COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP94-FT **Cir. Ct. No. 2014CV1389**

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

VILLAGE OF CHENEQUA,

PLAINTIFF-APPELLANT,

V.

CHAD C. SCHMALZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed*.

¶1 REILLY, J.[1] The Village of Chenequa appeals an order dismissing charges of operating a motor vehicle while intoxicated (OWI) and with a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

prohibited alcohol content (PAC) following the circuit court's decision to grant Chad Schmalz's suppression motion. We affirm as the Village has the burden of proof on motions to suppress evidence and the Village did not meet its burden.

BACKGROUND

¶2 Village of Chenequa Police Officer Richard Johns was driving his squad car about 3:00 a.m. on a Sunday when he observed a Chevy Tahoe traveling nine miles per hour below the thirty-five-mile-per-hour speed limit. Johns further observed that the Tahoe was "traveling very close to the fog line" and decided to follow the vehicle.

¶3 When he was about three- to four-car lengths behind the Tahoe, Johns saw a deer appear from a line of trees at the right side of the road. The deer crossed in front of the Tahoe, colliding with the driver's side corner of the vehicle and then "spin[ning] helicopter into the roadway into the northbound lane." Johns saw the Tahoe's brake lights go on, indicating that the driver "did tap the brake slightly just before impact." But the Tahoe did not immediately stop, which Johns believed was "not normal driving behavior" as a driver would normally stop to check whether his or her vehicle was safe for travel after hitting an animal as large as a deer. Johns did not observe any damage to the Tahoe from his position nor did he see the vehicle swerve or exhibit any visible signs of distress. Johns stopped the vehicle, identified the driver as Schmalz, and subsequently cited Schmalz for OWI and PAC.

¶4 Following his conviction in municipal court, Schmalz requested a trial before the circuit court, where he filed a motion to suppress the evidence on the basis that the stop was unlawful. The court granted Schmalz's motion, finding that none of the observed driving behavior prior to the stop either individually or

cumulatively amounted to reasonable suspicion that a crime was being committed. The court found that Schmalz's slow speed was reasonable, given the darkness and the presence of deer in the area, and that driving next to the fog line also was not suspicious. The court found no evidence from which it could infer that Schmalz saw the deer until hitting it and noted that there is no traffic law that requires a driver to stop after striking a deer. The court concluded that the stop was based on "conjecture" and "perhaps a good guess" but stated that "I don't think a guess is enough." Finding the Village would not be able to meet its burden of proof without the evidence obtained following the stop, the court dismissed the charges. The Village appeals.

STANDARD OF REVIEW

¶5 Whether there is a lawful reason to stop a vehicle presents a mixed question of law and fact. ***State v. Brown***, 2014 WI 69, ¶17, 355 Wis. 2d 668, 850 N.W.2d 66. We will uphold a circuit court's findings of fact unless they are clearly erroneous, but we independently review the application of those facts to constitutional principles. ***Id.***

DISCUSSION

¶6 In evaluating the lawfulness of a stop, we consider the totality of the circumstances leading up to the stop and the reasonableness of the officer's actions in the situation. ***State v. Miller***, 2012 WI 61, ¶30, 341 Wis. 2d 307, 815 N.W.2d 349. "The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." ***State v. Waldner***, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996). The burden is on the Village to prove the

stop meets the constitutional reasonableness requirement. ***Brown***, 355 Wis. 2d 668, ¶20.

¶7 The Village argues that Johns had reasonable suspicion to justify the stop based on the accumulation of these facts: (1) the time of day and day of the week, (2) Schmalz's slow rate of speed, (3) the vehicle's closeness to the fog line, and (4) Schmalz's failure to avoid a collision with the deer and subsequent failure to stop. We agree with the circuit court that these facts are insufficient to meet the Village's burden to show that the stop of Schmalz's vehicle was reasonable.

¶8 At the outset, we reject the Village's argument that Schmalz's driving under the posted speed limit constitutes suspicious behavior. We likewise reject the argument that driving within a few inches of the fog line, with no other erratic driving, is somehow indicative of impairment. *Cf.* ***State v. Post***, 2007 WI 60, ¶37, 301 Wis. 2d 1, 733 N.W.2d 634 (finding reasonable suspicion by accumulation of traveling across travel and parking lanes, weaving in an S-pattern, and canting in a parking lane). Adopting the Village's position that either of these lawful behaviors gives rise to reasonable suspicion of criminal activity would subject too many innocent people to investigation and invasions of their privacy. *See* ***id.***, ¶20.

¶9 That leaves the Village with only the time of day—3:08 a.m. on a Sunday—and Schmalz's reaction both before and after he struck the deer. The Village makes much of the fact that Schmalz only briefly tapped his brake before the impact with the deer and failed to stop following that impact. In evaluating the evidence presented by the Village at the suppression hearing, the court determined that it could not infer that Schmalz saw the deer prior to impact. The court noted that the Village had not presented evidence that would allow it to review the

positions and line of sight between Schmalz and deer. Left only with inferences from the time of day and day of the week as well as Schmalz's failure to immediately stop after hitting the deer, the court determined that these circumstances were insufficient to provide Johns with reasonable suspicion that Schmalz was committing a crime, i.e., operating while intoxicated. We agree. Johns may have had a "hunch" that Schmalz was impaired due to intoxication, but more is needed for the Village to meet its burden of proving that the stop was reasonable. *See* ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968).

¶10 The Village next argues that even if the stop was not supported by reasonable suspicion, it was justified by Johns' "community caretaker" role. We note that we are generally wary of considering arguments that were not decided by the circuit court. ***Vollmer v. Luety***, 156 Wis. 2d 1, 10-11, 456 N.W.2d 797 (1990). This issue was fully briefed by Schmalz in the court below, however, and can be easily dispatched on appeal.

¶11 To justify a seizure under a law enforcement officer's community caretaker function, the Village must show that the seizure was in the exercise of a "bona fide community caretaker activity" and that the public need and interest outweighed the intrusion upon the seized person's privacy. ***State v. Kramer***, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598. For the seizure to constitute a "bona fide community caretaker activity," it must be based upon the officer's function to render assistance and not for the purpose of conducting a criminal investigation. ***Id.***, ¶¶23, 39.

¶12 The Village points to Schmalz's "unusual vehicle conduct" to argue that Johns was justified in stopping Schmalz to see if he was in need of assistance. Here again, the Village's argument that it constitutes "unusual vehicle conduct" to

travel at a legal speed and within a traffic lane (albeit close to the edge) is a nonstarter. Furthermore, if Johns did not have grounds to stop Schmalz's vehicle to render assistance before the deer was struck, he did not gain any grounds afterward when the only "unusual" behavior observed was Schmalz's failure to immediately stop his vehicle as it continued on a straight path of travel with no apparent signs of distress or damage. The Village does not point to any facts that could give rise to a reasonable belief that Schmalz required assistance. Hitting a deer that jumps in front of one's vehicle and failing to stop to inspect for possible damage to the vehicle are insufficient grounds upon which to assert a bona fide community caretaker function.

By the Court.—Order affirmed.

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