

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2528-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PATRICK E. FRITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Patrick Fritz appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI) in violation of WIS. STAT. § 346.63(1) (1997-98). The issue on appeal is whether the arresting officer's

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

detention of Fritz was justified as a community caretaker activity. We conclude it was and the detention was therefore not a violation of the Fourth Amendment. Accordingly, we affirm.

BACKGROUND

¶2 Fritz moved to suppress all evidence obtained as a result of his detention and arrest for OWI on the ground, among others, that the detention violated the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.² Officer Trent Scanlon of the City of Sun Prairie testified as follows at the motion hearing. On January 4, 1998, at approximately midnight, Scanlon was patrolling in a marked squad car when he saw a car legally parked next to the curb. It was a chilly night, probably in the mid thirties. Scanlon knew the car was running because he saw the exhaust emissions. Scanlon noticed a man, later identified as Fritz, sitting upright in the driver's seat of the car. Scanlon testified that: "It was a peculiar hour. We don't have a lot of vehicle traffic at that time of night in Sun Prairie, so when I drove by, I made a mental note to make sure that person is okay. If they are still there in a little while, I will make sure they are okay. I will stop and check."

¶3 About forty-five minutes later, Scanlon drove by the parked car again; it was still parked in the same spot. He noted the man was still seated in the same position and the engine was still running. Scanlon pulled up behind the parked car, while activating his red and blue emergency lights, and exited his car. As he approached the parked car, Scanlon could see that Fritz's eyes were open;

² We interpret Article I, Section 11 of the Wisconsin Constitution in a manner that conforms to the interpretation of the Fourth Amendment to the United States Constitution. *See State v. Harris*, 206 Wis. 2d 243, 251-52, 557 N.W.2d 245 (1996).

he observed nothing abnormal about his appearance and no obvious signs of physical distress. He saw the keys in the ignition. When Fritz rolled the window down, Scanlon immediately smelled intoxicants emanating from the car. While speaking with Fritz, Scanlon noticed Fritz smelled of intoxicants, had bloodshot eyes, spoke slowly in a slurred manner, had impaired motor skills and half-closed eyes. Scanlon requested another officer's assistance to perform a field sobriety test. About three to four minutes later, Sun Prairie Police Officer Scott Gregory arrived to administer the test. When the test was completed, Fritz was arrested for operating under the influence.

¶4 Officer Gregory testified that approximately five to six minutes before Officer Scanlon detained Fritz, he, too, had observed Fritz's car parked and running in the same spot. Officer Gregory testified that he made a mental note of it and intended to go back in half an hour to make sure everything was okay. The weather was drizzly and about thirty degrees.

¶5 Fritz testified, stating he was sitting in his car looking at his paper, waiting for Keith Thomas. The dome light was on, he testified, and the engine was not running. When Officer Scanlon walked up to his car, the officer asked "is everything all right?" and Fritz said "fine."

¶6 Thomas testified that as he was driving to meet Fritz at his car, he saw a squad car pull up behind Fritz's car and he kept on driving. He said no exhaust was coming from Fritz's car, and the dome light was on and Fritz had a newspaper.

¶7 Officer Scanlon testified that he did not recall seeing Fritz reading a newspaper either the first time he passed or when he drove by again; he did not believe the dome light was on and he could not see whether Fritz's eyes were

open. He also testified that he did not recall seeing Fritz reading a newspaper when he went up to Fritz's car.

¶8 At the conclusion of the evidence, the trial court made a number of factual findings. The court resolved the conflicts in testimony by crediting the officers' testimony rather than that of Fritz and Thomas, carefully explaining why it did so. The court found that the parked car was running, it was parked for about forty-five minutes, the window was closed, and Scanlon was motivated by a concern for the well-being of the person in the car when he approached it because he knew that person had been sitting in the parked car with the engine on for forty-five minutes and the hour was late. After briefing, the court determined that Scanlon's conduct in detaining Fritz was justified as a community caretaker activity, and it denied the motion to suppress.

DISCUSSION

¶9 The State concedes that a seizure within the meaning of the Fourth Amendment occurred when Officer Scanlon pulled up behind Fritz's car with the emergency lights on and approached Fritz's car to talk to him. The State also concedes that Officer Scanlon did not at that time have reasonable suspicion to believe Fritz had committed or was about to commit an offense. Therefore, the dispositive issue is whether the seizure comes within the community caretaker exception. In evaluating the State's claim that it does, we must first decide if the police were engaged in a bona fide community caretaker function, which is a function "totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute." *State v. Dull*, 211 Wis. 2d 652, 658, 565 N.W.2d 575 (Ct. App. 1997) (quoting *State v. Anderson*, 142 Wis. 2d 162, 166, 417 N.W.2d 411 (Ct. App. 1987)). We must then balance the public

benefits of police intervention against the intrusion into individual privacy it causes and determine the reasonableness of the officer's conduct. *Id.* In our analysis, we accept the trial court's findings of fact unless clearly erroneous and independently decide whether those facts meet the legal standard. *Id.* at 655.

¶10 Fritz first argues that because Scanlon did not see visible signs that the vehicle's occupant was in distress, the trial court erred in concluding he was engaged in a bona fide community caretaker activity. We disagree. It is not necessary that the officer know the occupant is actually in distress before he or she investigates in order to be engaged in a bona fide community caretaker function. It is sufficient if the circumstances are such that an officer could reasonably and legitimately be concerned about the person's well-being he or she is checking. Given the circumstances here—an occupant sitting in a parked car with its engine running and windows closed for forty-five minutes late on a cold night in an area with little traffic—an officer could reasonably be concerned that the occupant might be affected by carbon monoxide or might be unwell for other reasons. We agree with the trial court that in these circumstances, checking on the individual as Scanlon did is a bona fide community caretaker activity.

¶11 We next balance the public benefits of police intervention against the intrusion of individual privacy and determine the reasonableness of the officer's conduct. In doing so, we consider these four factors:

1. the degree of the public interest and 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 and effectiveness of alternatives to the type of intrusion actually accomplished.

State v. Paterson, 220 Wis. 2d 526, 533-34, 583 N.W.2d 190 (Ct. App. 1998).

¶12 Fritz maintains that the absence of signs of distress minimizes the public interest and exigency of the situation. Again, we disagree. The State has a strong public interest in having its police officers assist citizens when the officers have reasonable grounds to believe that an individual may be affected by carbon dioxide or unwell for other reasons. In such circumstances there is a need for immediate investigation, and it is reasonable for an officer to determine if the person needs assistance.

¶13 The attendant circumstances also support the reasonableness of the officer's conduct. Fritz's car was already parked and the detention required only that he remain so and roll down a window to speak to the officer. The situation did not require any force and Scanlon used none. It was reasonable for him to activate his emergency lights both for his protection as he left his car in the road and stood next to Fritz's car and to let Fritz know a police officer was approaching. The activation of the lights was a minimal and appropriate show of authority.

¶14 The third factor also weighs in the State's favor. An occupant of a vehicle generally has a lesser expectation of privacy than a person not in a vehicle. *State v. Anderson*, 142 Wis. 2d 162, 169-70 n.4, 417 N.W.2d 411 (Ct. App. 1987).

¶15 Concerning the fourth factor, we see no effective way for Scanlon to determine if Fritz was all right other than approach his car and ask him. Fritz contends that Officer Scanlon's seizure of Fritz, accomplished by activating the squad car's emergency lights, was a far worse intrusion than the alternative of walking up to Fritz's car and speaking to him, without activating the lights. The

difference in these two scenarios from the standpoint of intrusiveness in personal privacy is small; and, as we have already stated, there were legitimate reasons for activating the emergency lights.

¶16 We conclude Officer Scanlon's actions constituted a bona fide community caretaker activity and, balancing the public's need and interest furthered by his conduct against the degree and nature of intrusion on Fritz's privacy, we conclude his conduct was reasonable. Therefore, Fritz's detention did not violate the Fourth Amendment and the trial court properly denied his motion.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

