COURT OF APPEALS DECISION DATED AND FILED

December 23, 2008

David R. Schanker
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. 2008AP1996 **Cir. Ct. No. 2007CV1918**

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

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

KEITH L. ENGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Keith Engel appeals the judgment finding him guilty of operating a motor vehicle while intoxicated contrary to WIS. STAT. § 346.63(1)(a) (OWI) and driving with a prohibited alcohol concentration in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

violation of § 346.63(1)(b) (PAC). He contends his detention by the arresting officer was not supported by reasonable suspicion or by the community caretaker exception and that his arrest was not supported by probable cause. He also contends he is entitled to suppression of evidence or dismissal because of the police department's failure to preserve the video recording relating to his arrest. For the reasons we explain below, we affirm.

BACKGROUND

¶2 Engel was charged with OWI and PAC after he was arrested by Madison Police Officer Mindy Winter at 4:15 a.m. on December 10, 2005. Before the municipal court Engel moved to suppress evidence because of a lack of reasonable suspicion to detain him, lack of probable cause to arrest him, and the failure of the Madison Police Department to preserve the video recording related to his arrest. In the alternative, Engel argued, the failure to preserve the video recording entitled him to dismissal of the charges.

¶3 After an evidentiary hearing, the municipal judge denied Engel's motions and found that the City had proved both charges by clear and convincing evidence. With respect to the motions to suppress based on lack of reasonable suspicion and probable cause, the judge found as follows:

> Officer Winter was dispatched to the Essen Haus parking lot [because of a report of] a person slumped over the steering wheel of a truck with the head lights and break lights turned on. The Essen Haus [is] a restaurant and bar and the parking lot [is] open to the public [and it had been closed for over two hours]. When the officer arrived at the scene she observed a truck with its headlights and brake lights turned on and the engine running. She also saw a male [later identified as Engel] slumped over the steering wheel of the vehicle … and no one else was in the truck. Officer Winter testified when she first made the observation she thought there was a medical problem with

> the defendant. She knocked on the driver's side window several times and the defendant did not move or respond in any way. Officer Winter opened the driver's side door and another officer opened the passenger side door at which time the defendant lifted his head and looked at her. When the door opened she noticed a strong odor of intoxicants coming from the vehicle and observed that the defendant had bloodshot eyes. At that point the officer's opinion was that she was not dealing with a medical problem, but rather a possible drunk driving situation.
>
> Officer Winter told the defendant to turn off his truck engine and take his foot off the brake, which he did. She asked him why he was there and he told her he was just sleeping in his vehicle. When she asked him where he was coming from he told her "Madisons." [sic] Officer Winter asked him how much alcohol he had consumed and he stated that he had "two red bull and vodkas" at the Cardinal Bar. The officer asked for his driver's license and he pulled out his wallet and she could see his license in the open flap on one side of his wallet. However, the defendant was looking in the other section of his wallet. He folded his wallet shut and put it away without giving the officer his license. She repeated her request for his license and he removed his wallet and again looked in the wrong area of the wallet and then put the wallet away. The officer requested the driver's license for a third time at which time the defendant produced the license from his wallet. Based upon her observations, she asked the defendant to exit his truck and perform some field sobriety tests. When the defendant exited his vehicle he stumbled and leaned on his truck for balance.

¶4 The judge also found that the officer had Engel perform three standardized field sobriety tests—the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg stand test—and that the manner in which he performed the tests, based on the officer's testimony, showed impairment even if the administration of the tests did not completely comply with the National Highway Traffic Safety Administration standards.

¶5 With respect to the motion relating to the video recording, the judge stated that discovery in circuit court is governed by WIS. STAT. § 800.07, which provides:

> **Discovery in municipal court**. Neither party is entitled to pretrial discovery in any action in municipal court, including refusal hearings held by a municipal court under s. 343.305(9), except that if the defendant moves within 30 days after the initial appearance in person or by an attorney and shows cause therefor, the court may order that the defendant be allowed to inspect documents, including lists of names and addresses of witnesses, if available, and to test under s. 804.09, under such conditions as the court prescribes, any devices used by the plaintiff to determine whether a violation has been committed.

The judge noted that the defendant had not made a request to the municipal court to preserve or produce any recording, but instead had made an open records request under WIS. STAT. §§ 19.31-19.37. Accordingly, the judge concluded, there was no violation of § 800.07.

¶6 As for the existence of a recording, the judge found that it was not clear from the testimony whether there was a recording made of events prior to the arrest. The judge also found that it was not clear whether any video recording made of events in the front of the squad car would have shed any light on the field sobriety tests, given that the tests were performed in front of the defendant's truck, where, the court found, it was unlikely the camera would have been able to record anything. The judge found that the officer had Engel move to the front of his truck for the field sobriety tests because it seemed most level there.

¶7 The camera in the squad car also had the capability of recording the back seat of the squad car, and could have recorded events in the back seat after

Engel's arrest and during his transport to the police station.[2] The judge found that the possible exculpatory evidence from such a recording, had one been made, might have been Engel's statement that he was sleeping in his vehicle because he was sick and that he did not have slurred speech when he made that statement. However, the judge noted, this evidence was established through other testimony.

¶8 The judge found that, while the Madison Police Department did not fully comply in this case with its policy regarding the recording of arrests and the documenting of those recordings, its conduct did not rise to the level of deliberately attempting to destroy or withhold evidence in bad faith and was not egregious.

¶9 Engel appealed the municipal judge's decision to the circuit court, requesting a jury trial, and filed substantially the same suppression motion. At the hearing on the motion, Engel requested that, rather than taking testimony, the circuit court use as a factual basis the transcript of the municipal court hearing as well as the accompanying exhibits. The court agreed to this procedure, explaining that it would be relying on the credibility assessments made by the municipal judge and the judge's findings of fact unless they were clearly erroneous. Both parties stated they had no disagreement with this framework.

¶10 In its oral ruling the circuit court concluded there was no basis for ruling that the municipal judge's findings of facts were erroneous, it agreed with all the findings, and it adopted them "in their entirety." The court ruled, based on these facts, that the officers acted as community caretakers in opening the truck

[2] At the hearing before the circuit court, the parties clarified that there was one camera in the squad car that had the capability of pointing both forward and backward.

door after Engel failed to respond to Officer Winter's knock. It further ruled that, upon smelling the odor of intoxicants and observing Engel's bloodshot eyes, the officer had a reasonable basis to investigate for possible OWI, and the arrest was amply supported by probable cause.

¶11 Regarding the video recording, the circuit court assumed for purposes of its ruling that there was a recording that was not properly preserved. The court determined there was no basis for finding that any member of the police department or the city attorney's office acted in bad faith and no basis for finding that the recording was exculpatory. Accordingly, the court concluded there was no due process violation. The court also concluded there was no basis for imposing sanctions under the standard for civil cases.

¶12 After the circuit court denied his motions, Engel withdrew his request for a jury trial and stipulated to a trial based on the police reports, the transcript of the municipal court hearing, and the exhibits received at that hearing. The circuit court found Engel guilty of OWI and PAC.

DISCUSSION

I. Detention and Arrest

¶13 On appeal Engel renews his contention that his detention and arrest were unconstitutional. When we review a decision on a motion to suppress evidence we uphold the circuit court's findings of fact unless they are clearly erroneous, while the application of the constitutional principles to those facts is a question of law, which we review de novo. ***State v. Kramer***, 2008 WI App 62, ¶8, 750 N.W.2d 941.

A. Detention

¶14 We will assume without deciding that, as Engel argues, a seizure occurred when Officer Winter and her partner arrived at the scene. We conclude the officers' conduct in arriving at the scene, knocking on the window, and, when there was no response, opening the truck doors was justified by the community caretaker exception. Because of this conclusion, we do not address the parties' dispute over whether there was reasonable suspicion to support the seizure.

¶15 A seizure is justified by the community caretaker exception if two requirements are met: (1) the police activity must be a "bona fide community caretaker activity," and (2) the public need and interest must outweigh the intrusion upon the privacy of the individual. ***Id.***, ¶10.

¶16 With respect to the first requirement, Wisconsin case law has established that a bona fide community caretaker activity must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Id***., ¶12 (citations omitted). In ***Kramer*** we questioned whether the police officer's subjective motivation should be relevant to the question of whether an officer's activity meets this requirement. ***Id***., ¶¶14, 30-40. We nonetheless assumed the officer's subjective motivation was relevant because we had considered subjective motivation in a prior community caretaker exception case. ***Id***., ¶14. The officer's testimony in ***Kramer*** was that, as he approached a truck stopped on the roadside with its hazard lights flashing, it was in his mind that "a crime might be going on; that the officer was not sure what was going on in [the] truck, but that concerns about something illegal are 'always in [the officer's] mind.'" ***Id***., ¶¶3-4, 13. We rejected the argument that the officer's conduct in approaching the truck did not meet the "totally divorced" rule because

he was thinking there might be a possibility of a crime. ***Id***., ¶¶14-17. We stated: "Whatever the precise meaning of 'totally divorced,' it cannot mean … that an officer must have subjectively ruled out all possibility of criminal activity in order to act in a community caretaker capacity." ***Id***., ¶15.

¶17 With respect to the balancing in the second requirement, we apply an objective analysis of the circumstances confronting the officer and an objective assessment of the intrusion upon the privacy of the citizen. ***State v. Anderson***, 142 Wis. 2d 162, 168, 417 N.W.2d 411 (Ct. App. 1987). The ultimate standard is the reasonableness of the seizure in light of the facts and circumstances of the case. ***Id.*** Relevant considerations include:

> (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. at 169 (footnotes omitted).

¶18 Turning now to the first requirement of a bona fide community caretaker activity, we conclude the findings of the municipal judge, adopted by the circuit court, meet this requirement. It was December and the officers were responding to a call in the early morning hours about a person slumped over the steering wheel of a truck in a parking lot, with the head lights and brake lights turned on, more than two hours after the establishment had closed. There was no reference to possible criminal activity in the information they were given. When they arrived at the scene, their observations matched what had been reported. Consistent with our prior case law, we will consider the officers' subjective

motivations. The municipal judge credited Officer Winter's testimony that when she first arrived at the scene, she thought there was a medical problem.[3]

¶19 Engel argues that the officers were not engaged in a bona fide community caretaker activity based on Officer Winter's testimony that she and her partner each opened a door of the truck at the same time and that this was "good officer safety … so that [they could] see what was going on." According to Engel, this implies the officers believed Engel might be dangerous. We reject the proposition that an officer is not engaged in a bona fide community caretaker function solely because he or she is concerned with safety. First, it is not apparent that an officer's concern with his or her safety in a situation such as this necessarily means that the officer is engaged in "the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Kramer***, 750 N.W.2d 941, ¶12 (citations omitted). Second, and more importantly, even if that is the case, we held in ***Kramer*** that an officer need not "subjectively [rule] out all possibility of criminal activity in order to act in a community caretaker capacity." ***Id***., ¶15. At most, the evidence here shows that the officers were aware there was a possibility that the person inside the truck might pose a danger to them and were taking the reasonable step of guarding against that by each simultaneously opening a door to the truck. This does not negate a bona fide community caretaker function.

¶20 Engel also argues that, because the evidence showed that Officer Winter did not ask him anything about his medical condition after she opened the

[3] Even if we were not to consider Officer Winter's subjective motivation, we would conclude that a reasonable officer seeing what she saw with the information she had would think the person in the truck might have a medical problem requiring immediate attention.

truck door, but instead asked him about his drinking, this shows she was not engaged in a bona fide community caretaker function. This is an implicit challenge to the municipal judge's findings, which the circuit court adopted. The municipal judge believed Officer Winter's testimony that she initially thought she was dealing with a person who had a medical problem. The judge stated in its ruling that not until she opened the truck door and smelled the strong odor of alcohol and observed Engel's bloodshot eyes did she think otherwise—that is, that he did not have a medical problem but had consumed too much alcohol. The judge's implicit finding is that the officer did not ask Engel about medical problems after she opened the truck door because she was presented with new information that changed her view of the situation, not because she never thought he had a medical problem. We accept this finding because, although not express, it is necessarily implicit in the judge's and the circuit court's ultimate determination and it is supported by the record. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 311-12, 470 N.W.2d 873 (1991). We therefore reject Engel's argument to the contrary.

¶21 Turning to the balancing requirement, we conclude this second part of the test is also met. The public has a substantial interest in encouraging police officers to quickly come to the aid of citizens in a parked automobile in winter who may be in need of medical assistance. Engel argues that he was simply sleeping in a legally parked car. However, the officers could not know what his situation was and whether he needed assistance without more information than they had, and Engel did not respond when Officer Winter knocked on his window. Engel implicitly concedes there is a lesser expectation of privacy in an automobile. *See* ***Kramer***, 750 N.W.2d 941, ¶24. There was no force utilized, although Engel asserts that opening the truck doors was a display of authority that exceeded that

which was necessary. Engel points to alternatives, such as Officer Winter using "her siren, loudspeaker, shout[ing] at Engel or announce[ing] her intentions," which, he asserts, could have avoided the invasion of Engel's privacy by opening the door to his truck while he was sleeping inside. We do not understand the alternative of "announcing her intentions" because this would have no efficacy unless Engel were roused from sleep or unconsciousness, which the officer's knocking had failed to achieve. As for the other proposed alternatives, they might or might not have been more effective in rousing Engel than knocking on the window right next to where he was sitting, and they would have taken additional time when the concern was the medical condition of the person inside the car who failed to respond to the knocks. In these circumstances it was reasonable for the officers to open the doors to the truck after the attempt to rouse Engel by knocking on the window failed.

¶22 Weighing the relevant factors, we conclude the public's substantial interest in encouraging officers to act quickly to determine whether there is a need for medical assistance in situations such as that presented here outweighs the limited intrusion into Engel's privacy. Accordingly, we conclude the officers were lawfully acting in a community caretaker role when they opened the doors to Engel's truck.

B. Arrest

¶23 Engel contends there was not probable cause to arrest him because the results of the field sobriety tests did not constitute evidence that he was impaired by the consumption of alcohol. This is so, according to Engel, because the HGN test was administered incorrectly and he performed well on the other two tests.

¶24 In ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994) (citation omitted), we stated:

> In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant."

Probable cause is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***State v. Petrone***, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991).

¶25 In this case there is no dispute that Engel had consumed alcohol, and he does not argue that he was not operating a motor vehicle after consuming alcohol. The issue is whether there was probable cause to believe that he had consumed sufficient alcohol to impair his ability to drive safely. *See* WIS. STAT. § 346.63(1)(a) ("[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving"). We conclude there was.

¶26 From Engel's slurred speech, his failed attempts to locate his driver's license in his wallet when Officer Winter could see it, his stumbling when exiting his truck and his using his truck for balance, a reasonable officer could believe that he had consumed sufficient alcohol to impair his ability to speak, to concentrate, and to walk steadily.

¶27 As for the field sobriety tests, without considering the HGN test, we conclude the other two provided additional evidence of impairment. The court found that on the walk-and-turn test Engel did not maintain the stance he was told to maintain while being given instructions, he stepped off the line during the test,

and he did not make the turn as instructed. On the one-leg stand test, the court found, Engel put his foot down before he was finished counting and he used his arms for balance. Both of these actions were contrary to the instructions Engel had been given, and, when he resumed counting, he started over rather than continuing from where he stopped, as he had been instructed. A reasonable officer with the experience that Officer Winter had[4] could conclude that Engel's performance on these tests showed that his ability to concentrate, his balance, and his coordination were impaired. Regardless of the exact number and definition of "clues," these are common-sense indicators of impairment because of alcohol consumption.

¶28 These circumstances taken together are sufficient to provide a basis for a reasonable police officer to believe that Engel was operating a motor vehicle while under the influence of an intoxicant.

II. Failure to Preserve Video Recording

¶29 Engel also contends that he was entitled either to suppression of evidence or dismissal of the charges because of the failure to preserve the video recording of the arrest. We conclude that, given the findings adopted by the circuit court, none of the theories he advances entitles him to this relief. In our discussion we assume, as did the circuit court, that there was a recording.

¶30 First, Engel contends that under ***City of Lodi v. Hine***, 107 Wis. 2d 118, 318 N.W.2d 383 (1982), suppression is an appropriate remedy when evidence

[4] The court found Officer Winter had training in the area of impaired driving and had worked on between thirty to fifty cases where persons were suspected of OWI.

has been destroyed. However, in ***Hine*** the defendant had made a timely request under the predecessor to WIS. STAT. § 800.07. *See **id***. at 120. Engel does not challenge the municipal judge's finding that no request under § 800.07 was made to that court.

¶31 Second, Engel contends that under criminal case law dismissal is proper when the destruction of evidence has violated the defendant's right to due process. Under this standard the defendant's right to due process is violated when "(1) … the evidence destroyed was apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means; or (2) … the evidence was potentially exculpatory and was destroyed in bad faith." ***State v. Parker***, 2002 WI App 159, ¶14, 256 Wis. 2d 154, 647 N.W.2d 430. We will assume this standard applies in a municipal court proceeding. We review de novo the application of this constitutional standard to the facts. ***Id***., ¶8. As we have already explained, we accept unless clearly erroneous the findings of fact made by the municipal judge and adopted by the circuit court. *See* WIS. STAT. § 805.17(2).

¶32 Engel does not contend that the recording was apparently exculpatory but, rather, that it was potentially exculpatory. It is thus incumbent on Engel to establish that the police department acted in bad faith. *See **State v. Greenwold***, 189 Wis. 2d 59, 70, 525 N.W.2d 294 (Ct. App. 1994). Engel is asking this court to draw inferences of bad faith from the police department's noncompliance with its policy regarding the recording of arrests and the documenting of those recordings. However, the municipal judge and the circuit court both made clear that they did not draw any inference of intent to destroy or withhold evidence from that noncompliance. This is a reasonable inference supported by the record and we accept it. No other evidence that Engel points to

meets the high standard of bad faith. Accordingly, Engel's right to due process was not violated.

¶33 Third, Engel relies on the civil line of cases that establish that a circuit court has the discretion to order dismissal as a sanction for spoliation of evidence when there was a conscious attempt to affect the outcome of the litigation or a flagrant knowing disregard of the judicial process. *See, e.g.*, ***Garfoot v. Fireman's Fund Ins. Co***., 228 Wis. 2d 707, 711, 717, 599 N.W.2d 411 (Ct. App. 1999). The circuit court decided this standard was not met based on the evidence before it. We affirm the circuit court's discretionary ruling because it applied the correct legal standard, was based on the relevant facts, and was reasonable. *See* ***id***. at 717.

CONCLUSION

¶34 The police officers were lawfully acting in their community caretaker capacity when they first seized Engel and his subsequent arrest was supported by probable cause. None of the theories Engel advances shows that the circuit court erred or erroneously exercised its discretion in denying his request to suppress evidence or his request to dismiss the charges because of the police department's failure to preserve the video recording. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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