

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2011

A. John Voelker
Acting 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. 2010AP2119-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CT957

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC W. SAGEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ Eric Sagen appeals the order denying his motion to suppress evidence and the judgment of conviction for operating a motor

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

vehicle with a prohibited alcohol concentration in excess of 0.08, in violation of WIS. STAT. § 346.63(1)(b), third offense. He claims that the traffic stop initiated by a police officer was not supported by the community caretaker exception, and therefore the circuit court erred when it denied his motion to suppress evidence. For the reasons we explain below, we conclude the circuit court properly denied Sagen's motion. We therefore affirm.

BACKGROUND

¶2 Sagen was stopped by Village of Orfordville Police Officer Nathan Olson in the early morning hours of June 20, 2009. Evidence leading to Sagen's conviction was obtained during this stop. Sagen moved to suppress this evidence. At the hearing on the motion, Officer Olson testified as follows.

¶3 While the officer was sitting in his marked squad car doing reports and observing traffic, he heard a yell come from a truck as it passed directly in front of him. Because Officer Olson's vehicle was the only vehicle in the area and there was no pedestrian traffic on the street, he believed that someone in the vehicle was attempting to get his attention. When he heard the yell, his first thought was that there was a fight occurring in the vehicle, and someone was trying to get his attention so that he could assist them. He testified that in his experience, people do not attempt to get his attention unless they are in need of help. Officer Olson had previously been involved in situations in which there were disturbances within vehicles, and had been trained to look into situations where someone yells something out of the ordinary, in order to ensure that everyone in the vehicle is safe. Officer Olson was unable to see into the vehicle and thus was unable to determine how many people were inside. Because he was unable to tell what had been yelled and whether there were any passengers, he

decided to stop the vehicle in order to determine whether anyone in the vehicle needed assistance.

¶4 Officer Olson followed Sagen’s truck for distance of about a block before activating his emergency lights and conducting a traffic stop of the vehicle. He explained to the occupants that he had stopped the vehicle because he heard a yell coming from the vehicle, and asked if everyone was okay. At no time did Officer Olson observe Sagen violating any traffic laws. Evidence obtained during this stop led to Sagen’s arrest for operating a motor vehicle with a prohibited alcohol concentration.

¶5 Sagen filed a motion to suppress evidence obtained during this stop. The circuit court concluded that the seizure was justified under the community caretaker exception, and therefore denied the motion.

DISCUSSION

¶6 On appeal, Sagen contends that Officer Olson’s conduct did not fall within the scope of the community caretaker exception and the seizure was therefore unconstitutional.

¶7 In reviewing a circuit court’s decision on a suppression motion, we uphold a circuit court’s factual findings unless they are clearly erroneous, but we independently decide whether those facts meet the constitutional standard. *State v. Samuel*, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423.

¶8 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. “Subject to a few well-delineated exceptions, warrantless searches are deemed per se

unreasonable” under the United States and Wisconsin Constitutions. *State v. Faust*, 2004 WI 99, ¶11, 274 Wis.2d 183, 682 N.W.2d 371. One of those exceptions arises when an officer is serving as a community caretaker to protect persons or property. *State v. Pinkard*, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592. When acting as a community caretaker, an officer may conduct a seizure without probable cause or reasonable suspicion, as long as the seizure satisfies the reasonableness requirement of the Fourth Amendment. *State v. Kelsey C.R.*, 2001 WI 54, ¶34, 243 Wis. 2d 422, 626 N.W.2d 777.

¶9 The State concedes that Officer Olson did not have probable cause or reasonable suspicion to believe that a traffic violation had been or would be committed when he conducted the stop of Sagen’s vehicle. Therefore, we must determine whether Officer Olson’s conduct is justified under the community caretaker exception.

¶10 We apply a three-part test to determine whether a seizure unsupported by probable cause or reasonable suspicion is justified under the community caretaker exception. *State v. Kramer*, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598. First, a seizure within the meaning of the Fourth Amendment must have occurred. *Id.* Second, the police conduct must be a bona fide community caretaker activity. *Id.* Third, “the public need and interest [must] outweigh the intrusion upon the privacy of the individual.” *Id.* (citation omitted). It is the State’s burden to prove that an officer’s conduct falls within the community caretaker function. *Id.*, ¶17.

¶11 It is undisputed that a seizure occurred when Officer Olson stopped Sagen’s vehicle. Therefore, we address only the second and third parts of the test.

¶12 With respect to the second part, 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.*, ¶23 (citation omitted). An officer meets this standard if the court concludes that he or she has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function. *Id.*, ¶36.

¶13 We conclude that the facts as found by the circuit court satisfy this objective standard. Officer Olson heard a yell coming from within the truck passing directly in front of him. In his experience, it is rare for people to try to get his attention while he is in his official capacity unless they are seeking help. It was dark and Officer Olson was unable to see inside the vehicle to determine what was happening. Under these circumstances, it was objectively reasonable for Officer Olson to stop the vehicle in order to determine whether anyone inside needed assistance.

¶14 Sagen makes two arguments in support of his position that, in the totality of the circumstances of this case, the yell was not an objectively reasonable basis for the community caretaker function. First, he points out that Officer Olson could not identify details about the yell and contends that an “unsupported ‘feeling’ about the vehicle” is not a legally sufficient basis for a stop. However, contrary to Sagen’s contention, Officer Olson’s “feeling” that there was a disturbance in the vehicle was not unsupported: the officer heard a yell

coming from within the vehicle and his experience provided a reasonable basis to believe the yell could be a call for help.²

¶15 Second, Sagen argues that, rather than acting in a bona fide community caretaker function, Officer Olson seized upon the opportunity to stop a vehicle that appeared to be leaving the nearby June Days festival³ in order to determine whether the driver had been drinking. Sagen provides no factual support for his claim that Officer Olson was subjectively hoping to obtain evidence that the driver of the vehicle had been drinking, and this contention is wholly unsupported by the record. However, even if Sagen had provided factual support, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, “that determination is not negated by the officer’s subjective law enforcement concerns.” *Kramer*, 315 Wis. 2d 414, ¶¶30-32.

¶16 Under the totality of the circumstances, we conclude that Officer Olson was performing a bona fide community caretaker activity.

² Sagen repeatedly claims that Officer Olson’s “feeling” that there was a disturbance in the vehicle was not objectively reasonable because Officer Olson knew that what was yelled was not the word “help.” The relevant portion of Officer Olson’s testimony is as follows: “The reason for that was I couldn’t determine if it was help. If it was help, it would be very obvious. But not knowing what was said, I needed to check further to determine what was being said.” Officer Olson does not say that he knew the yell was not the word “help”; he says he didn’t know. However, even if the yell was not “help,” but some other word the officer couldn’t understand, our conclusion would be the same: Officer Olson’s concern that there was a disturbance in the vehicle based on the circumstances surrounding the indecipherable yell was reasonable.

³ The June Days festival was occurring during the weekend that Sagen was stopped. Activities at the festival included a beer tent. At the time of the stop, the festival was over for the night.

¶17 We next turn to the third part of the test. This requires us to 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 *Kelsey C.R.*, 243 Wis. 2d 422, ¶36).

¶18 We conclude that this part of the test is also satisfied. First, the public has a substantial interest in police officers assisting motorists and passengers who may be involved in a disturbance within a vehicle. Several possible vehicle disturbances, including car-jackings and kidnappings, certainly involve exigent circumstances. Since Officer Olson was the only person in the area when he heard the yell, he believed that someone inside the vehicle was attempting to get his attention. He testified that people try to get his attention only when they are in need of help. There is a substantial public interest in police assistance in such situations.

¶19 The second factor also favors application of the community caretaker exception. At the time of the stop, it was about 1:42 in the morning, Officer Olson heard a yell coming from the vehicle, and he was the only person in the area. Due to his concern, he initiated a traffic stop to determine whether the occupants of the vehicle needed assistance. Under the circumstances, activating

his safety lights to initiate a stop and asking the occupants of the vehicle whether they were okay was a minimal use of authority.

¶20 The third 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. This case involved an automobile, and persons have a lower expectation of privacy in a vehicle than in their homes. *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974). As we have explained, it was reasonable for Officer Olson to initiate a stop in order to determine whether anyone in the vehicle needed assistance. This factor weighs in favor of applying the community caretaker exception.

¶21 Fourth, we consider the availability and effectiveness of alternatives to the type of intrusion that occurred. Sagen argues that Officer Olson should have followed Sagen’s vehicle for a longer period of time in order to observe the driver’s conduct and determine whether there were any passengers in the vehicle. We disagree. After hearing a yell, Officer Olson believed that there might be a disturbance within the vehicle. Waiting to offer assistance while he followed the vehicle may have aggravated a time-sensitive situation. Under these circumstances, Officer Olson’s actions in conducting the traffic stop were reasonable. Merely following the vehicle without offering assistance was not an adequate alternative.

¶22 Balancing these four factors, we conclude that the public’s substantial interest in ensuring that police officers offer assistance to those involved in intra-vehicle disturbances outweighs the limited intrusion into Sagen’s privacy.

CONCLUSION

¶23 Officer Olson's conduct falls within the scope of the community caretaker function. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment and order affirmed.

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

