COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP490-CR **Cir. Ct. No. 2014CT1205**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN D. MYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOSANN M. REYNOLDS, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] John Myer challenges a suppression ruling of the circuit court in this appeal of a judgment finding him guilty of operating a

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

motor vehicle while intoxicated, second offense. Myer argues that, while he sat apparently sleeping or unconscious in his vehicle, he was unreasonably seized by a police officer in violation of the Fourth Amendment, and therefore all evidence obtained following his seizure should have been suppressed. I affirm the circuit court's denial of the suppression motion and denial of a motion for reconsideration because I conclude that, assuming without deciding that the officer's conduct constituted a seizure under the Fourth Amendment, this conduct was lawful because the officer acted in a community caretaker capacity.

Background

¶2 Myer filed a motion to suppress. At the suppression hearing, the State moved for denial of the motion "without a hearing based upon the factual allegations within the defendant's motion." The defense agreed that the court should base its analysis on the factual allegations in the motion without taking evidence. Relying on these assumed facts, the court denied the motion to suppress.

¶3 Myer moved for reconsideration. The court held an evidentiary hearing. The only witness was an officer, who testified in pertinent part as follows.

¶4 The officer had 15-16 years' experience as a police officer and 30 years' experience as a firefighter paramedic. At 2:37 a.m. one October night, the officer was on patrol when he noticed a vehicle in the parking lot of a dance studio. The vehicle "was running with its headlights on." The studio was closed, and "to my knowledge" there was "no reason for a vehicle to be in that parking lot at that time of day." The officer could see a person, subsequently identified as Myer, "sitting in the driver's seat with his head back." The officer did not know

how long the vehicle had been sitting in this manner in this location. The officer made a U-turn and entered the parking lot. At some point, the officer observed that, in addition to his head being "back," Myer's jaw was "open."

¶5 Asked if the officer's training and experience suggested "any signs that created apprehension or fear for [Myer's] safety," the officer responded:

> Well, with the way [Myer's] head was back, I've run [into] numerous incidents of alcohol and/or narcotic overdoses where [in many cases] subjects … were shooting up in vehicles or intoxicated in vehicles. And so I wanted to do a welfare check to see the status of that subject, so that's why I made the loop around[,] as well as … to see why he's in [front of] a closed business at 2:30 in the morning.
>
> ….
>
> Again, going back to the paramedic side of my training and experience, if someone has overdosed on a narcotic especially, … it suppresses the body's drive to breathe to the point that they will become hypoxic or apneic[2] or they basically stop breathing and within only a couple of minutes it will cause permanent brain injury and/or death.

¶6 Prompted to say what he did after pulling into the parking lot and why, the officer testified:

> Well, the only way for me to determine whether this is an overdose of a substance or if he's just sleeping is to make actual physical contact with him to see what his physical and mental state is. So I came up behind the vehicle, notified dispatch of my location and what was going on, and then I walked up to the vehicle, knocked on

[2] Hypoxia is "[w]hen all or part of the body doesn't get enough oxygen," and apnea is "[a] temporary pause in breathing during sleep that can be very brief or can last so long that the amount of oxygen in the blood drops dangerously low." Harvard Health Publications, Definitions, http://www.health.harvard.edu/medical-dictionary-of-health-terms/a-through-c#A-terms (last visited 12/14/16).

> the window quick, checked the driver's door and found that the door was open and I opened it.
>
> ….
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> … [O]verdose was in my mind, it was a possibility, or he could have even been sleeping, but the only way for me to determine that is again to make physical contact with him or to communicate with him to see what his physical and mental state is.
>
> ….
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> … [I]f it was an overdose and their drive to breathe was suppressed far enough, we're well into the critical areas for brain damage or death if they're not breathing.

The officer further testified that he stood in a position to catch Myer if he started to fall out of the vehicle, and that he told Myer to turn off the vehicle.

¶7 Asked why he did not wait for Myer to respond to his "quick" window knock, the officer had two responses. First,

> I didn't know at that time whether the door was locked, unlocked, and I tried to get control of the vehicle and because I want that vehicle shut off.
>
> ….
>
> I try to make contact with the subject in the safest fashion that I know how and by that I mean trying to disable the vehicle so that it doesn't move since it's a running vehicle.

Second, the officer wanted "to see what the status of that person is as fast as I can without having to force entry."

¶8 The defense made no meaningful attempt to impeach the officer's testimony and the circuit court credited his testimony. The court denied the motion for reconsideration.

Discussion

¶9 Myer does not challenge any fact found, or implicitly relied on, by the circuit court, and therefore I rely on the officer's testimony as summarized above.[3] I apply the pertinent constitutional principles to the undisputed facts under a de novo standard of review. *See* ***State v. Matalonis***, 2016 WI 7, ¶28, 366 Wis. 2d 443, 875 N.W.2d 567.

¶10 The parties agree that it was a seizure for Fourth Amendment purposes for the officer to open the door of Myer's vehicle without consent and without a warrant. I will assume, without deciding, that this is the case. The State argues that the seizure was justified, if at all, because the officer acted in a community caretaker capacity. For example, the State does not argue that the officer had reasonable suspicion or probable cause before he seized Myer.

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[3] Myer does not explicitly challenge any finding of fact relied on by the circuit court. However, he argues from the premise that the State stipulated in the circuit court that the officer "had no reason to believe" that Myer needed help. I reject this premise for three reasons.

First, the premise is based on an argument contained in Myer's motion to suppress, not an allegation of fact. The State initially agreed that the court could rely on *factual allegations* contained in the motion to suppress for purposes of resolving the motion, but the State did not stipulate to the merits of any arguments contained in the motion. To the contrary, the record reflects that the State took the consistent position that the officer acted as a community caretaker, based on Myer possibly needing help.

Second, Myer fails to explain why, when the court addressed the motion for reconsideration, the court could not reasonably ignore the prior factual stipulation and instead rely solely on the testimony presented (that of the officer) to resolve this issue.

Third, Myer fails to explain where in the record he presented this stipulation-by-the-State argument to the circuit court, and therefore he appears to have forfeited it.

I have the same view of Myer's repeated references to the officer "causing Myer to fall" by opening the door, which was not a fact stipulated to by the State nor a fact testified to at the evidentiary hearing.

¶11 Police may reasonably perform warrantless seizures consistent with the federal and state constitutions if they are "conducted pursuant to a police officer's reasonable exercise of a bona fide community caretaker function." ***Id.***, ¶30. This function can arise "when [an] officer discovers a member of the public who is in need of assistance." ***State v. Kramer***, 2009 WI 14, ¶¶4, 32, 37, 315 Wis. 2d 414, 759 N.W.2d 598 (officer who stopped to check on a vehicle legally parked, with hazard lights activated, on side of highway at 8:45 p.m. "had an objectively reasonable basis for deciding that a motorist may have been in need of assistance").

¶12 A seizure is justified by the community caretaker function if "the police conduct was bona fide community caretaker activity," and "the public need and interest outweigh the intrusion upon the privacy of the individual." ***Id.***, ¶21 (quoted source omitted).

¶13 Myer makes a perfunctory argument that seizure here was not bona fide community caretaker activity. Myer briefly argues that it would have been "mere speculation" to worry that "a man sleeping in a legally parked car" could be in need of assistance due to the harmful effects of alcohol or drug intake. To the contrary, I conclude that the totality of circumstances here—including the time of day, the location, the fact that the vehicle was running, and the posture of Myer, head back and jaw open—demonstrates that the officer's actions were directly related to concern for Myer's physical well being. *See* ***State v. Blatterman***, 2015 WI 46, ¶46, 362 Wis. 2d 138, 864 N.W.2d 26; ***Kramer***, 315 Wis. 2d 414, ¶30.

¶14 Myer spends more effort arguing that the public need and interest in the seizure here did not outweigh the intrusion on Myer's privacy. As Myer recognizes, this involves a balancing of four primary factors:

> (1) [T]he degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the search, 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.

See ***Matalonis***, 366 Wis. 2d 443, ¶33 (quoted source omitted).

¶15 With respect to the first factor, the public has a strong interest in police responding to persons who may be suffering from the effects of harmful substance abuse or other medical emergencies, and the exigencies here were obviously high. Myer argues that "everything" that the officer observed "prior to opening the door was entirely consistent with Myer simply sleeping." It is true that Myer could have been "simply sleeping," but there was also a realistic possibility that he was at risk of harm.

¶16 The second factor—the time and location of the search, and the degree of overt authority and force displayed—also weighs primarily in favor of a conclusion that the officer reasonably exercised a community caretaker function. The officer responded as one would expect a responsible officer to respond, and did not use excessive force or commands for the circumstances. Opening the door and having Myer turn off the ignition was a reasonable approach. Myer argues that the only reasonable response would have been for the officer to rap on the vehicle window and allow an "appropriate time" for a response from Myer. Among other problems, this ignores the fact that the vehicle was running. A running vehicle with a sleeping or passed-out driver at the wheel is a potential hazard in itself, and the officer could reasonably have decided on the spot that he needed to address that in a direct manner.

¶17 The third factor is whether an automobile was involved, due to the reduced Fourth Amendment protections in that context. The officer here was presented with a running vehicle.

¶18 The fourth factor, involving the availability, feasibility, and effectiveness of alternatives to the seizure, also weighs in favor of the State. Myer argues that a "simple knock" would have sufficed. It is conceivable that a "simple knock" might have resulted in a prompt, safe, and reassuring response that Myer could have clearly communicated to the officer through the vehicle window or otherwise. However, in addition to the running vehicle problem referenced above, the officer was presented with someone who might have needed immediate care, on a moment-to-moment survival or disability basis. *See* ***State v. Horngren***, 2000 WI App 177, ¶17, 238 Wis. 2d 347, 617 N.W.2d 508 (counting a "split-second" police decision made in response to danger of physical harm in favor of State on fourth factor).

¶19 While ***Kramer*** is distinguishable in several respects, its reasoning is instructive, and Myer's attempts to distinguish that reasoning are weak. Myer argues that, unlike in the situation in ***Kramer*** involving a "stranded" car parked on the side of a road with its hazard lights on, here the officer observed only "a man sleeping in a legally parked car." However, the circumstances here were objectively *more* concerning than the facts in ***Kramer***. Indeed, for the reasons discussed above, it would have been arguably neglectful for the officer to have failed to make immediate, effective contact with Myer, as he sat sleeping or passed out in the running vehicle.

¶20 In sum, I assume that a seizure occurred, and conclude that the State demonstrated that the seizure occurred pursuant to a bona fide community

caretaker function and that the officer's exercise of that function was reasonable under the totality of the circumstances.

By the Court.—Judgment affirmed.

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