹ Benjamin Schultz appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration. As Schultz drove by an officer conducting a traffic stop, the passenger door on Schultz’s vehicle opened up and someone inside of Schultz’s vehicle yelled out. The officer called for backup and Schultz was soon stopped by another police officer and arrested for operating with a prohibited alcohol concentration. He appeals his conviction, arguing that the stop of his vehicle was not justified by the community caretaker exception to the warrant requirement. We disagree and affirm his conviction.

BACKGROUND

¶2 Officer Jonathan Smith of the City of Sheboygan Police Department was on routine patrol during the evening of June 19, 2010, when he stopped a vehicle for an “equipment violation.” As Smith was conducting the stop in the right lane of a two-lane street, a silver Ford Taurus drove by Smith in the left lane. Smith testified that as the Taurus drove by, the passenger door opened and someone in the car yelled out.

¶3 Smith called for backup, and shortly thereafter Officer Spencer Wilson arrived. Smith told Wilson what happened and showed him where the vehicle went. Wilson subsequently pulled over the Taurus. The driver—Schultz—was later arrested for operating a motor vehicle with a prohibited alcohol concentration.

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

¶4 Schultz filed a motion to suppress on the grounds that Wilson did not have probable cause or reasonable suspicion to conduct a traffic stop. The circuit court rejected the motion after it found the testimony of the officers credible and that they appropriately exercised their community caretaker functions. Schultz was convicted of operating a motor vehicle with a prohibited alcohol concentration and now appeals.

STANDARD OF REVIEW

¶5 Whether a search and seizure is justified under the community caretaker function is a question of constitutional fact. *State v. Ultsch*, 2011 WI App 17, ¶9, 331 Wis. 2d 242, 793 N.W.2d 505 (Ct. App. 2010). A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We first review the circuit court's findings of historical fact under the clearly erroneous standard. *Id.* Second, we apply de novo review to the application of those facts to constitutional principles. *Id.*

DISCUSSION

¶6 Police officers may exercise two types of functions: law enforcement and community caretaker. *State v. Pinkard*, 2010 WI 81, ¶18, 327 Wis. 2d 346, 785 N.W.2d 592. An officer exercises a community caretaker function when he or she discovers a member of the public who is in need of assistance. *Id.* An officer does not need probable cause or reasonable suspicion to act when the officer is exercising his or her community caretaker functions. *See State v. Kramer*, 2009 WI 14, ¶29, 315 Wis. 2d 414, 759 N.W.2d 598. The community caretaker function is thus a police action separate from the

investigation of a crime. See *State v. Anderson*, 142 Wis. 2d 162, 167, 417 N.W.2d 411 (Ct. App. 1987).

¶7 While the community caretaker function is not like a typical search and seizure, Fourth Amendment considerations still apply. *Anderson*, 142 Wis. 2d at 167-68. We apply a three-part test to determine whether an officer was lawfully exercising his or her community caretaker functions: (1) did a seizure occur?; (2) if yes, was the police conduct a bona fide community caretaker activity?; and (3) if yes, did the public need and interest outweigh the intrusion upon the privacy of the individual? *Id.* at 169.

¶8 There is no question that Schultz was seized. We thus move to the second part of the test. When determining whether an officer was acting as a community caretaker, a court must examine the totality of the circumstances at the time of the police conduct. *Kramer*, 315 Wis. 2d 414, ¶30. The circuit court concluded that if a car drives by a police officer with its door open and one of the passengers yells out, the officer has a duty to investigate the situation to make sure no one in the car is in danger. We agree that the investigation of this situation clearly falls within an officer's community caretaker function.

¶9 We now turn to the third part of the test: whether the public need and interest outweighed the intrusion upon the privacy of Schultz. Given that Officer Smith testified that while he was conducting a traffic stop a car drove by with an open passenger door and one of the occupants yelling, it was reasonable for Smith to investigate to find out if someone in the vehicle needed assistance, as there is no rational reason for a citizen to open his car door as he drives by a police officer conducting a traffic stop. As it was reasonable for the officer to determine

if someone in Schultz's car was in danger or needed assistance, we hold that the public safety interests outweighed the privacy interests of Schultz.

CONCLUSION

¶10 Schultz's conviction is affirmed.

By the Court.—Judgment affirmed.

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

