

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP3021

STATE OF WISCONSIN

Cir. Ct. Nos. 2007TR17367
2007TR17368

**IN COURT OF APPEALS
DISTRICT IV**

DANE COUNTY,

PLAINTIFF-RESPONDENT,

V.

SHARON M. LAMB,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
JOHN W. MARKSON, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Sharon Lamb appeals her judgment of conviction for operating a motor vehicle while impaired and operating a motor

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

vehicle with a prohibited alcohol concentration, first offense. Lamb argues that the circuit court erred in denying her motion to suppress evidence. There are two issues in this case: (1) whether the stop of Lamb's vehicle constituted a seizure under the Fourth Amendment of the United States Constitution and Art. 1, Section 11 of the Wisconsin Constitution; and (2) if a seizure did occur, whether it was justified under the community caretaker doctrine. We assume without deciding that a seizure occurred in this case, and conclude that the deputy's conduct was reasonable within the community caretaker function and thus satisfies the requirements of the federal and state constitutions. We therefore affirm.

BACKGROUND

¶2 Deputy David Hopperdietzel was patrolling Highway 12, commonly known as the Beltline, in the City of Madison around 1:30 a.m. when he observed a vehicle pull over to the side of the road. As he approached the vehicle, he noticed that its lights were on, the right blinker was flashing, and the driver's side tires were on the fog line. At trial, Deputy Hopperdietzel testified that he assumed there was a problem because the driver had stopped on a six-lane controlled access highway.

¶3 The deputy activated his vehicle's overhead emergency lights as he pulled behind the stopped vehicle. Walking toward the stopped vehicle, Hopperdietzel saw vomit on the road near the vehicle's left-side rear bumper. Upon making contact with the driver, Sharon Lamb, the deputy observed that the passenger in the left rear of the vehicle had vomited on himself and on the vehicle's interior. Additionally, Hopperdietzel noticed Lamb's eyes were bloodshot and her speech was slurred, and detected the odor of intoxicants and vomit emanating from the vehicle.

¶4 Hopperdietzel asked Lamb if she had been drinking, and Lamb responded affirmatively, volunteering that she had had four drinks. Hopperdietzel then asked her to step out of the vehicle to perform field sobriety tests. Lamb complied with the request, failed three field sobriety tests, and was arrested for operating a motor vehicle while intoxicated.

¶5 Lamb filed a motion to suppress the evidence of her intoxication, alleging that the deputy's conduct constituted an unlawful stop and detention. The court denied the motion by written order without an evidentiary hearing. Lamb filed a motion to reconsider. At a hearing on the motion, the court again found no basis for an evidentiary hearing and denied Lamb's motion to reconsider. Lamb renewed her motion to suppress at the bench trial and it was again dismissed. The court found Lamb guilty of both operating a motor vehicle while impaired and operating a motor vehicle with a prohibited alcohol concentration. This appeal follows.

DISCUSSION

A. Standard of Review

¶6 When reviewing a motion to suppress evidence, we uphold the circuit court's findings of fact unless they are clearly erroneous and review constitutional issues de novo. *State v. Young*, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. We independently review whether an officer's conduct as a community caretaker satisfies the requirements of the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution. *State v. Kramer*, 2009 WI 14, ¶16, 315 Wis.2d 414, 759 N.W.2d 598.

B. Community Caretaker Function

¶7 The United States Constitution and the Wisconsin Constitution protect against unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. 1, § 11. However, an unreasonable seizure, i.e. one unsupported by probable cause or reasonable suspicion, may be justified under the community caretaker doctrine. *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). Community caretaker functions have been described as those police responsibilities that are beyond traditional enforcement of criminal and regulatory laws. *State v. Dull*, 211 Wis. 2d 652, 658, 565 N.W.2d 575 (Ct. App. 1997).

¶8 We apply a three-part test to determine whether a seizure that is unsupported by probable cause or reasonable suspicion is justified under the community caretaker doctrine. *Kramer*, 315 Wis. 2d 414, ¶21. First, the conduct must be a seizure within the meaning of the Fourth Amendment. *Id.* Second, the police conduct must be a bona fide community caretaker activity. *Id.* Third, “the public need and interest outweigh the intrusion upon the privacy of the individual.” *Id.* The State bears the burden of proving that the police conduct was within the boundaries of a reasonable community caretaker function. *Id.*, ¶17.

1. Seizure

¶9 A seizure occurs when, by physical force or show of authority, a reasonable person would not feel free to leave. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980). We choose to assume without deciding that the police conduct constituted an unreasonable seizure that was unsupported by probable cause or reasonable suspicion. Accordingly, we conclude for purposes of this analysis that the first step of the community caretaker test is satisfied.

2. Bona Fide Community Caretaker Function

¶10 Next, we evaluate whether the deputy's actions constituted a bona fide community caretaker function. See *Kramer*, 315 Wis.2d 414, ¶21. When determining whether police conduct constitutes a bona fide community caretaker function, we assess the totality of the circumstances surrounding the officer's actions. *Id.*, ¶30. If "under the totality of the circumstances an objectively reasonable basis for a community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns." *Id.* Instead, the officer's subjective intent is a factor that may be considered. *Id.*, ¶36. Consequently, "if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function" the officer has met the bona fide community caretaker standard. *Id.*

¶11 We conclude that the deputy had a reasonable basis for assuming that the motorist, Lamb, may have been in need of assistance. The facts in this case are similar to those in *Kramer*, 315 Wis.2d 414, ¶¶4-7. In *Kramer*, an officer noticed a car with flashing hazard lights parked on the side of a rural road at night. *Id.*, ¶4. The officer testified that in his experience, hazard lights typically indicated a vehicle problem. *Id.*, ¶5. The officer turned on his overhead lights and pulled behind the vehicle to see if the motorist needed assistance. *Id.* After he approached the vehicle and spoke with the driver, the officer became concerned that the driver was intoxicated. *Id.*, ¶7. The court held that it was the officer's community caretaker role, not his law enforcement role, which led to the officer's contact with the driver. *Id.*, ¶39.

¶12 Lamb argues that her case is distinguishable from *Kramer* because the deputy did not testify to any observations or experiences that would have led him to believe that the motorist was in need of assistance. *Id.*, ¶5. For instance, her vehicle's hazard lights were not engaged, the hood was not up, and no person in the vehicle attempted to gain the deputy's attention. Further, Lamb suggests that Hopperdietzel was acting in his law enforcement role rather than his community caretaker role when he stopped and approached the vehicle because the first question he asked Lamb was whether she had been drinking. We reject this argument.

¶13 Similar to *Kramer*, the facts indicate that Deputy Hopperdietzel reasonably and objectively believed that the motorist may have needed assistance. *Id.*, ¶39. Hopperdietzel testified that he pulled behind Lamb because he was concerned that there was a problem. He acted upon that concern by pulling behind the vehicle, turning on his lights for safety, and approaching the driver's side window. This conduct was reasonable because it was around 1:30 in the morning and Lamb had parked her vehicle on the side of a busy highway with its right blinker flashing. Hopperdietzel followed standard police procedure as he entered the unknown situation and approached the vehicle with caution. Similar to *Kramer*, it was only after the officer approached the vehicle that his concern shifted from his community caretaker function to a law enforcement function. *Id.*, ¶38.

¶14 As discussed in *Kramer*, the law enforcement and community caretaker roles of an officer can shift to adapt to new circumstances. *Id.*, ¶39. Accordingly, under the totality of the circumstances, Hopperdietzel's beliefs formed after he approached the vehicle do not undermine his objectively reasonable basis for stopping to determine whether there was a problem.

Consequently, Hopperdietzel's conduct meets the bona fide community caretaker standard and the second part of the test is satisfied.

3. The Balancing Test

¶15 In the final part of the community caretaker test, we consider four factors to determine whether the public need and interest for the police conduct outweigh the intrusion upon the individual's privacy. *Kramer*, 315 Wis. 2d 414, ¶41. The factors include the following:

(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. If the public need and interest for the police conduct prevails over the amount of intrusion on the individual's privacy, the officer's conduct is reasonable. *Id.*

¶16 First, we examine the "degree of the public interest and the exigency of the situation." *Id.* The public has a significant interest in encouraging the police to stop and attend to motorists who may be in need of assistance. In fact, "such contact is 'not only authorized, but constitute[s] an important duty of law enforcement officers.'" *Id.*, ¶42 (quoting *State v. Goebel*, 103 Wis. 2d 203, 208, 307 N.W.2d 915 (1981)).

¶17 Lamb argues that the public interest in this case is not as great as in *Kramer*. Specifically, she suggests that Hopperdietzel's concerns about whether the motorist was stranded should have been negated because the deputy saw her pull over and stop on the highway's shoulder. Additionally, Lamb stopped in the City of Madison on a busy highway where she was less likely to need assistance

than in the more rural setting in *Kramer*. See *Kramer*, 315 Wis. 2d 414, ¶42. Further, Lamb argues that Hopperdietzel did not see any signs of distress, like hazard lights, which would have been more indicative of mechanical or medical problems.

¶18 Lamb reads *Kramer* too narrowly. *Kramer* does not hold that a significant public interest supporting an exercise of the community caretaker function exists only when a vehicle is stranded in a remote area and a heightened possibility of a medical emergency exists. Instead, the *Kramer* court states more generally that “the public has a substantial interest in police offering assistance to motorists who may need assistance” *Id.* Here, Hopperdietzel testified that he was concerned that there was a problem because the vehicle pulled over on a controlled access highway, had its right blinker on, and was parked on the fog line. The deputy’s concerns were reasonable and serve as a legitimate basis for pulling over to assess the situation. Accordingly, we conclude that the first factor weighs in favor of finding that the officer acted reasonably under the circumstances.

¶19 The second factor requires us to consider the attendant circumstances surrounding the seizure including whether the time, location, and degree of authority and force the deputy displayed were appropriate under the circumstances. *Id.*, ¶41. Lamb suggests that Hopperdietzel exercised an excessive degree of authority by displaying his vehicle’s emergency lights, and therefore the seizure was unreasonable. We are not persuaded.

¶20 In *Kramer*, the court found that the use of emergency lights was not an overt act of authority or force, but a reasonable safety measure. *Id.*, ¶43. This was in part due to the obscure and dark location of the parked vehicle at night. *Id.*

The lights warned other drivers that the vehicles were parked on the shoulder of the road. *Id.*

¶21 We conclude that Hopperdietzel's actions were also appropriate under these circumstances. As in *Kramer*, safety reasons justified the officer's use of his emergency lights; the two vehicles were parked on the shoulder of a busy highway at night. Moreover, the driver's side tires of Lamb's vehicle were parked on the fog line, unusually close to traffic traveling at highway speeds. Hopperdietzel's use of the emergency lights allowed him to approach the vehicle safely on the driver's side. For her part, Lamb argues that the officer should have approached the vehicle on the passenger's side. However, Hopperdietzel testified that he approached the driver's side because it was "standard procedure" to deal with potential threats to officer safety. Clearly, it is "unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry v. Ohio*, 392 U.S. 1, 23 (1968). Accordingly, we conclude that the evidence supports the conclusion that Hopperdietzel was reasonably acting within the community caretaker function.

¶22 Under the third factor, we consider whether the presence of an automobile influenced the reasonableness of the community caretaker function. *Kramer*, 315 Wis. 2d 414, ¶¶41, 44. Lamb admits that a person has a lower expectation of privacy in an automobile than in a dwelling. *See Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). Yet, Lamb argues that the amount of her privacy invasion outweighs the public interest here. She asserts that Deputy Hopperdietzel, unlike the officer in *Kramer*, did not need to approach the vehicle to determine whether it was occupied because he observed the vehicle pull over before stopping. *Kramer*, 315 Wis. 2d 414, ¶44. However, this is not the reason why Hopperdietzel made contact with the vehicle. Hopperdietzel testified that he

stopped because he was concerned that there was a problem when he saw the vehicle pull onto the shoulder of the highway. He acted reasonably in response to his concern by pulling behind the vehicle, approaching the driver's side window, and making contact with Lamb. *See id.*, ¶¶43-44. This was the officer's only reasonable means of determining whether the motorist needed assistance. As a result, we conclude that the third factor supports the reasonableness of the officer's actions.

¶23 Finally, we must evaluate the feasibility and availability of alternatives to the officer's conduct. *Id.*, ¶41. This factor requires us to consider whether an officer had any feasible and available alternatives to the intrusion that occurred under the circumstances.

¶24 Lamb argues that Hopperdietzel could have approached the vehicle without engaging the emergency lights. This argument fails to address the core of this factor. The issue is whether the officer had a feasible alternative to approaching the vehicle and having contact with the driver in order to determine whether there was a problem. We conclude that the evidence supports the officer's actions as the only reasonable means of gathering this information. Further, as we addressed under the second factor, it was reasonable for the officer to activate his lights for emergency purposes. Therefore, we conclude that the fourth factor's requirements have been met and support the conclusion that Hopperdietzel reasonably acted within his community caretaker function. Because all four factors of the third part of the test weigh in favor of the public interest and need for the officer's action, the final part of the community caretaker test is satisfied.

CONCLUSION

¶25 Assuming without deciding that a seizure occurred, we conclude that Deputy Hopperdietzel's actions fell within the scope of the community caretaker exception to the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. Applying the community caretaker test, we conclude that Hopperdietzel actions constituted a bona fide community caretaker function, and that the public need and interest for the officer's actions outweighed the minimal intrusion of Lamb's privacy interest. We therefore affirm.

By the Court.—Judgment affirmed.

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

