**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 17, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-3134-CR** **Cir. Ct. No. 02-CT-125**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TAMMY J. ERDMANN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Reversed.*

¶1 DYKMAN, J.[1] Tammy Erdmann appeals from a judgment of conviction for operating a motor vehicle while intoxicated, in violation of WIS. STAT. § 346.63(1)(a). She contends that the trial court erred when it denied her

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

motion to suppress. We conclude that the traffic stop that led to Erdmann's arrest was not justified under the community caretaker function. Accordingly, we reverse.

## BACKGROUND

¶2 The facts are not disputed. At approximately 1:55 a.m. on March 19, 2002, Officer Eric Christianson responded to a request from another officer to do a "welfare check" on a woman walking north on Fourth Street in downtown La Crosse. The reason for the request was that the woman, who had blonde hair and was wearing a light-colored jacket, appeared to be crying. When Christianson reached Main Street he saw Erdmann, a blonde woman in a light tan jacket, pull out of a parking space. He followed her and noted that she was driving at a very slow speed, only sixteen miles per hour. After advising dispatch that he would make a traffic stop to check the driver's welfare, Christianson turned on his emergency squad lights and pulled Erdmann's car over.

¶3 Erdmann was not crying but Christianson noticed that her eyes were glossy, her speech was slurred and there was an odor of intoxicants coming from the vehicle. When Erdman failed field sobriety tests, Christianson arrested her and took her to a hospital where a blood draw established her blood alcohol level to be .129 percent. The criminal complaint charged Erdmann with OMVWI as a second offense and operating a motor vehicle with a prohibited blood alcohol concentration.

¶4 Erdmann moved to suppress the evidence and dismiss the charges asserting that the traffic stop was illegal. At the motion hearing Christianson testified that Erdmann's car was moving at a very slow rate of speed, but that he did not observe Erdmann commit any traffic violations, nor was her car impeding

other vehicles. He also stated that it was later determined that Erdmann was not the woman seen crying by Officer Roden. When asked why he stopped Erdmann's vehicle, Christianson explained:

> The reason for stopping [Erdmann's car] was two-fold. Number one, it was—she met the description. Number two, considering I had my red and blue lights on for two city blocks, she was driving at a slow speed; like I explained earlier, number one, she was either possibly intoxicated or number two, she was crying and this was definitely the person that Officer Roden saw walking. That was the reason for my traffic stop.

¶5 The trial court ruled that the stop of Erdmann's car was a seizure within the meaning of the Fourth Amendment but that it was not for the purpose of detection, investigation or acquisition of evidence relating to a crime. Rather, the purpose of the stop was to determine whether or not Erdmann was in need of assistance, that is, "[w]hy she might be crying." The trial court denied the motion to suppress, finding that it was reasonable for Christianson to conclude that Erdmann was the woman described by dispatch and the circumstances warranted the stop under the police community caretaker function. Erdmann appeals.

## DISCUSSION

¶6 When reviewing a motion to suppress evidence, we will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. However, the application of constitutional principles to the facts is a question of law that we decide de novo without deference to the trial court's decision. ***Id.***

¶7 The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause." The Wisconsin Constitution provides a nearly identical protection in article I, section 11. The State concedes that when Officer Christianson turned on his squad lights and Erdmann obeyed this show of authority by pulling over and stopping her vehicle, a seizure occurred. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). Such a seizure is permitted under the Fourth Amendment if it is justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. ***Id.*** at 439. Because the State also concedes that the stop of Erdmann's vehicle was not supported by reasonable suspicion, the dispositive issue is whether the seizure occurred pursuant to a valid exercise of the community caretaker function.[2]

¶8 The community caretaker function describes those actions by police that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973). To determine if this exception to the Fourth Amendment's warrant requirement applies, the court must balance the public good furthered by the caretaking activity against the resulting intrusion into individual privacy and evaluate the overall reasonableness of the police conduct. ***State v. Dull***, 211 Wis. 2d 652, 658, 565 N.W.2d 575 (Ct. App. 1997). "Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." ***Pennsylvania v. Mimms***, 434 U.S. 106, 108-09 (1977) (quoting ***United States v. Brignoni-***

[2] The State has failed to contest Erdmann's contention that Officer Christianson lacked reasonable suspicion for the traffic stop under a law enforcement function, asserting that such analysis is unnecessary because Christianson's actions were performed solely in his capacity as a community caretaker. Arguments that are not refuted are deemed admitted and therefore we need not consider this issue further. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

***Ponce***, 422 U.S. 873, 878 (1975)). Erdmann contends that the traffic stop was not a valid exercise of the police caretaker function and therefore the trial court erred when it denied her motion to suppress. We agree.

¶9 We use a three-step test to evaluate whether a seizure conducted as part of police caretaker activity is reasonable: "(1) that a seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual." ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987) (***Anderson I***), *rev'd on other grounds,* 155 Wis. 2d 77, 454 N.W.2d 763 (1990).[3] As it is undisputed that the traffic stop was a seizure, we confine our discussion to the second step.

¶10 The trial court found that the reason Christianson stopped Erdmann's vehicle was to see if Erdmann was in need of assistance, based on a report that a woman meeting her description had been observed crying, and therefore the stop was bona fide community caretaker activity. But Christianson testified that there was a dual purpose to the stop: (1) the driver might be intoxicated, and (2) she might be the crying woman for whom a welfare check had been requested.

¶11 The police officer's subjective assessment or motivation is not dispositive of whether his actions are legally justified. ***State v. Baudhuin***, 141

[3] We decline Erdmann's invitation to analyze the traffic stop under the "emergency doctrine" test used in ***State v. Ferguson***, 2001 WI App 102, ¶17, 244 Wis. 2d 17, 629 N.W.2d 788. That case involved the warrantless search of a home, and, although similar to the ***Anderson I*** test, is not applicable when determining if a traffic stop is justified under the community caretaker exception.

Wis. 2d 642, 651, 416 N.W.2d 60 (1987). The question is whether the circumstances, viewed objectively, justify that action. ***Id.*** Thus Christianson's testimony, that he stopped Erdmann's car in part because of his belief that she might be intoxicated, does not, by itself, bar the conclusion that he was engaged in community caretaker activity when he made the traffic stop. But, it is a significant factor to consider when determining if police action is totally divorced from the detection of crime. In addition to Christianson's explanation, other evidence presented at the hearing supports the conclusion that the stop was, at least in part, made to see if Erdmann was intoxicated. Christianson responded to a report that there was a crying woman walking in downtown La Crosse. However, when he saw Erdmann, she was already in her car. She drove down the street slowly, but there was no indication that she was in distress or that her vehicle was not operating properly.

¶12 While we will uphold findings of historical fact unless they are clearly erroneous, the trial court's conclusion regarding the nature and reasonableness of the conduct are legal issues subject to independent review. ***Dull***, 211 Wis. 2d at 658. A community caretaker action must be "totally divorced from the detection, investigation or acquisition of evidence" relating to a criminal violation. ***State v. Ellenbecker***, 159 Wis. 2d 91, 96, 464 N.W.2d 427 (Ct. App. 1990). Christianson's stop of Erdmann was not totally divorced from the detection, investigation or acquisition of evidence relating to a traffic violation. Christianson testified that one reason why he stopped Erdmann was to see if she was intoxicated. OMVWI is a traffic violation and sometimes a criminal violation. Pulling over Erdmann's vehicle was not bona fide community caretaker

activity.[4] Accordingly, the trial court erred in denying Erdmann's motion to suppress on the ground that the stop was justified under the community caretaker function.

*By the Court.*—Judgment reversed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

[4] Neither Erdmann or the State discusses our supreme court's most recent discussion of the community caretaker function, ***State v. Kelsey C.R.***, 2001 WI 54, 243 Wis. 2d 422, 626 N.W.2d 777. There the court ruled that the seizure of a fifteen-year-old girl, sitting alone on a sidewalk was bona fide caretaking activity. Kelsey was sitting in a huddled position. She was in a high-crime neighborhood and it was after dark. She fled after being told to "stay put" by one of two uniformed police officers. Concerned that she might be a runaway, the officers gave chase and detained her. ***Id.*** at ¶42. The court first concluded that Kelsey's flight from the officers constituted reasonable suspicion, and therefore the temporary investigation detention did not violate the Fourth Amendment. ***Id.*** Then, reviewing the situation again under the ***Anderson I*** factors, the court held that the officers' actions were also a reasonable exercise of the community caretaking function, because there was a strong public interest in locating runaway children and something bad could have happened to Kelsey had the officers not detained her after she fled. ***Id.*** at ¶¶45-46. ***Kelsey*** is factually distinguishable from this case because here Christianson testified that the purpose of the stop was twofold: investigating a possible OMVWI and investigating why a woman was crying.