**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 16, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP2743** **Cir. Ct. No. 2012TR25198**

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

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**DANE COUNTY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSHUA H. QUISLING,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County: RHONDA L. LANFORD, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Joshua Quisling appeals a judgment of the circuit court finding him guilty of first offense operating a motor vehicle while

[1] The decision at issue on appeal was rendered by Judge Lanford's predecessor, Judge Rebecca St. John. This appeal is decided by one appellate judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version, the version in effect at all pertinent times here.

intoxicated pursuant to WIS. STAT. § 346.63(1)(a). Quisling argues that the circuit court erred when it concluded that the stop of the vehicle Quisling was driving was justified under the community caretaker doctrine and, therefore, the circuit court erred in denying Quisling's motion to suppress evidence of intoxication acquired after the stop. I disagree, and affirm the circuit court.

¶2 On October 24, 2012, at approximately 1:54 a.m., Quisling was driving a car in the City of Middleton when a police officer in a marked squad car activated the squad's flashing lights and stopped Quisling based on a tip that Quisling was suicidal. The officer approached Quisling and observed signs of intoxication. Quisling was eventually charged with the OWI offense described above. What happened after the stop does not matter for purposes of this appeal. Rather, the only dispute on appeal is whether Quisling was properly stopped under Wisconsin's community caretaker doctrine.

¶3 The parties agree that a three-part test applies to the determination of whether an action is a valid community caretaker function:

> "[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 (quoting ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)); *accord* ***State v. Kelsey C.R.***, 2001 WI 54, ¶35, 243 Wis. 2d 422, 626 N.W.2d 777.

¶4 The parties agree that the first part of the test is met; Quisling was seized within the meaning of the Fourth Amendment.

¶5 Although Quisling seems to challenge the second part of the test on appeal, he has forfeited this challenge by not raising it before the circuit court. Without objection, the circuit court stated that the "defense is not disputing that the police were acting in a bona fide community caretaker activity, and I agree." We do not "blindside trial courts with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995).

¶6 What remains is the parties' dispute as to whether the third part of the community caretaker function test is met. To repeat, the third part asks whether the exercise of a bona fide community caretaker function was reasonable. As explained in ***Kramer***, consideration of this part of the test is done

> by balancing a public interest or need that is furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen.
>
> The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable. In balancing these interests, we consider 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.

***Kramer***, 315 Wis. 2d 414, ¶¶40-41 (footnote, citations, and quoted sources omitted). Accordingly, we turn our attention to the four factors listed in ***Kramer***.

*1. Public Interest And The Exigency*

¶7 As to the first factor, the public plainly has an interest in preventing people from committing suicide who might be temporarily in distress. And, the police here had reason to believe the situation was urgent. The circuit court gave a good summary of the police's source of information and why this informant was credible:

> I started [by] ... looking at the nature of the tip.... Here we had an informant who identified herself, gave her—had a relationship with the defendant, including knowledge about previous suicidal statements, gave her address and phone number to police officers, and updated the police officers about repeated texts and conversations or communications she was having with the defendant.
>
> She also was very specific, talking about where the defendant was in traffic and a lot of her information was actually confirmed during the investigation. The ping,[2] while not getting the precise location, got within half a mile or so of the location that the informant—or the person who called in gave in terms of location of the defendant.

The circuit court's comments are based on evidence of multiple text messages between the informant and Quisling and numerous phone calls between the informant and Quisling, the informant and police, police and Quisling's mother, and police and Quisling. Of particular concern, the informant told police that Quisling:

- Made suicidal statements about four weeks prior, including the statement that he would put a bullet in his head.
- Was currently "angry."

[2] "Ping" is a reference to a cellular company assisting police in locating a person by determining a cell phone's location using cell phone towers.

- Threatened to "end it all after his last bottle."
- Threatened to "drive his car into oncoming traffic."

Also important is evidence that Quisling misled the police. In one instance, police made contact with Quisling who told an officer that he was at a downtown Madison bar and that he would wait for police, but, when police responded to that location, Quisling was not present. Also, during one phone call with a police officer, Quisling stated that he was not driving, but then an officer spotted a person driving a car matching the description of the suspect car in the approximate location police acquired from Quisling's cellular company.

¶8 Quisling acknowledges that a current threat of suicide presents a public interest issue and a sufficient exigency. Quisling argues, however, that police obtained evidence before the stop that contradicted the informant and dissipated the threat. Quisling argues that the following should have persuaded the police that he was not suicidal:

- Quisling had no known history of suicide attempts.
- There was no "reason to believe that [Quisling] was in possession of a weapon or any other instrumentality particularly suitable for carrying out a suicide attempt."
- Quisling's mother did not believe Quisling was suicidal.[3]
- Quisling personally told police by phone that he was fine and would talk with police the next day.

[3] In places, the record refers to Quisling's "parents," but it appears to me that police learned only Quisling's mother's view of the situation. Accordingly, I refer only to Quisling's mother. Whether police had information from one parent or both does not affect my analysis.

- Police received no reports of "slurred speech, incoherence or ... otherwise disorganized behavior."[4]

Like the circuit court, I do not find these pieces of information, individually or collectively, persuasive.

¶9 My starting point is two facts: first, police had good reason to think that a woman with substantial personal knowledge of Quisling believed, based on Quisling's recent and current behavior and statements, that Quisling was suicidal, and, second, that Quisling actively avoided the police and lied about driving his car. Support for these facts is summarized above, and I will not repeat it here. The question is whether the five pieces of information Quisling relies on dissipate the reasonable concern that police would have had based on other information.

¶10 Regarding Quisling's first point, it is true that police had no information as to whether Quisling had previously attempted suicide. But police were told that Quisling had previously talked about putting a bullet in his head. Thus, there was reason to think that Quisling had at least some history that was cause for concern.

¶11 Regarding Quisling's second point, I do not agree that Quisling was not in possession of an instrumentality "particularly suitable for carrying out a suicide attempt." As the circuit court observed, Quisling could have used the car he was driving very effectively to harm both himself and others.

[4] Quisling also asserts that there were no "observations suggesting agitation." This is literally true in the sense that the informant did not observe Quisling in person. However, a dispatcher related that the informant told police she "just spoke with Josh who is currently driving ... [and] Josh is very upset and angry as well as very intoxicated." Thus, I disagree with what I perceive to be the thrust of Quisling's assertion: that police did not have information indicating that Quisling was agitated.

¶12 The fact that police learned that Quisling's mother did not believe Quisling was suicidal carries some weight. However, when faced with conflicting information, it was reasonable for the police to think that Quisling was more candid with a friend than with his mother, especially on the topic of whether he intended to harm himself.

¶13 Regarding the fact that Quisling told a police officer by phone that he was fine, the problem is the same as it is regarding information from Quisling's mother. If Quisling meant to harm himself—and perhaps others—he might have been motivated to lie to avoid being stopped. As the circuit court explained, Quisling's statements to the police indicating that he was okay and would talk with them the following day "could be seen, given the totality of the circumstances, as just an effort to push off police officers so he could do something potentially fatal to himself and other people as well."

¶14 Finally, regarding Quisling's point that police received no reports of "slurred speech, incoherence or ... otherwise disorganized behavior," it is not apparent why this matters. Quisling provides no support for the proposition that people exhibiting these symptoms are more or less likely to commit suicide.

¶15 In sum, the first factor favors the conclusion that police engaged in a proper community caretaker function.

*2. Circumstances Of Seizure*

¶16 The second factor looks at the "attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed." ***Kramer***, 315 Wis. 2d 414, ¶41. Here, police attempted to make contact with Quisling at a downtown Madison bar. When that effort failed

because Quisling was not where he told police he would be, police continued searching for him. Eventually, an officer spotted a vehicle that the officer had good reason to believe was being driven by Quisling, and what followed was a normal traffic stop. The officer engaged his flashing lights, Quisling pulled over, and the officer approached Quisling's car where he found Quisling talking on his cell phone. So far as the record discloses, the contact with Quisling here was comparable to the contact the supreme court approved of in ***Kramer***, where the officer activated his squad's flashing lights and approached on foot. *See* ***id.***, ¶¶5-6, 43.

¶17 Quisling points to nothing that suggests that the manner in which police made contact with him was inconsistent with checking on Quisling's well-being. Indeed, Quisling's discussion of this topic largely sidesteps the stop itself. To the extent Quisling does discuss the circumstances of the stop, he merely points to the late hour.

¶18 We agree with the circuit court that this factor supports the conclusion that the officer was engaged in a proper community caretaker function.

*3. Automobile*

¶19 The third factor looks at whether an automobile is involved. Why the list of factors sets forth this one separately from the second "circumstances" factor is not clear to me. In ***Anderson***, we listed this factor and then stated in a footnote: "In some situations a citizen has a lesser expectation of privacy in an automobile. Despite this diminished expectation of privacy, fourth amendment considerations still apply." ***Anderson***, 142 Wis. 2d at 169-70 n.4 (citations omitted). We went on to contrast the automobile situation with approaching an individual in a public place. *See* ***id.*** The suggestion seems to be that the public

interest and exigency needed are lowest when approaching a person who is on foot in a public place and, perhaps, highest when entering a home. Stopping an automobile falls somewhere in between.

¶20 Thus, taking into account the proposition that the justification for a community caretaker automobile stop must be more than the justification for a community caretaker stop of a person on foot in a public place, I conclude that the information known to police here weighs in favor of the stop. The information was more than needed to stop Quisling on foot in a public place and, perhaps, less than needed to enter his residence.

*4. Alternatives*

¶21 The fourth factor looks at the availability, feasibility, and effectiveness of alternatives to the action the police actually took. Here, the action was engaging in a traffic stop of the vehicle Quisling was driving. Regarding this factor, I agree with the County that police had no apparent alternative, save not making personal contact with Quisling at all.

¶22 Addressing the fourth factor, Quisling argues that the stop was unnecessary. But that argument addresses the necessity of making contact, not the alternative courses of action police could have taken.

¶23 Quisling does touch on the alternative of contacting him by phone, but Quisling's discussion presupposes that the phone contact police did have with Quisling should have satisfied them that Quisling was not suicidal. I have already rejected that argument.

*5. Balancing*

¶24 What remains is balancing. As explained above, consideration of the third part of the community caretaker function test involves balancing public interest or need furthered by the officer's conduct against the degree of and nature of the intrusion. As should be apparent by now, I do not view this as a close case. Police had seemingly reliable information that Quisling was suicidal and might try to kill himself by driving into oncoming traffic. When this danger is balanced against the relatively minor intrusion of stopping the car Quisling was driving, the balancing easily favors a traffic stop.

¶25 For the reasons stated, I agree with the circuit court that police engaged in a valid community caretaker function.

*By the Court*.—Judgment affirmed.

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