

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 2009

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. 2009AP1840

**Cir. Ct. No. 2008TR19377
2008TR19378**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK E. REINWALL,

DEFENDANT-APPELLANT.

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

¶1 VERGERONT, J.¹ Mark Reinwall appeals the judgment of conviction for operating a motor vehicle while intoxicated (OWI) and operating

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) & (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

with a prohibited alcohol concentration (PAC) of .10 or more, in violation of WIS. STAT. § 346.63(1)(a) and (b) (2007-08), first offense. He contends that his detention by the arresting officer was not supported by reasonable suspicion or by the community caretaker exception and, therefore, the circuit court should have granted his motion to suppress evidence. For the reasons we explain below, we conclude that the circuit court properly denied the motion based on the community caretaker exception. We therefore affirm.

BACKGROUND

¶2 Reinwall was arrested by Wisconsin State Patrol Trooper Andrew Martin for OWI and PAC at approximately 8 p.m. on August 23, 2008. At the hearing on Reinwall's motion to suppress evidence, troopers Mark Samborski and Martin testified to the circumstances of the traffic stop as follows.

¶3 At approximately 7:30 p.m. on that date, Trooper Samborski stopped motorcyclist Daniel Lennon on Interstate 39/90/94 for speeding. The trooper subsequently arrested Lennon for OWI. The trooper and Lennon were on the left-hand shoulder of the interstate. During the stop, a second motorcyclist, later identified as Reinwall, drove by at a reasonable speed and stopped a short distance ahead on the right-hand shoulder of the interstate. Trooper Martin and another trooper arrived on the scene shortly thereafter.

¶4 After placing Lennon in custody, Trooper Samborski asked Trooper Martin to speak to Reinwall in order to confirm that the two motorcyclists were traveling together and, if Reinwall had not been drinking, to ask Reinwall if he would be willing to remove Lennon's motorcycle and sign a responsible party agreement so Lennon would not have to spend the night in jail.

¶5 Trooper Martin turned on his emergency lights and crossed from the left shoulder of the interstate to the right shoulder, where he pulled over behind Reinwall, who was standing next to his motorcycle talking on a cell phone. At nearly 8 p.m on an August evening, it was still light out, and traffic on the interstate was moderate. Reinwall did not have his motorcycle's hazard or other lights on. Trooper Martin first asked Reinwall if he was okay or needed assistance. Reinwall replied that he did not need help and that he had stopped to wait for Lennon, who was his friend. During this exchange, Trooper Martin detected a strong odor of intoxicants and observed that Reinwall had "glassy bloodshot eyes" and that his speech was slurred. Trooper Martin then administered field sobriety tests and subsequently arrested Reinwall.

¶6 The circuit court denied Reinwall's motion to suppress evidence. The court assumed without deciding that a "seizure" occurred when Trooper Martin pulled his vehicle behind Reinwall with his emergency lights activated, and the court concluded that the seizure was justified under the community caretaker exception.

DISCUSSION

¶7 On appeal Reinwall renews his contention that his detention was unconstitutional because it was not based on reasonable suspicion and did not come within the community caretaker exception. Because we conclude the community caretaker exception applies, we do not address the parties' dispute over whether there was reasonable suspicion. 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, and we review de novo the application of the

constitutional principles to those facts. *State v. Kramer*, 2008 WI App 62, ¶8, 311 Wis. 2d 468, 750 N.W.2d 941.

¶8 As did the circuit court, we assume without deciding that, as Reinwall argues, a seizure occurred when Trooper Martin stopped behind Reinwall with his emergency lights activated. Police may conduct a seizure within the meaning of the Fourth Amendment without probable cause or reasonable suspicion, “provided that the seizure based on the community caretaker function is reasonable.” *State v. Truax*, 2009 WI App 60, ¶9, 318 Wis. 2d 113, 767 N.W.2d 369. 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. *State v. Kramer*, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598 (citing *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)).

¶9 With respect to the first requirement, 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.” *Kramer*, 315 Wis. 2d 414, ¶23 (citations omitted). However, the “totally divorced” language does not mean that a police officer cannot also have subjective law enforcement concerns at the time he or she is engaged in a valid community caretaker function. *Id.*, ¶30. For example, in *Kramer*, the officer testified that his reason for approaching a vehicle parked at the roadside with its hazard lights flashing was to offer assistance, but as he approached the vehicle, “[i]t was in [his] mind” that a crime might be happening. *Id.*, ¶¶5-6. The *Kramer* court concluded that a community caretaker function is bona fide when under the totality of the circumstances an objectively reasonable basis for the community caretaker

function is shown, and “that determination is not negated by the officer’s subjective law enforcement concerns.” *Id.*, ¶¶30-32.

¶10 With respect to the second requirement, we determine whether an officer’s exercise of a bona fide community caretaker function was reasonable by “balancing a public interest or need that is furthered by the officer’s conduct against the degree of and nature of the restriction upon the liberty interest of the citizen.” *Id.*, ¶ 40. In balancing these interests, we consider the following factors:

(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 (quoting *State v. Kelsey C.R.*, 2001 WI 54, ¶36, 243 Wis. 2d 422, 626 N.W.2d 777).

¶11 Turning to the first requirement of a bona fide community caretaker activity, we conclude that the facts as found by the circuit court meet this objective standard. It was nearly 8 p.m. on a summer evening, and while there was still daylight, the court found that under the circumstances, it was clearly unusual for a motorcyclist to be stopped on the shoulder of a moderately busy interstate highway with no lights activated and talking on a cell phone.

¶12 Reinwall argues that Trooper Martin was not engaged in a bona fide community caretaker activity because of the trooper’s testimony that, in addition to wanting to check to see if Reinwall was in need of assistance, he wanted to check to see if Reinwall could remove Lennon’s motorcycle, and if Reinwall did not need assistance, he wanted to inform Reinwall that it was illegal to park on the

shoulder of an interstate highway absent an emergency. Reinwall asserts that these two additional reasons are law enforcement functions.

¶13 This argument ignores the supreme court’s holding in *Kramer* that an “officer may have law enforcement concerns, even when the officer has an objectively reasonable basis for performing a community caretaker function.” *Kramer*, 315 Wis. 2d 414, ¶32. Describing the multifaceted nature of police work, the *Kramer* court explained that “which function is primary may shift during the course of the officer’s interaction with members of the public.” *Id.*, ¶39. In the present case, Trooper Martin testified on cross-examination that “[i]t’s my job to check on people that are stopped to see if they are in any sort of a need.” While it is true that, if Reinwall was not impaired and was Lennon’s friend, Trooper Martin intended to ask if Reinwall could serve as a responsible party for Lennon, that does not negate the objectively reasonable basis for concern that Reinwall might need assistance.

¶14 Trooper Martin’s subjective view that it was illegal to park on the shoulder of the interstate unless there was an emergency also does not negate the objectively reasonable basis for asking if Reinwall needed assistance. Whether or not the trooper’s view of the law was correct, an issue we need not decide,² it was objectively reasonable for Trooper Martin to view as unusual a person stopped on the shoulder of the highway as Reinwall was. Under the totality of these circumstances, we conclude that Trooper Martin was acting as a bona fide community caretaker.

² The parties dispute whether it is illegal to park a vehicle on the shoulder of an interstate highway when there is not an emergency.

¶15 Turning to the balancing requirement, we conclude that this is also met. First, the public has a “substantial interest in ensuring that police assist motorists who may be stranded on the side of a highway,” especially after dark and in less urban areas. *Id.*, ¶42. Reinwall argues that he was stopped less than a mile from the East Towne area of Madison, and thus assistance may have been available nearby. He further argues that, since he was talking on a cell phone, he could have called for assistance had he needed it. However, Trooper Martin could not have known what Reinwall’s situation actually was and we have already decided that it was objectively reasonable for him to view what he observed as unusual.

¶16 The second reasonableness factor also favors the application of the community caretaker exception. It was nearly 8 p.m. in the evening, and while there was still daylight, it would be getting dark soon. Reinwall was standing on the shoulder of the interstate, and there is no evidence that he could have safely walked from where he was to a business district about a mile away. Trooper Martin, in asking Reinwall if he was okay, was showing at most a minimal degree of overt authority: activation of his emergency lights. While that might be viewed as a show of authority, it was also a safety precaution. Trooper Martin testified that he activated his lights to “warn other traffic around [him] that there’s someone that’s stopped on the shoulder of the road.” Both Troopers Samborski and Martin testified that they are required to activate their emergency lights for safety anytime they stop on the interstate. We conclude Trooper Martin’s manner of performing his community caretaker function was reasonable.

¶17 The third reasonableness factor considers “whether the involvement of an automobile has an effect on whether the community caretaker function was reasonably performed.” *Kramer*, 315 Wis. 2d 414, ¶44. In this case, Reinwall

was standing next to his motorcycle. As we have explained in discussing the second factor, the trooper's approach to determine if Reinwall needed assistance in these circumstances was reasonable.

¶18 Finally, we consider the availability of alternatives to the type of intrusion that actually occurred. Reinwall argues that Trooper Martin did not need to activate his emergency lights and could have used his hazard lights or activated only his rear-facing emergency lights instead. Trooper Martin testified that using his hazard lights was not an available option, but he did acknowledge that he could have used only his rear-facing emergency lights. However, we conclude that it was reasonable for Trooper Martin to activate both front and back emergency lights as he crossed three lanes of speeding traffic from the left median to the right shoulder because, as he stated, “[i]t’s a warning to oncoming vehicles that there’s an emergency vehicle moving in the roadway.”

¶19 Weighing these factors, we conclude that the public’s substantial interest in ensuring that police assist motorists, including motorcyclists, who may be stranded on the side of a highway outweighs the limited intrusion into Reinwall’s privacy.

CONCLUSION

¶20 In summary, Trooper Martin’s conduct fell within the scope of the community caretaker exception to the Fourth Amendment’s guarantee against unreasonable searches and seizures. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

