

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2017

Diane M. Fremgen
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. 2016AP2536-CR

Cir. Ct. No. 2015CM1552

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRYAN J. LANDWEHR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
LAMONT K. JACOBSON, Judge. *Reversed and cause remanded with directions.*

¶1 STARK, P.J.¹ Bryan Landwehr appeals a judgment of conviction for fourth-offense operating a motor vehicle with a prohibited alcohol concentration (PAC). Landwehr argues the circuit court erred in denying his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

suppression motion because he was unlawfully seized in the curtilage of his home without a warrant. The State concedes this issue, but argues that the community caretaker exception to the warrant requirement is applicable. We disagree. Accordingly, we reverse and direct the circuit court on remand to grant Landwehr's suppression motion.

BACKGROUND

¶2 The facts are undisputed. Officer Mitchell Klieforth was on patrol in his squad car at 8:45 p.m. when he observed a woman staggering down the shoulder of a highway with her back to traffic. Klieforth made contact with the woman, Sarah Paulson, and observed she appeared to be crying, upset and intoxicated. Paulson initially protested the contact, but she eventually asked Klieforth for a ride to her home and entered his squad car.

¶3 As Klieforth drove, Paulson indicated a vehicle stopped at an intersection ahead of them was hers and was being driven by her boyfriend, who was meeting her at their home. Paulson then made several comments that caused Klieforth to suspect the two might have had an altercation or were involved in a domestic dispute. Klieforth called for backup and followed the vehicle to the home.

¶4 As the vehicle pulled into an attached garage, Klieforth followed and parked in the driveway behind it. The driver, later identified as Landwehr, exited the vehicle but remained in the garage. Klieforth approached from outside of the garage with his hand on his utility belt. After he called out "How you doing?" Klieforth directed Landwehr to exit the garage by saying "step outside for a second. I wanna talk to ya." Klieforth did not tell Landwehr he was free to ignore Klieforth or that speaking with Klieforth would be voluntary. Landwehr

complied, and while Klieforth questioned him, a second officer who had arrived at the residence watched over Paulson in Klieforth's squad car. Klieforth had not observed any bad driving by Landwehr and did not testify that he observed evidence suggesting Landwehr was intoxicated at any time before directing Landwehr to exit the garage. During the ensuing questioning, Klieforth concluded that Landwehr was intoxicated and subsequently arrested him.

¶5 Landwehr was charged with operating a motor vehicle while intoxicated and PAC, as fourth offenses. He moved to suppress the evidence Klieforth gathered on the grounds that Klieforth's entry onto the property was unlawful and that Landwehr was illegally seized. After Klieforth's testimony as the sole witness at the suppression hearing, the circuit court concluded Klieforth had reasonable suspicion of a domestic incident when he "ma[de] contact with [Landwehr] in the garage." At a second hearing, and after reviewing a video from Klieforth's squad car recording the above events, the circuit court denied Landwehr's suppression motion, concluding Klieforth's reasonable suspicion permitted him to conduct "a detention or seizure" of Landwehr.

¶6 Landwehr pleaded no contest to fourth-offense PAC. He appeals, and we review the denial of the suppression motion pursuant to WIS. STAT. § 971.31(10). Further facts are discussed below.

DISCUSSION

¶7 On appeal, Landwehr argues that he "was illegally seized in the attached garage of his home without probable cause, much less a warrant." *See State v. Dumstrey*, 2016 WI 3, ¶¶22-23, 366 Wis. 2d 64, 873 N.W.2d 502 (searches and seizures in curtilage presumptively unreasonable without warrant), *cert. denied*, 137 S. Ct. 43 (2016). The State concedes a Fourth Amendment

seizure occurred when Kleiforth instructed Landwehr to step outside of the garage and talk, but it contends, for the first time in this case, Klieforth detained Landwehr pursuant to the community caretaker exception to the warrant requirement.² As the facts are undisputed, we independently review whether an officer's community caretaker function satisfies constitutional standards. *State v. Pinkard*, 2010 WI 81, ¶12, 327 Wis. 2d 346, 785 N.W.2d 592.

¶8 A law enforcement officer's actions as a community caretaker are those that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State v. Kramer*, 2009 WI 14, ¶19, 315 Wis. 2d 414, 759 N.W.2d 598 (citing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). Officers who reasonably perform community caretaker functions may be constitutionally permitted to perform warrantless seizures. *See Pinkard*, 327 Wis. 2d 346, ¶¶14, 20. We assess the application of the community caretaker exception under a three-part test:

(1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.

² Although the circuit court alluded to the community caretaker exception at the first hearing, the State never argued the exception served as a basis to deny the suppression motion. As the respondent, however, the State may raise any argument in defending this appeal, including those inconsistent with positions it took in the circuit court. *See State v. Baeza*, 156 Wis. 2d 651, 657-58, 457 N.W.2d 522 (Ct. App. 1990). The State has abandoned its argument that the seizure was justified by reasonable suspicion of wrongful conduct, and it makes no argument in support of the circuit court's factual findings and conclusions of law. *See State v. Johnson*, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994). The State also does not argue the circuit court's factual finding that Klieforth "ma[de] contact with [Landwehr] in the garage" is clearly erroneous. *See id.*

Id., ¶29. The State bears the burden to show the exception applies. *Id.*

¶9 Because the State concedes a seizure occurred, we move directly to the second part of the test. A law enforcement officer acts as a bona fide community caretaker when he or she “discovers a member of the public who is in need of assistance.” *Kramer*, 315 Wis. 2d 414, ¶32. We evaluate whether an officer had an objectively reasonable basis for the community caretaker function under the totality of the circumstances at the time of the acts in question. *State v. Gracia*, 2013 WI 15, ¶17, 345 Wis. 2d 488, 826 N.W.2d 87.

¶10 The State argues Klieforth was performing a bona fide community caretaker function when he made contact with Landwehr. The State reasons that because Klieforth initially assisted Paulson with getting home, it was necessary to question Landwehr in order to ensure Paulson remained safe once there. Landwehr replies that while Klieforth’s initial contact with Paulson may have involved a community caretaking function, his contact with Landwehr was purely from the standpoint of a criminal investigation. Landwehr is correct. The record illustrates the distinction between the community caretaking and investigatory functions in this case. What began as a community caretaker matter evolved into a law enforcement investigation.

¶11 Klieforth observed a visibly intoxicated woman stumbling on the shoulder of a highway with her back to traffic. Under those circumstances Klieforth reasonably determined Paulson was in need of aid and stopped to assist her within his community caretaker function. Paulson told Klieforth she was walking home from a bar when he initially made contact with her. Paulson resisted Klieforth’s offer of a ride at first because she was upset with Klieforth’s refusal to turn off his emergency lights, but ultimately accepted a ride. The DVD

the circuit court reviewed reflects that initially during the ride Paulson was emotional while referring to her troubled family (a brother in prison). Subsequently, Paulson asked Klieforth several times to leave her alone and let her out of the vehicle. Klieforth testified he did not heed Paulson's requests because she earlier agreed to have Klieforth drive her home. Given that it was late evening and Paulson was alone and intoxicated, this decision was also consistent with Klieforth's community caretaker function.

¶12 While in Klieforth's squad car, Paulson stated a vehicle stopped at an intersection ahead of them was hers and was being driven by her boyfriend, who was meeting her at their home. Klieforth testified he began to believe Paulson and her boyfriend had been in an argument and that she did not want to get him in trouble for something "based on how emotional she was" and the fact that they did not travel home together. When Klieforth questioned her, Paulson denied getting into any fight with her boyfriend and stated she just wanted to go home. She did state her boyfriend was "so mad at her right now," and she needed his money to help support her children. At that point Paulson told Klieforth several times to stop the squad car and let her walk the rest of the way home and that nothing had happened, statements which Klieforth testified raised his suspicion that "now she doesn't want to be near this person." After three or four ignored requests to leave her alone Paulson became more upset and refused to answer Klieforth's questions regarding her boyfriend's name and the physical location of the house. As a result, en route to the residence Klieforth called for backup because he "looked at it as a domestic dispute investigation" As Klieforth pulled into the driveway, Paulson again told Klieforth nothing happened and to leave her alone.

¶13 The record indicates Paulson was not in immediate danger once Klieforth brought her to the residence. Specifically, there were no outward signs that Paulson had been physically injured beforehand, and Paulson also denied several times she had been involved in an altercation. *See State v. Ultsch*, 2011 WI App 17, ¶¶19-21, 331 Wis.2d 242, 793 N.W.2d 505 (concluding limited damage to vehicle after accident plus lack of information about any present condition or injury of the driver did not provide objectively reasonable basis to infer need for assistance). Klieforth testified that he informed the backup officer via radio prior to reaching the residence Paulson was “fine to leave on her own” and also that he “had suspicions that there might be a fight as well.” As Paulson waited in the squad car while Klieforth spoke to Landwehr, Klieforth testified the backup officer, who arrived at the residence at the same time as Klieforth and was observing Paulson in Klieforth’s squad, called out to Klieforth twice to affirm “everything seems fine on this end” Thus, at the point Klieforth directed Landwehr to leave the garage, Paulson, who remained in Klieforth’s squad car, was neither injured nor in need of further assistance. *See Gracia*, 345 Wis. 2d 488, ¶17. Klieforth’s community caretaking function was concluded, and his subsequent contact with Landwehr was “related to detection, investigation, or acquisition of evidence.” *See Cady*, 413 U.S. at 441.

¶14 The State contends—presumably because Klieforth explained he was investigating a domestic disturbance—that an officer’s subjective law enforcement concerns do not otherwise negate a reasonable exercise of the community caretaker function. *Gracia*, 345 Wis. 2d 488, ¶19. While correct, there must also be an objectively reasonable basis for a community caretaker function as distinguished from detection, investigation or acquisition of evidence. *See Kramer*, 315 Wis. 2d 414, ¶¶30, 36. Klieforth offered no additional facts

indicating anyone—be it Paulson, Landwehr or someone in the residence—was objectively in need of further assistance once Paulson safely arrived at home. Under the totality of the circumstances, Klieforth was not acting as a community caretaker at the time he seized Landwehr.

¶15 Even if we assume Klieforth was engaged in a bona fide community caretaker function in seizing Landwehr, the State also fails to carry its burden to show any such function was reasonably exercised under these circumstances. In balancing the public need versus the degree of intrusion on the individual's privacy under the third part of the test, 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.

Id., ¶41.

¶16 On the first factor, we agree with the State's assertion that there is a substantial public interest in preventing violent domestic disputes. However, no exigent circumstances existed at the time Klieforth seized Landwehr requiring Klieforth's immediate aid and assistance. Any danger Paulson faced was purely speculative at the point of the seizure, particularly given both officers' affirmations that Paulson was "fine."

¶17 On the second factor, the State asserts the time of night, isolation of the residence—which was in a rural, wooded area near only a few houses—Klieforth's non-use of force, and the fact that both Paulson and Landwehr would retreat inside together after Klieforth left justified detaining Landwehr. Again, we

note that Klieforth and the backup officer did not observe visible signs of injury nor receive any reports of a violent domestic disturbance. Moreover, Klieforth pulled his squad car into the driveway despite Paulson's request that he leave her alone, and blocked any exit for Landwehr's vehicle. A backup squad car approached and stopped at the same time. Klieforth had Paulson remain in the vehicle with the backup officer as Klieforth approached the garage and demanded to speak with Landwehr. Klieforth directed Landwehr to leave the garage and talk with him. These actions constitute an overt display of authority.

¶18 As to the third factor, while Landwehr's vehicle was tangentially involved in this case, only his residence was subject to police conduct. "[O]ne has a heightened privacy interest in preventing intrusions into one's home." *Pinkard*, 327 Wis. 2d 346, ¶56.

¶19 Regarding the fourth factor, Klieforth had other viable alternatives to seizing Landwehr in his garage. For example, he could have permitted Landwehr to remain in the garage while attempting to speak with him from outside of the curtilage, offered to take Paulson elsewhere for the night, called Landwehr by telephone, or waited until Landwehr entered the home and contacted Landwehr at the front door. If he had probable cause to arrest Landwehr, Klieforth could have applied for a warrant to enter Landwehr's home. Contrary to the State's suggestion, we cannot so casually set aside an individual's right "to retreat into his [or her] own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961); see also *Dumstrey*, 366 Wis. 2d 64, ¶23. Balancing all the above factors, we conclude any discernable community caretaker function in this case was nevertheless unreasonably exercised.

¶20 The community caretaker exception is inapplicable in this case. Without other arguments from the State, we thus conclude Landwehr's constitutional right to be free from unreasonable searches and seizure while in his garage was violated.

By the Court.—Judgment reversed and cause remanded with directions.

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

