



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

February 21, 2017

To:

Hon. Randy R. Koschnick
Circuit Court Judge
Jefferson County Courthouse
311 South Center Avenue
Jefferson, WI 53549

Carla Robinson
Clerk of Circuit Court
Jefferson County Courthouse
311 South Center Avenue
Jefferson, WI 53549

Jonas B. Bednarek
Hurley, Burish & Stanton, S.C.
33 E. Main St., Suite 400
P O Box 1528
Madison, WI 53701-1528

Monica J. Hall
Assistant District Attorney
311 S. Center Ave., Rm. 225
Jefferson, WI 53549-1718

Katherine Desmond Lloyd
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2016AP154-CR

State of Wisconsin v. Jacob E. Niesen (L.C. # 2014CF442)

Before Lundsten, Sherman and Blanchard, JJ.

After a suppression motion was denied, Jacob E. Niesen pled no contest to the possession of narcotic drugs. *See* WIS. STAT. § 961.41(3g)(am) (2015-16).¹ On appeal, Niesen renews his Fourth Amendment challenge. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We affirm.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Facts

The following facts are taken from the testimony at the suppression hearing and they are not disputed.² In the early afternoon of December 24, 2014, State Trooper Todd Weinberger was patrolling I-94 in Jefferson County when he received a dispatch alerting him to a vehicle being driven erratically. An anonymous caller had reported that an eastbound gold Cadillac, driven by a male, was swerving within and across lanes and that the driver occasionally was slumped over the steering wheel. The dispatch included the vehicle's license plate number. Weinberger positioned himself at a crossover to watch for the vehicle. The vehicle shortly thereafter passed the crossover and Weinberger pulled out to follow. The vehicle's license plate was as reported, except that the last three letters were in a different order.

Weinberger followed the car for about two minutes until the car exited to a rest area. During that time, Weinberger did not see any unusual driving. Because of traffic, Weinberger could not exit immediately. He turned around at the next crossover and arrived at the rest area in less than four minutes. The Cadillac was parked at the rest area and Weinberger "pulled in almost perpendicular" to the Cadillac so that it could not leave. Weinberger remained in his squad car and watched. Weinberger testified that he has encountered persons whose bad driving was caused by diabetes or some other medical issue, so he decided to watch the driver "for a while." The driver, later identified as Niesen, was "moving around inside the vehicle" but Weinberger did not believe that the movements were "furtive" such that he feared for his safety.

² The circuit court expressly found State Trooper Weinberger's testimony was credible and not contradicted.

In his report, Weinberger described the movements as Niesen collecting garbage from the inside of the car.

Weinberger testified that Niesen opened the car door and “leaned out of the vehicle. It appeared that he had dropped something. He stood, got out of the vehicle, and began kneeling.” When Niesen stood up, he “made eye contact” with Weinberger who then “turned [the squad car’s] lights on to let him know [Weinberger was] going to make contact” and because Weinberger “was parked in an active lane of traffic” of the rest area. “[I]mmediately” after making eye contact, Niesen “began walking away from the vehicle” with the door still open. Niesen was not walking in the direction of a trash can or bathroom and Weinberger felt he did not have a destination. Weinberger testified that he then “summoned” Niesen.

Weinberger asked Niesen if he was all right, and Niesen replied that he was. Weinberger “immediately” noticed that Niesen “was shaking badly” and “[h]is hands were trembling.” Weinberger asked Niesen why he was shaking, and Niesen replied that “he had anxiety.” Niesen told Weinberger he took medication for the problem but did not have any with him. Weinberger again asked Niesen if he was okay “because he just continued to shake.” Niesen’s eyes were glassy and bloodshot, his speech was slow and slightly slurred, and he was “very visual[ly] trembling.” Weinberger then saw an “orange item” just inside the left front tire that he immediately recognized as a syringe cap. Based on those observations, Weinberger told Niesen he was going to search the vehicle and during the search he found heroin and drug paraphernalia.

Discussion

“In reviewing the denial of a motion to suppress evidence, we will uphold a circuit court’s findings of historical fact unless they are clearly erroneous.” *State v. Pinkard*, 2010 WI

81, ¶12, 327 Wis. 2d 346, 785 N.W.2d 592. We then review the circuit court’s application of constitutional principles to those facts independently. *Id.*

A warrantless search is constitutional if “conducted pursuant to a police officer’s reasonable exercise of a bona fide community caretaker function.” *State v. Matalonis*, 2016 WI 7, ¶30, 366 Wis. 2d 443, 875 N.W.2d 567. The community caretaker function arises “when [an] officer discovers a member of the public who is in need of assistance.” *State v. Kramer*, 2009 WI 14, ¶¶4, 32, 37, 315 Wis. 2d 414, 759 N.W.2d 598. A seizure is justified by the community caretaker function if “the police conduct was bona fide community caretaker activity,” and “the public need and interest outweigh the intrusion upon the privacy of the individual.” *Id.*, ¶21 (quoted source omitted).

In this case, Niesen does not challenge the circuit court’s factual findings and, therefore, we independently review whether Trooper Weinberger’s conduct fall within the community caretaker exception to the warrant requirement. *See Pinkard*, 327 Wis. 2d 346, ¶12.

To determine whether the community caretaker exception applies, we must consider: “(1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised....” *See id.*, ¶29.

The circuit court found that Niesen was seized, for purposes of the Fourth Amendment, when Weinberger called out to him. The court reasoned that Niesen was not seized before that point because he had not noticed that Weinberger was there. On appeal, Niesen does not

challenge that conclusion and we also conclude that Niesen was seized when Weinberger called out to Niesen as he was walking away from his car.

The next question is whether Weinberger was exercising a bona fide community caretaker function. Niesen does not argue that Weinberger could not consider the information in the anonymous tip. Thus, Weinberger knew that Niesen reportedly had been slumped over the steering wheel and weaving in and out of traffic while driving on the Interstate. It was reasonable for Weinberger to be concerned that such slumping and erratic driving may be caused by a medical emergency. Once parked in the rest area, Weinberger observed Niesen drop something as he got out of his car and then begin walking away from the car leaving the car door open, without an apparent destination. Those observations added to the possibility that Niesen was disoriented or ill. Investigating a possible medical emergency and offering assistance is a bona fide community caretaker function. See *Kramer*, 315 Wis. 2d 414, ¶32.

We next must consider whether the public interest outweighed the intrusion into Niesen's privacy. That consideration is guided by a four-factor balancing test:

(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 (quoted source omitted).

Here, the public's interest was substantial. Niesen had reportedly been driving in an erratic fashion that put himself and other drivers at risk. Weinberger had information that suggested Niesen was physically impaired. His observations of Niesen while parked did little to

dispel his concern into Niesen's health. The public also has an interest in Niesen's well-being and in having police assist community members at risk.

The seizure itself was not effected in an aggressive manner. Weinberger merely asked Niesen to stop and then asked him if he was all right—a minimal intrusion into Niesen's privacy. Weinberger did not draw a weapon or display any show of force. Weinberger did not enter a dwelling. *Cf. Pinkard*, 327 Wis. 2d 346, ¶56 (recognizing a “heightened privacy interest in preventing intrusions into one's home.”).

Once Weinberger saw the syringe cap near the car's front tire, he had probable cause to search the car.³ Because Weinberger had acted lawfully within the meaning of the community caretaker doctrine prior to his observation of the syringe cap, the circuit court correctly denied Niesen's suppression motion.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

³ Niesen does not challenge Weinberger's search of the car which yielded heroin and drug paraphernalia.