CASE LAW

Community Caretaking

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847 F.3d 71
United States Court of Appeals, First Circuit.

Peter ALFANO, Plaintiff, Appellant,
v.
Thomas LYNCH, Defendant, Appellee.

No. 16-1914
|
February 1, 2017

Synopsis

Background: Concert goer who was taken into protective custody for allegedly being intoxicated and prevented from attending concert brought civil rights action against detaining officer. The United States District Court for the District of Massachusetts, Richard G. Stearns, J., 2016 WL 2993615, granted officer's motion for summary judgment on qualified immunity grounds, and concert goer appealed.

Holdings: The Court of Appeals, Selya, Circuit Judge, held that:

controlling and persuasive authority combined to give a reasonable police officer fair and clear warning, in July of 2014 when officer took allegedly intoxicated concert goer into protective custody, handcuffed him, transported him to police station miles away, and confined him in jail cell, that the Fourth Amendment required officer to have probable cause to believe that concert goer was incapacitated to so interfere with his freedom of movement, and

fact that concert goer had evidently been drinking, had failed at least one field sobriety test by being unable to stand on one leg, and had refused to take breath test was insufficient, without more, to give police officer probable cause to believe that he was incapacitated.

Vacated and remanded.

***73** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, [Hon. Richard G. Stearns, U.S. District Judge]

Attorneys and Law Firms

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Alexandra R. Hassell, with whom Douglas I. Louison and Louison, Costello, Condon & Pfaff, LLP were on brief, for appellee.

Before Kayatta, Circuit Judge, Souter, Associate Justice,[*] and Selya, Circuit Judge.

Opinion

SELYA, Circuit Judge.

The doctrine of qualified immunity shields from liability public officials, including police officers, whose conduct does not violate clearly established federal statutory or constitutional rights. It is a strong, but not impenetrable, shield. After careful consideration of the record in this case, viewed in the light most favorable to the plaintiff, we conclude that qualified immunity is not available: given the state of the preexisting law, the unconstitutionality of a police officer's actions in taking a ***74** person into protective custody, handcuffing that person, transporting him to a police station, and jailing him without probable cause to believe that he is incapacitated should have been apparent. Consequently, we vacate the district court's entry of summary judgment in the defendant's favor and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

Inasmuch as the court below resolved this case at the summary judgment stage, we rehearse the facts in the light most favorable to the nonmovant (here, the plaintiff), consistent with record support. See DePoutot v. Raffaelly, 424 F.3d 112, 114 (1st Cir. 2005).

On the morning of July 11, 2014, plaintiff-appellant Peter Alfano and two friends set out to attend a concert at the Xfinity Center in Mansfield, Massachusetts. They travelled to Mansfield on a chartered bus that provided round-trip transportation from downtown Boston to the concert venue. The threesome consumed beers both on the bus and at a tailgate party upon their arrival. All told, Alfano (by his own admission) drank between six and eight beers over a span of some four to six hours.

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When it came time for the concert to begin, Alfano and his friends made their way to a security checkpoint at the entrance of the amphitheater. Alfano was feeling the effects of the alcohol that he had consumed, but he did not feel out of control. As he reached the checkpoint, two security guards asked him to step out of the line and escorted him to a separate holding area on the Xfinity Center property. There, Alfano was turned over to defendant-appellee Thomas Lynch, a lieutenant from a neighboring town's police department, who was working a security detail at the Xfinity Center. According to Lynch, the security guards told him that they thought that Alfano might be incapacitated and, thus, took him aside for further scrutiny.

Massachusetts law permits police officers to take "incapacitated" persons into civil protective custody. Mass. Gen. Laws ch. 111B, § 8; see id. § 3 (specifying, as pertinent here, that an "[i]ncapacitated" person is one who is both intoxicated and, "by reason of the consumption of intoxicating liquor is ... likely to suffer or cause physical harm or damage property"). To evaluate whether Alfano was in fact incapacitated, Lynch—acting under color of state law—asked Alfano to perform a series of field sobriety tests. The parties dispute how Alfano performed on these tests. They agree, however, that he refused to take a breathalyzer test. Following that refusal, Lynch handcuffed Alfano and placed him in protective custody.

At first, Alfano was shackled to a bench. He was later transported to the Mansfield police station (some miles away) and confined in a holding cell. Roughly five hours later, he was released. By that time, the concert was over.

The matter did not end there. In July of 2015, Alfano sued in the federal district court.[1] His complaint alleged, in substance, that Lynch lacked probable cause to take him into protective custody and, accordingly, abridged his Fourth Amendment right against unreasonable seizures. After a course of pretrial discovery, Lynch moved for summary judgment on qualified immunity ***75** grounds. Over Alfano's opposition, the district court granted Lynch's motion. See Alfano v. Lynch, No. 15–12943, 2016 WL 2993615, at *3 (D. Mass. May 23, 2016). The court held that the law was not clearly established as to the need for probable cause. See id. This timely appeal ensued.

II. ANALYSIS

We review the district court's entry of summary judgment de novo. See DePoutot, 424 F.3d at 117. Summary judgment is appropriate only when the record reflects no genuine issue as to any material fact and discloses that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Schiffmann v. United States, 811 F.3d 519, 524 (1st Cir. 2016).

"[Q]ualified immunity shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " Matalon v. Hynnes, 806 F.3d 627, 632–33 (1st Cir. 2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The doctrine's prophylactic sweep is broad: it leaves unprotected only those officials who, "from an objective standpoint, should have known that their conduct was unlawful." MacDonald v. Town of Eastham, 745 F.3d 8, 11 (1st Cir. 2014) (quoting Haley v. City of Bos., 657 F.3d 39, 47 (1st Cir. 2011)). Put another way, the doctrine protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

The qualified immunity analysis entails a two-step pavane. See Matalon, 806 F.3d at 633 (citing Pearson v. Callahan, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). The first step requires an inquiring court to determine whether the plaintiff's version of the facts makes out a violation of a protected right. See id. The second step requires the court to determine "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Id. (citation omitted).

These steps, though framed sequentially, need not be taken in order. See Pearson, 555 U.S. at 236, 129 S.Ct. 808. A court "may alter the choreography in the interests of efficiency," defer the first step, and proceed directly to the second step. Matalon, 806 F.3d at 633. Because that path seems the most efficacious here, we focus initially on the second step, that is, whether the right at issue was clearly established when Lynch confronted Alfano.

The "clearly established" analysis has two sub-parts. See MacDonald, 745 F.3d at 12. The first sub-part requires the plaintiff to identify either "controlling authority" or a "consensus of cases of persuasive authority" sufficient to send a clear signal to a reasonable official that certain conduct falls short of the constitutional norm. Wilson v. Layne, 526

U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999); see Limone v. Condon, 372 F.3d 39, 45 (1st Cir. 2004) (asking "whether the state of the law at the time of the putative violation afforded the defendant fair warning that his or her conduct was unconstitutional"). The second sub-part asks whether an objectively reasonable official in the defendant's position would have known that his conduct violated that rule of law. See Wilson v. City of Bos., 421 F.3d 45, 57–58 (1st Cir. 2005). The question is not whether the official actually abridged the plaintiff's constitutional rights but, rather, whether the official's conduct was unreasonable, given the state of the law when he acted. See ***76** Amsden v. Moran, 904 F.2d 748, 751–52 (1st Cir. 1990).

The first sub-part of this analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." Brosseau v. Haugen, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) (citation omitted). In other words, the clearly established law must not be gauged at too high a level of generality; instead, it must be "particularized" to the facts of the case. Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Even so, there is no requirement of identicality. In arguing for clearly established law, a plaintiff is not required to identify cases that address the "particular factual scenario" that characterizes his case. Matalon, 806 F.3d at 633. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning" to public officials, United States v. Lanier, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997); rather, the existence of fair and clear warning depends on whether, "in the light of pre-existing law" the unconstitutionality of the challenged conduct is "apparent," Anderson, 483 U.S. at 640, 107 S.Ct. 3034. In the last analysis, it is enough if the existing precedents establish the applicable legal rule with sufficient clarity and specificity to put the official on notice that his contemplated course of conduct will violate that rule. See Matalon, 806 F.3d at 633 (citing Hope v. Pelzer, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)).

In applying the test for clearly established law, the focus must be on federal precedents. See Davis v. Scherer, 468 U.S. 183, 193-95, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). Courts may consider state precedents, though, to the extent that they analyze the relevant federal issue. See Wilson, 421 F.3d at 56-57; Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 143–44 (1st Cir. 2001).

Here, the initial question reduces to whether—as of the parties' encounter in July of 2014—controlling and persuasive precedent provided fair and clear notice that the Fourth Amendment requires probable cause before a police officer, acting under a state protective custody statute, can take an individual into protective custody, handcuff the individual, transport him to a police station, and confine him in a jail cell. See Layne, 526 U.S. at 617, 119 S.Ct. 1692; Limone, 372 F.3d at 45. We turn next to that question.

It is hornbook law that the Fourth Amendment requires probable cause to place an individual under arrest. See Hayes v. Florida, 470 U.S. 811, 816, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985). The proper approach, though, is a functional one: for decades, controlling precedent has made pellucid that the probable cause requirement extends to certain types of custody that, though short of an arrest, possess attributes that are characteristic of an arrest. See id. (explaining that police must have probable cause to effect seizures that are "sufficiently like arrests"); Dunaway v. New York, 442 U.S. 200, 212–13, 216, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) (holding that probable cause was required where petitioner's detention, though not styled as an arrest, "was in important respects indistinguishable from a traditional arrest"). Following this logic, the Court—in the absence of express judicial authorization—has insisted upon probable cause when, for example, officers eschew an arrest but detain an individual and transport him to a police station against his will. See Kaupp v. Texas, 538 U.S. 626, 630–31, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003) (per curiam); Hayes, 470 U.S. at 816, 105 S.Ct. 1643. In a similar vein, this court has required probable cause when a detention included ***77** "characteristics ordinarily associated with an arrest," such as being placed in handcuffs and "involuntarily transported ... to an official holding area some distance from the place of the original stop." United States v. Acosta–Colon, 157 F.3d 9, 15 (1st Cir. 1998).

Of particular pertinence for present purposes, we have left no doubt that the Fourth Amendment requires officers acting under a civil protection statute to have probable cause before taking an individual into custody of a kind that resembles an arrest. In Ahern v. O'Donnell, 109 F.3d 809 (1st Cir. 1997) (per curiam), we considered the Fourth Amendment implications of actions taken under a Massachusetts civil protection statute that allows a police officer to restrain and seek hospitalization of an individual when he has reason to believe that the failure to do so "would create a likelihood of serious harm by reason of mental illness." Id. at 816

(quoting Mass. Gen. Laws ch. 123, § 12(a)). Observing that "involuntary hospitalization is no less a loss of liberty than an arrest," we held that the Fourth Amendment's safeguards against unreasonable seizures extended to protective custody on mental health grounds. Id. at 817.

Our holding in Ahern is not an outlier but, rather, reflects clearly established law. It comports with substantially identical holdings in other circuits. See, e.g., Cantrell v. City of Murphy, 666 F.3d 911, 923 & n.8 (5th Cir. 2012); Roberts v. Spielman, 643 F.3d 899, 905 (11th Cir. 2011); Bailey v. Kennedy, 349 F.3d 731, 739 (4th Cir. 2003); Monday v. Ouellette, 118 F.3d 1099, 1102 (6th Cir. 1997); Pino v. Higgs, 75 F.3d 1461, 1467-68 (10th Cir. 1996); Sherman v. Four Cty. Counseling Ctr., 987 F.2d 397, 401 (7th Cir. 1993); Glass v. Mayas, 984 F.2d 55, 58 (2d Cir. 1993); Maag v. Wessler, 960 F.2d 773, 775-76 (9th Cir. 1991) (per curiam).[2]

To be sure, the scenario presented in Ahern is not entirely congruent with the scenario faced by Lynch. In our view, however, the parallels are close enough to have afforded a reasonable officer in Lynch's position fair and clear warning that his conduct was unconstitutional. See Hope, 536 U.S. at 741, 122 S.Ct. 2508 (explaining that, in determining the existence of clearly established law, cases with identical facts are not required); Limone, 372 F.3d at 48 (similar). In other words, given the controlling and persuasive precedents and the notice that those precedents provided, the unlawfulness of Lynch's actions should have been apparent to him. No more was exigible to satisfy the first sub-part of the "clearly established" analysis. See Anderson, 483 U.S. at 640, 107 S.Ct. 3034.

The Tenth Circuit reached the same conclusion in Anaya v. Crossroads Managed Care Systems, Inc., 195 F.3d 584 (10th Cir. 1999). There, the court—relying on much the same consensus of cases assembled in Ahern—held that it was clearly established that the Fourth Amendment required probable cause to take an allegedly incapacitated individual into protective custody under a municipal civil protection policy.[3] See id. at 590–91, 594. The court found the analogy between inebriated ***78** persons and the mentally ill compelling: it observed that "the context of protecting the public from the mentally ill is directly analogous to that of protecting the public from the intoxicated." Id. at 594–95. Anaya, then, buttresses the view that the probable cause requirement for effecting seizures of incapacitated persons was clearly established at the time Alfano and Lynch crossed paths.

Because no Massachusetts reported cases analyze whether and to what extent the Fourth Amendment requires probable cause to take an individual into protective custody under the relevant statute, we could end our analysis here. See Scherer, 468 U.S. at 193–95, 104 S.Ct. 3012; Starlight Sugar, 253 F.3d at 143-44. We think it useful to note, however, that a decision of the state's highest court, the Massachusetts Supreme Judicial Court (SJC), confirms the result to which the federal cases unambiguously point. In Commonwealth v. O'Brien, 434 Mass. 615, 750 N.E.2d 1000 (2001), the SJC stated (apparently as a matter of state law) that "[t]o take someone into protective custody, officers need ... probable cause to believe that the person is 'incapacitated' within the meaning of [the protective custody statute]." Id. at 1007.

To be sure, other Massachusetts courts have been more recondite. The Massachusetts Appeals Court, for example, has authored Janus-like decisions that appear to face in conflicting directions. Compare Commonwealth v. Nickerson, 79 Mass.App.Ct. 642, 948 N.E.2d 906, 913 (2011) (suggesting that "reasonable suspicion" standard applies), with Commonwealth v. Thomas, 73 Mass.App.Ct. 1127, 902 N.E.2d 433, at *1 (Mass. App. Ct. 2009) (unpublished table opinion) (stating that "probable cause" standard applies) and Commonwealth v. Silva, 63 Mass.App.Ct. 1108, 824 N.E.2d 487, at *2 n.3 (Mass. App. Ct. 2005) (unpublished table opinion) (same) and Commonwealth v. St. Hilaire, 43 Mass.App.Ct. 743, 686 N.E.2d 1045, 1048 (1997) (interpreting state precedent to mean that probable cause "is ordinarily the standard to be applied in protective custody cases"). We regard these decisions as being of little consequence because none of them purports to analyze the question in Fourth Amendment terms and because the SJC (which has been crystal clear on the issue) is the ultimate arbiter of Massachusetts law. Federal courts of appeals typically look only to precedents from the United States Supreme Court, federal appellate courts, and the highest court of the state in which a case arises to gauge whether a particular right is clearly established. See, e.g., Hill v. Crum, 727 F.3d 312, 322 (4th Cir. 2013); Lederman v. United States, 291 F.3d 36, 47-48 (D.C. Cir. 2002); Neague v. Cynkar, 258 F.3d 504, 507 (6th Cir. 2001); Jenkins ex rel. Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 826 n.4 (11th Cir. 1997) (en banc).

To say more about the clearly established nature of the law would be to paint the lily. We hold that, in July of 2014, controlling and persuasive authority combined to give a reasonable officer fair and clear warning that the Fourth

Amendment required probable cause to take an individual into protective custody, handcuff him, transport him to a police station miles away, and confine him in a jail cell.[4]

***79** This holding does not end our odyssey. Concluding, as we do, that the probable cause requirement is clearly established, what remains to be done "reduces to the test of objective legal reasonableness." Camilo–Robles v. Hoyos, 151 F.3d 1, 6 (1st Cir. 1998). Our resolution of this point turns on whether an objectively reasonable officer would have believed he had probable cause to take Alfano into protective custody within the meaning of the relevant protective custody statute. To make this judgment, we must consider whether Lynch's decision to deem Alfano incapacitated, take him into protective custody, handcuff him, transport him to the police station, and confine him in a jail cell was the kind of decision (whether or not correct) that a reasonable officer standing in Lynch's shoes would have reached. See id. at 7.

For probable cause to have existed, the facts known to Lynch would have had to "give rise to a reasonable likelihood," Cox v. Hainey, 391 F.3d 25, 31 (1st Cir. 2004), that Alfano was both intoxicated and incapacitated (that is, apt to harm himself, to harm someone else, or to damage property),[5] see Mass. Gen. Laws ch. 111B, § 3. This is a fact-specific determination: a qualified immunity defense cannot prevail unless the officer's conduct can be justified in light of the facts. See Morelli v. Webster, 552 F.3d 12, 24 (1st Cir. 2009).

Given that the district court resolved the qualified immunity question at summary judgment, we must take as true (for purposes of our probable cause inquiry) Alfano's supportable version of the facts. See id. at 24-25. By "supportable," we mean that we give credence only to facts that derive support from affidavits or other materials of evidentiary quality contained in the summary judgment record. See Garside v. Osco Drug, Inc., 895 F.2d 46, 49-50 (1st Cir. 1990).

On Alfano's supportable version of the facts, Lynch took him into protective custody after Alfano was denied admission to the concert and brought to Lynch, who administered three field sobriety tests and unsuccessfully requested that Alfano agree to a breathalyzer test. Alfano admits that he failed the first field sobriety test (the one-leg stand) but maintains that he passed the second and third tests (which involve, respectively, reciting the alphabet and carrying out a horizontal gaze nystagmus exercise). In his view, these test results revealed only what Lynch already knew: that Alfano had been drinking and was under the influence of alcohol.

Alfano explains that he refused a breathalyzer test because he had already arranged bus transportation back to Boston and would not be operating a motor vehicle. He adds that Lynch —who had been told that Alfano was travelling by bus—had no reason to think that he was planning to drive.

Alfano insists that he was walking normally, steady on his feet (not stumbling, swaying, or lurching), and speaking clearly and in conversational tones. He asserts that he responded to Lynch's questions in an alert and coherent manner; that he was generally cooperative and well-mannered throughout his interactions with Lynch and other security personnel; and that he was in no visible distress. The record, ***80** viewed favorably to Alfano, contains no facts indicating that Alfano was likely to harm himself, injure another person, or damage property.

The short of it is that Lynch may well have had probable cause to believe that Alfano was intoxicated. Here, however, Lynch's reasons for placing Alfano into protective custody did not extend beyond probable cause to think that Alfano was intoxicated, and intoxication alone is not sufficient to warrant a finding of incapacitation. See Veiga v. McGee, 26 F.3d 1206, 1210 (1st Cir. 1994). The summary judgment record, construed in the light most favorable to Alfano, simply does not support a conclusion that Lynch had adequate reason to believe that Alfano, though intoxicated, was likely to harm himself or anyone else or to damage property. See, e.g., Nickerson, 948 N.E.2d at 913 (finding no incapacitation when defendant appeared intoxicated but was otherwise able to "converse coherently" and "relate appropriately" with police).

That ends this aspect of the matter. We readily acknowledge that Lynch's version of the facts differs in many respects from Alfano's account. Those factual disputes, however, must await resolution at a trial; at the summary judgment stage, it is Alfano's version that controls. See Morelli, 552 F.3d at 24–25. On that version, a rational jury would have no choice but to find that Lynch's determination of incapacitation was made without probable cause and was objectively unreasonable. It follows that—contrary to the district court's view—the qualified immunity defense was not available to Lynch. See id. at 25.

III. CONCLUSION

We need go no further. For the reasons elucidated above, we vacate the entry of summary judgment and remand for further

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proceedings consistent with this opinion. Costs shall be taxed in Alfano's favor.

So ordered.

All Citations

847 F.3d 71

Footnotes

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

1 Alfano brought suit pursuant to 42 U.S.C. § 1983, which furnishes a cause of action against any person who, while acting under color of state law, transgresses someone else's constitutional rights. See Kalina v. Fletcher, 522 U.S. 118, 123, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997).

2 Our decision in Veiga v. McGee, 26 F.3d 1206, 1214 (1st Cir. 1994), is not at odds with this line of cases. Although that decision did assess whether officer defendants acted reasonably under Mass. Gen. Laws ch. 111B, §§ 3, 8, it did not assess the level of suspicion required to take an individual into custody thereunder.

3 The municipal policy at issue in Anaya was substantially similar to the Massachusetts statute under which Lynch was acting. Compare Anaya, 195 F.3d at 589 (quoting Trinidad, Colo. Police Dept. Order 95-04) with Mass. Gen. Laws ch. 111B, §§ 3, 8.

4 It is critical to our holding that Alfano was subjected to a deprivation of liberty that resembled an arrest. We take no view as to whether something less than probable cause might justify a briefer, less intrusive detention under the Massachusetts protective custody statute. See Commonwealth v. McCaffery, 49 Mass.App.Ct. 713, 732 N.E.2d 911, 914 (2000); cf. Terry v. Ohio, 392 U.S. 1, 30–31, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (requiring only reasonable suspicion for a brief investigatory stop).

5 For the sake of completeness, we note that the Massachusetts protective custody statute limns a trio of other grounds for finding a person incapacitated. See Mass. Gen. Laws ch. 111B, § 3 (specifying that an intoxicated person may also be incapacitated if he is unconscious, in need of medical attention, or disorderly). Lynch does not claim that any of these other grounds has relevance here.

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72 Cal.App.5th 904
Court of Appeal, Third District, California.

Derrick J. BLAKES, Petitioner,
v.
The SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent;
The People, Real Party in Interest.

C093856
|
Filed 11/24/2021

Synopsis
Background: Defendant charged with felon in possession of a firearm, driving without a valid license, appropriation of lost property by finder, and possession of a controlled substance, filed motion to suppress evidence obtained from warrantless vehicle search. Following magistrate's denial of the motion, the Superior Court, Sacramento County, No. 19FE022202, Timothy M. Frawley, J., also denied the motion to suppress. Defendant filed mandamus petition.

Holdings: The Court of Appeal, Blease, J., held that:

police detectives' smelling of burnt marijuana emanating from defendant's vehicle during traffic stop was insufficient to support probable cause as would have justified warrantless search under automobile exception to warrant requirement, and

warrantless search of defendant's vehicle was not justified by a community caretaking function and instead was based on investigative pretext, and thus, was an invalid inventory search.

Writ of mandamus granted.

****802** (Super. Ct. No. 19FE022202)

Attorneys and Law Firms

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Opinion

BLEASE, Acting P.J.

*****1** ***907** In this mandamus action, petitioner Derrick J. Blakes seeks review of the denial of his motion to suppress the fruits of a ****803** search of his car following a traffic stop. He claims the trial court erred in finding the warrantless search supported by probable cause and was a valid impound search. We agree.

The facts adduced by the officers before the warrantless entry of the car; illegally tinted windows, defendant taking one-tenth of a mile to pull over and stop, the smell of marijuana emanating from the car, his having a suspended license, and his having a prior arrest for felon in possession of a firearm, do not provide probable cause that contraband or evidence of illegal activity was in the car. The evidence shows the impound decision was based on an investigative pretext rather than serving a community caretaking function.

***908** We shall issue the writ and remand with directions to grant the suppression motion.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of the search are taken from the combined preliminary hearing and hearing on the suppression motion.

On December 11, 2019, Sacramento County Sheriff's Deputies Nicholas Sareeram and Joshua Langensiepen were assigned to the gang suppression unit and were patrolling in their marked vehicle when they spotted a gold Chevy Impala with tinted windows in violation of the Vehicle Code. Positioning their patrol car behind the Impala, they ran a records check and determined the Impala was owned and being driven by petitioner, whose license was suspended.

Detective Sareeram initiated a traffic stop based on the window tint violation and driving with a suspended license. Petitioner drove for about one-tenth of a mile before pulling over into a parking lot and legally parking the Impala. The Impala was not blocking any traffic and in a safe location. In Detective Sareeram's experience, most people pulled over

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more quickly than petitioner did. The Impala's windows were one-third to halfway down; the detectives were able to observe petitioner until and after the car stopped.

The detectives contacted petitioner and told him he was driving on a suspended license and an illegally tinted front window. Petitioner showed the detectives a Department of Motor Vehicles (DMV) printout showing his license was suspended; he told them he had just been to the DMV trying to resolve the matter. Detective Sareeram smelled the odor of marijuana coming from petitioner's car but did not know if it was freshly burned or whether the marijuana had been extinguished during the extra time it took for petitioner to pull over.

Detective Sareeram asked petitioner to exit the Impala. Petitioner initially declined, raising the detective's suspicions, but he eventually complied with the directive to leave his car. Based on the smell of marijuana and previous firearm arrest, Detective Sareeram conducted a patdown search of petitioner, which yielded nothing. The detectives decided to tow the car, with Detective Langensiepen calling for a tow. Both detectives testified that it was common to tow the vehicle of someone driving on a suspended license in order prevent the person from continuing to drive. The policy for impounding vehicles in such situation was that the officer made the determination on a case-by-case basis. Officers would sometimes allow detainees to retrieve their vehicle; Detective Sareeram did not afford petitioner this opportunity because ***909** "the totality of the circumstances" caused him to believe "something else was going on besides just a suspended license."

*****2** Following the patdown, Detective Sareeram told petitioner he would be searching the interior of the Impala because he ****804** had smelled burnt marijuana from within the car and his license was suspended. The detective had asked petitioner if he had any marijuana in the car, but defendant did not respond. Detective Sareeram testified that the smell of the burnt marijuana weighed heavily in his decision to search the car, but that they would be conducting an "inventory search incident to a tow ...". He thought the smell of burned marijuana gave him probable cause to search the vehicle, and admitted he had no information indicating whether petitioner was impaired or how recently the marijuana had been burned. He had not performed a field sobriety test or any other test to determine whether petitioner was under the influence of marijuana or another controlled substance.

During the search of the Impala, Detective Sareeram first found a burnt marijuana cigarette sticking out of the trash receptacle in the center console. Removing the trash receptacle and lid uncovered more marijuana cigarettes in the trash can. A digital scale with green and white residue on top and prescription bottles were in the center console. On the floorboard there was a glass jar which contained marijuana with at least one bag tied in a knot. An empty handgun holster was found in the back seat. When shown the holster and asked if there was a gun in the car, petitioner said he knew nothing about the holster or any gun. A handgun was found on the rear driver's side seat. Also in the car was a black backpack containing different identification cards, driver's licenses, and credit cards.

Petitioner was arrested and put in handcuffs after the gun was found. The Impala was subsequently towed.

Petitioner was charged with felon in possession of a firearm (Pen. Code, § 29800, subd. (a) (1)),[1] driving without a valid license (Veh. Code, § 12500, subd. (a), appropriation of lost property by finder, § 485), and possession of a controlled substance (Bus. & Prof. Code, § 4060), along with a serious felony and a strike allegation (§§ 1192.7, subd. (c), 1170.12).

On November 6, 2020, petitioner filed a motion to suppress, to be heard contemporaneously with the preliminary hearing. The magistrate denied the motion, finding the search was the product of a lawful impound and supported by probable cause that petitioner was driving under the influence of ***910** marijuana or with an open container of marijuana. The magistrate also held petitioner to answer on the charges.

On March 8, 2021, petitioner filed a section 1538.5 motion to suppress evidence with the trial court. On March 19, 2021, the trial court heard oral argument and denied the motion.

Petitioner subsequently filed a timely mandamus petition with this court.

DISCUSSION

Petitioner contends the suppression motion should have been granted. The standard of review here is well-established.

The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures by law enforcement

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personnel. (U.S. Const., 4th Amend.) When police conduct a search or seizure without a warrant, the prosecution has the burden of showing the officers' actions were justified by an exception to the warrant requirement. (*People v. Camacho* (2000) 23 Cal.4th 824, 830, 98 Cal.Rptr.2d 232, 3 P.3d 878.)

Because the initial motion to suppress was made during the preliminary hearing, and the renewed motion before ****805** the trial court was submitted on the transcript of that hearing pursuant to section 1538.5, subdivision (i), we disregard the findings of the trial court and review the determination of the magistrate who ruled on the initial motion. "We review the evidence in the light most favorable to the magistrate's ruling and will uphold the magistrate's express or implied findings if supported by substantial evidence. [Citation.]" (*People v. Nonnette* (1990) 221 Cal.App.3d 659, 664, 271 Cal.Rptr. 329.) "The question of whether a search was unreasonable, however, is a question of law. On that issue, we exercise 'independent judgment.' [Citation.]" (*People v. Camacho, supra*, 23 Cal.4th at p. 830, 98 Cal.Rptr.2d 232, 3 P.3d 878.)

*****3** One exception to the warrant requirement is where an officer has probable cause to believe contraband or evidence of a crime is in an automobile. (*Carroll v. United States* (1925) 267 U.S. 132, 149, 45 S.Ct. 280, 283–84, 69 L.Ed. 543, 549.) Another exception is for inventory searches of an impounded vehicle. (*Colorado v. Bertine* (1987) 479 U.S. 367, 371, 107 S.Ct. 738, 741, 93 L.Ed.2d 739, 741 (*Colorado*).)

We discuss these two exceptions, which are the justifications asserted by the People for the warrantless search of petitioner's car, in turn.

***911** I

The Search was not Supported by Probable Cause

The automobile exception provides "police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found. [Citations.]" (*People v. Evans* (2011) 200 Cal.App.4th 735, 753, 133 Cal.Rptr.3d 323.) Once an officer has probable cause to search the vehicle under the automobile exception, an officer "may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view." (*United States v. Ross* (1982) 456 U.S. 798, 800, 102 S.Ct. 2157, 2160, 72 L.Ed.2d 572, 578.) Probable cause to search exists "where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found [citation.]" (*Ornelas v. United States* (1996) 517 U.S. 690, 696, 116 S.Ct. 1657, 1661, 134 L.Ed.2d 911, 918.)

In 2016, the voters passed Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act, which legalized the possession of up to 28.5 grams of cannabis by individuals 21 years or older. (Health and Saf. Code, § 11362.1, subd. (a)(1).) The use and possession of cannabis is not unconditional, however; there are various statutory provisions proscribing such use and possession in certain circumstances. (See Health and Saf. Code, § 11362.3; Veh. Code, § 23222, subd. (b).) Notwithstanding any other proscription by law, Health and Safety Code section 11362.1, subdivision (c) provides that "[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest." Thus, this provision does not apply when the totality of the circumstances gives rise to a fair probability that an existing cannabis regulation was violated when the search occurred. (*People v. Fews* (2018) 27 Cal.App.5th 553, 563, 238 Cal.Rptr.3d 337.)

This court and other courts have found Proposition 64 changed whether possession of cannabis by itself could be the basis for probable cause to search a car. ****806** (See *People v. Johnson* (2020) 50 Cal.App.5th 620, 629, 264 Cal.Rptr.3d 103; *People v. McGee* (2020) 53 Cal.App.5th 796, 802, 266 Cal.Rptr.3d 650.) In particular, section 11362.1, subdivision (c), "fundamentally changed the probable cause determination by specifying lawfully possessed cannabis is 'not contraband' and lawful conduct under the statute may not ' "constitute the basis for detention, search or arrest." ' [Citation.]" (*People v. Hall* (2020) 57 Cal.App.5th 946, 954, 271 Cal.Rptr.3d 793.) But this applies only to activities "deemed lawful" by Proposition 64. (*Johnson*, at p. 629, 264 Cal.Rptr.3d 103.) Thus, even after the enactment of ***912** Proposition 64, there is probable cause to search a vehicle if a law enforcement official sees a legal amount of cannabis in an illegal setting, such as in an open container while the car is being driven. (See *McGee*, at p. 804, 266 Cal.Rptr.3d 650, [probable cause to search vehicle after an officer "witnessed the passenger in possession of an unsealed container of [cannabis] in violation of [Health and Safety Code] section 11362.3, subdivision (a)(4)"].)

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*****4** There are two possible illegal uses of marijuana that could have supported probable cause to believe a crime involving marijuana was being committed, had there been sufficient evidentiary support, driving under the influence of marijuana (Veh. Code, § 23152, subd. (a)) and driving with an open container of marijuana (Veh. Code, § 23222). The evidence adduced at the suppression hearing does not carry the People's burden of proving probable cause to justify the warrantless search. The prosecution presented no evidence that petitioner was impaired; no sobriety test was administered, there was no evidence petitioner drove erratically before the stop,[2] and neither detective testified to observing any indicia of petitioner being intoxicated. Likewise, there was no evidence either detective observed an open container before petitioner's car was searched.

The fact that there was a smell of burnt marijuana emanating from the car was insufficient to support either theory of probable cause in this case. Neither detective could determine if the marijuana was freshly burnt, removing any support for an inference that petitioner was smoking the marijuana while driving. As we found in *Johnson*, "the facts in this case comprised of a parked car missing a registration tag and having an expired registration, the odor of marijuana emanating from the car, the observation of a tied baggie containing 'a couple grams' of marijuana in the car's center console, and defendant's actions outside the car in resisting the officers. The totality of these circumstances did not amount to a 'fair probability that contraband or evidence of a crime' would be found in defendant's car. [Citation.]" (*People v. Johnson, supra*, 50 Cal.App.5th at p. 635, 264 Cal.Rptr.3d 103.)

Here, there is even less evidence in support of probable cause than in *Johnson*, as the detectives did not see any container of marijuana before initiating the warrantless search of petitioner's car. The Attorney General attempts to distinguish *Johnson* by noting it addressed the smell of burnt marijuana as evidence of an open container violation and not as evidence of driving under the influence. This is unavailing. The smell of burnt marijuana in a car, where there is no indication it had been recently smoked within, cannot by itself provide probable cause of driving under the influence of ***913** marijuana. Since there is insufficient evidence of probable cause to support the warrantless search, the automobile exception ****807** is inapplicable and the rulings below to the contrary are incorrect.

II

Invalid Inventory Search

Inventory searches of police-impounded cars are "a well-defined exception to the warrant requirement of the Fourth Amendment." (*Colorado, supra*, 479 U.S. at p. 371, 107 S.Ct. at p. 741, 93 L.Ed.2d at p. 745.) The Supreme Court has recognized that police officers have a legitimate interest in taking an inventory of the contents of vehicles they legally impound "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." (*Id.* at p. 372, 107 S.Ct. at p. 741, 93 L.Ed.2d at pp. 745-746.) Nonetheless, it is well established that an inventory search must not be a "ruse for a general rummaging in order to discover incriminating evidence." (*People v. Williams* (1999) 20 Cal.4th 119, 126, 83 Cal.Rptr.2d 275, 973 P.2d 52.)

"To determine whether a warrantless search is properly characterized as an inventory search, 'we focus on the purpose of the impound rather than the purpose of the inventory.' [Citation.]" (*People v. Lee* (2019) 40 Cal.App.5th 853, 867, 253 Cal.Rptr.3d 512.) (" '[A]n inventory search conducted pursuant to an unreasonable impound is itself unreasonable.' [Citation.]" (*People v. Torres* (2010) 188 Cal.App.4th 775, 786, 116 Cal.Rptr.3d 48 (*Torres*).) "The decision to impound the vehicle must be justified by a community caretaking function 'other than suspicion of evidence of criminal activity' [citation] because inventory searches are 'conducted in the absence of probable cause' [citation]." (*Id.* at p. 787, 116 Cal.Rptr.3d 48.) "Whether 'impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft.' [Citation.]" (*People v. Williams* (2006) 145 Cal.App.4th 756, 761, 52 Cal.Rptr.3d 162.)

*****5** "Police officers may exercise discretion in determining whether impounding a vehicle serves their community caretaking function, 'so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.' [Citation.] Statutes authorizing impounding under various circumstances 'may constitute a standardized policy guiding officers' discretion [citation], though 'statutory authorization does not, in and of itself, determine the constitutional

reasonableness of the seizure' [citation]." (*Torres, supra*, 188 Cal.App.4th at p. 787, 116 Cal.Rptr.3d 48.) California law authorizes an impound "[when] an officer arrests a person ***914** driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or permitted to take, and does take, the person into custody." (Veh. Code, § 22651, subd. (h)(1).)

We assume there was a valid policy in place governing the impound decision. Although the evidence regarding such a policy was minimal; the detectives testified there was a policy to allow impounds for driving on a suspended license at the officer's discretion; that plus the general authority to impound following a custodial arrest satisfies the policy requirement.

What is not present is an adequate community caretaking function served by the impound here. There was no evidence petitioner's car blocked traffic or was at risk of theft or vandalism; the Impala was legally parked in a parking space in a public parking lot. Although the detectives testified it was common (and thus part of the ****808** policy) to tow when the driver had a suspended license to prevent more driving under a suspended license, this policy does not provide a community caretaking function for the tow. The detectives did not afford petitioner the opportunity to call someone to drive his car to another location. More importantly, the evidence shows the impound decision was motivated by an investigatory purpose.

Asked what type of search of the Impala he was planning to conduct, Detective Sareeram replied: "At that time it was an inventory search incident to a tow, but the burnt marijuana that I could smell also weighed heavily on my decision to search the vehicle. [¶] At that point I didn't know what Mr. Blakes' sobriety was, whether the burnt marijuana smell was fresh and had been put out during the time that I was trying to stop him." The investigative pretext for the search is reinforced by Detective Sareeram's reason for not letting petitioner call for someone to pick up his Impala:

"So the circumstances for me in this particular traffic stop were I could smell burnt marijuana coming from the vehicle, and in talking to Mr. Blakes, he was not very forthcoming. In fact, he refused to answer any questions about marijuana being inside the vehicle, and when I asked him to step out of the vehicle, I encountered an unusual resistance in stepping out of the vehicle. [¶] And in addition to that, when I told him I was going to be patting him down for weapons, he resisted that, as well. [¶] So the totality of the circumstances made me feel as though something else was going on besides just a suspended license."

This is an investigatory pretext for an impound search. Citing *Whren v. United States* (1996) 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89, the Attorney General asserts and the magistrate ruled pretext to an impound search is irrelevant so long as there was an objective community caretaking justification for the impound decision, here preventing an unlicensed driver ***915** from returning to his car and driving it. This is wrong. *Whren* establishes that an officer's motivations or intent are irrelevant to whether probable cause for a search or seizure exists, as probable cause is determined objectively. (See *id*. at p. 813, 116 S.Ct. at p. 1774, 135 L.Ed.2d at p. 98 ["Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"].) *Whren* itself notes its reasoning is irrelevant in the context of impound searches; "we never held, outside the context of inventory search or administrative inspection ..., that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment ...." (*Id*. at p. 812, 116 S.Ct. p. at 1774,135 L.Ed.2d at p. 97; accord *Torres, supra*, 188 Cal.App.4th at p. 791, 116 Cal.Rptr.3d 48.) The United States Supreme Court has thus invalidated impound searches based on the officer's subjective motivations for the impound even though objective grounds to impound the vehicle existed. (See *Colorado*, *supra*, 479 U.S. at pp. 372, 376, 107 S.Ct. at pp. 741, 743–44, 93 L.Ed.2d at pp. 745-746, 748; *South Dakota v. Opperman* (1976) 428 U.S. 364, 376, 96 S.Ct. 3092, [49 L.Ed.2d 1000, 1009].)

*****6** "The relevant question is whether the impounding was subjectively motivated by an improper investigatory purpose." (*Torres, supra*, 188 Cal.App.4th at p. 791, 116 Cal.Rptr.3d 48.) The answer to that question here is "yes." The search here was motivated by a desire to further investigate petitioner and the car he drove for evidence of criminal activity. That warrantless search was not supported by probable cause and the impound rationale was no more than a pretext to justify the search. ****809** The magistrate and trial court erred in denying the suppression motion.

DISPOSITION

Let the peremptory writ of mandamus issue directing respondent court to vacate its March 19, 2021 order denying the suppression motion and enter an order granting the motion.

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We concur:

ROBIE, J.

DUARTE, J.

All Citations

72 Cal.App.5th 904, 287 Cal.Rptr.3d 799, 2021 WL 5937430, 21 Cal. Daily Op. Serv. 12,564, 2021 Daily Journal D.A.R. 12,811

Footnotes

1 Undesignated statutory references are to the Penal Code.

2 Although Detective Sareeram testified that petitioner drove an unusually long distance to pull over, there was no evidence that this fact supports any inference of impaired driving.

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93 S.Ct. 2523
Supreme Court of the United States

Elmer O. CADY, Warden, Petitioner,
v.
Chester J. DOMBROWSKI.

No. 72—586.
|
Argued March 21, 1973.
|
Decided June 21, 1973.

Synopsis

Petition for writ of habeas corpus. The District Court, 319 F.Supp. 530, denied the petition, and the Court of Appeals for the Seventh Circuit, 471 F.2d 280, reversed, and certiorari was granted. The Supreme Court, opinion of the Court by Mr. Justice Rehnquist, announced by Mr. Justice Blackmun, held that where accused's vehicle was disabled as result of accident and constituted a nuisance along highway and accused, being intoxicated and later comatose, could not make arrangements to have the vehicle towed and stored and at direction of police and for elemental reasons of safety automobile was towed to private garage, search of trunk pursuant to standard procedure of that police department to retrieve revolver which officer reasonably believed to be contained therein was not unreasonable within meaning of Fourth and Fourteenth Amendments solely because a warrant had not been obtained, and further held that where search warrant was validly issued and police were authorized to search automobile and seizures of sock and floor mat occurred while the valid warrant was outstanding, it was not constitutionally significant that they were not listed in the return of the warrant.

Reversed.

Mr. Justice Brennan, with whom Mr. Justice Douglas, Mr. Justice Stewart and Mr. Justice Marshall joined, filed dissenting opinion.

****2524 *433** Syllabus[*]

Respondent had a one-car accident near a small Wisconsin town, while driving a rented Ford. The police had the car towed to a garage seven miles from the police station, where it was left unguarded outside. Respondent was arrested for drunken driving. Early the next day, an officer, looking for a service revolver which respondent (who had identified himself as a Chicago policeman) was thought to possess, made a warrantless search of the car and found in the trunk several items, some bloodied, which he removed. Later, on receipt of additional information emanating from respondent, a blood-stained body was located on respondent's brother's farm in a nearby county. Thereafter, through the windows of a disabled Dodge which respondent had left on the farm before renting the Ford, an officer observed other bloodied items. Following issuance of a search warrant, materials were taken from the Dodge, two of which (a sock and floor mat) were not listed in the return on the warrant among the items seized. Respondent's trial for murder, at which items seized from the cars were introduced in evidence, resulted in conviction which was upheld on appeal. In this habeas corpus action, the Court of Appeals reversed the District Court and held that certain evidence at the trial had been unconstitutionally seized. Held:

1. The warrantless search of the Ford did not violate the Fourth Amendment as made applicable to the States by the Fourteenth. The search was not unreasonable since the police had exercised a form of custody of the car, which constituted a hazard on the highway, and the disposition of which by respondent was precluded by his intoxicated and later comatose condition; and the revolver search was standard police procedure to protect the public from a weapon's possibly falling into improper hands. Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777, distinguished; Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067, followed. Pp. 2527—2531.

2. The seizure of the sock and floor mat from the Dodge was not invalid, since the Dodge, the item "particularly described," was the subject of a proper search warrant. It is not constitutionally significant that the sock and mat were not listed in the warrant's return, which (contrary to the assumption of the Court of Appeals) was not filed prior to the search, and the warrant was thus validly outstanding at the time the articles were discovered. Pp. 2531—2532.

471 F.2d 280, reversed.

Attorneys and Law Firms

***434** LeRoy L. Dalton, Madison, Wis., for petitioner.

William J. Mulligan, Milwaukee, Wis., for respondent.

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Opinion

Opinion of the Court by Mr. Justice REHNQUIST, announced by Mr. Justice BLACKMUN.

Respondent Chester J. Dombrowski was convicted in a Wisconsin state court of first-degree murder of Herbert McKinney and sentenced to life imprisonment. The conviction was upheld on appeal, State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969), the Wisconsin Supreme Court rejecting respondent's contention that certain evidence ****2525** admitted at the trial had been unconstitutionally seized. Respondent then filed a petition for a writ of habeas corpus in federal district court, asserting the same constitutional claim. The District Court denied the petition but the United States Court of Appeals for the Seventh Circuit reversed, holding that one of the searches was unconstitutional under Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), and the other unconstitutional ***435** for unrelated reasons. 471 F.2d 280 (1972). We granted certiorari, 409 U.S. 1059, 93 S.Ct. 556, 34 L.Ed.2d 510 (1972).

I

On September 9, 1969, respondent was a member of the Chicago, Illinois, police force and either owned or possessed a 1960 Dodge automobile. That day he drove from Chicago to West Bend, Wisconsin, the county seat of Washington County, located some hundred-odd miles northwest of Chicago. He was identified as having been in two taverns in the small town of Kewaskum, Wisconsin, seven miles north of West Bend, during the late evening of September 9 and the early morning of September 10. At some time before noon on the 10th, respondent's automobile became disabled, and he had it towed to a farm owned by his brother in Fond du Lac County, which adjoins Washington County on the north. He then drove back to Chicago early that afternoon with his brother in the latter's car.

Just before midnight of the same day, respondent rented a maroon 1967 Ford Thunderbird at O'Hare Field outside of Chicago, and apparently drove back to Wisconsin early the next morning. A tenant on his brother's farm saw a car answering the description of the rented car pull alongside the disabled 1960 Dodge at approximately 4 a.m. At approximately 9:30 a.m. on September 11, respondent purchased two towels, one right brown and the other blue, from a department store in Kewaskum.

From 7 to 10:15 p.m. of the 11th, respondent was in a steak house or tavern in West Bend. He ate dinner and also drank, apparently quite heavily. He left the tavern and drove the 1967 Thunderbird in a direction away from West Bend toward his brother's farm. On the way, respondent had an accident, with the Thunderbird breaking through a guard rail and crashing into a ***436** bridge abutment. A passing motorist drove him into Kewaskum, and, after being let off in Kewaskum, respondent telephoned the police. Two police officers picked him up at a tavern and drove to the scene of the accident. On the way, the officers noticed that respondent appeared to be drunk; he offered three conflicting versions of how the accident occurred.

At the scene, the police observed the 1967 Thunderbird and took various measurements relevant to the accident. Respondent was, in the opinion of the officers, drunk. He had informed them that he was a Chicago police officer. The Wisconsin policemen believed that Chicago police officers were required by regulation to carry their service revolvers at all times. After calling a tow-truck to remove the disabled Thunderbird, and not finding the revolver on respondent's person, one of the officers looked into the front seat and glove compartment of that car for respondent's service revolver. No revolver was found. The wrecker arrived and the Thunderbird was towed to a privately owned garage in Kewaskum, approximately seven miles from the West Bend police station. It was left outside by the wrecker, and no police guard was posted. At 11:33 p.m. on the 11th respondent was taken directly to the West Bend police station from the accident scene, and, after being interviewed by an assistant district attorney, to whom respondent again stated he was a Chicago policeman, respondent was formally arrested for drunken driving. Respondent was "in a drunken condition" and "incoherent at times." Because of his injuries sustained in the accident, the same two officers took respondent to a local hospital. He lapsed into an unexplained ****2526** coma, and a doctor, fearing the possibility of complications, had respondent hospitalized overnight for observation. One of the policemen remained at the hospital as a guard, and the other, Officer Weiss, drove at some time after ***437** 2 a.m. on the 12th to the garage to which the 1967 Thunderbird had been towed after the accident.

The purpose of going to the Thunderbird, as developed on the motion to suppress, was to look for respondent's service revolver. Weiss testified that respondent did not have a revolver when he was arrested, and that the West Bend authorities were under the impression that Chicago police

officers were required to carry their service revolvers at all times. He stated that the effort to find the revolver was “standard procedure in our department.”

Weiss opened the door of the Thunderbird and found, on the floor of the car, a book of Chicago police regulations and, between the two front seats, a flashlight which appeared to have “a few spots of blood on it.” He then opened the trunk of the car, which had been locked, and saw various items covered with what was later determined to be type O blood. These included a pair of police uniform trousers, a pair of gray trousers, a nightstick with the name “Dombrowski” stamped on it, a raincoat, a portion of a car floor mat, and a towel. The blood on the car mat was moist. The officer removed these items to the police station.

When, later that day, respondent was confronted with the condition of the items discovered in the trunk, he requested the presence of counsel before making any statement. After conferring with respondent, a lawyer told the police that respondent “authorized me to state he believed there was a body lying near the family prinic area at the north end of his brother's farm.”

Fond du Lac County police went to the farm and found, in a dump, the body of a male, later identified as the decedent McKinney, clad only in a sportshirt. The deceased's head was bloody; a white sock was found near the body. In observing the area, one officer looked through the window of the disabled 1960 Dodge, located ***438** not far from where the body was found, and saw a pillowcase, backseat, and briefcase covered with blood. Police officials obtained, on the evening of the 12th, returnable within 48 hours, warrants to search the 1960 Dodge and the 1967 Thunderbird, as well as orders to impound both automobiles. The 1960 Dodge was examined at the farm on the 12th and then towed to the police garage where it was held as evidence. On the 13th, criminologists came from the Wisconsin Crime Laboratory in Madison and searched the Dodge; they seized the back and front seats, a white sock covered with blood, a part of a bloody rear floor mat, a briefcase, and a front floor mat. A return of the search warrant was filed in the county court on the 14th, but it did not recite that the sock and floor mat had been seized. At a hearing held on the 14th, the sheriff who executed the warrant did not specifically state that these two items had been seized.

At the trial, the State introduced testimony tending to establish that the deceased was first hit over the head and then shot with a .38-caliber gun, dying approximately an hour after the gunshot wound was inflicted; that death occurred at approximately 7 a.m. on the 11th, with a six-hour margin of error either way; that respondent owned two .38-caliber guns; that respondent had type A blood; that the deceased had type O blood and that the bloodstains found in the 1960 Dodge and on the items found in the two cars were type O.

The prosecution introduced the nightstick discovered in the 1967 Thunderbird, and testimony that it had traces of type O blood on it; the portion of the floor mat found in the 1967 car, with testimony that it matched the portion of the floor mat found in the 1960 Dodge; the bloody towel found in the 1967 car, with ****2527** testimony that it was identical to one of the towels purchased by respondent on the 11th; the police uniform trousers; and the sock ***439** found in the 1960 Dodge, testimony that it was identical in composition and stitching to that found near the body of the deceased.

The State's case was based wholly on circumstantial evidence. The Supreme Court of Wisconsin, in reviewing the conviction on direct appeal, stated that “even though the evidence that led to his conviction was circumstantial, we have seldom seen a stronger collection of such evidence assembled and presented by the prosecution.” State v. Dombrowski, 44 Wis.2d, at 507, 171 N.W.2d, at 360.

II

The Fourth Amendment provides:

“The 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing this command, there has been general agreement that “except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” (Camara v. Municipal Court, 387 U.S. 523, 528—529, 87 S.Ct. 1727, 1731, 18 L.Ed.2d 930 (1967). See Coolidge v. New Hampshire, 403 U.S. 443, 454—455, 91 S.Ct. 2022, 2031, 29 L.Ed.2d 564 (1971). One class of cases which constitutes at least a partial exception to this general rule is automobile searches. Although vehicles are “effects” within the meaning of the Fourth Amendment, “for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.” Chambers v. Maroney,

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399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970). See ***440** Carroll v. United States, 267 U.S. 132, 153—154, 45 S.Ct. 280, 69 L.Ed. 543 (1925). In Cooper v. California, 386 U.S. 58, 59, 87 S.Ct. 788, 790, 17 L.Ed.2d 730 (1967), the identical proposition was stated in different language: "We made it clear in Preston (Preston v. United States) that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property. 376 U.S., at 366—367, 84 S.Ct., at 882—883."

While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web.

Since this Court's decision in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), which overruled Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), and held that the provisions of the Fourth Amendment were applicable to the States through the Due Process Clause of the Fourteenth Amendment, the application of Fourth Amendment standards, originally intended to restrict only the Federal Government, to the States presents some difficulty when searches of automobiles are involved. The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle. Cases such as Carroll v. United States, supra, and Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), illustrate the typical situations in which federal officials come into contact with and ****2528** search vehicles. In both cases members of a special federal unit charged with enforcing a particular federal criminal ***441** statute stopped and searched a vehicle when they had probable cause to believe that the operator was violating that statute.

As a result of our federal system of government, however, state and local police officers, unlike federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves. All States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former, Carroll v. United States, supra; Brinegar v. United States, supra; cf. Coolidge v. New Hampshire, supra; Chambers v. Maroney, supra, warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed ***442** or evidence in it destroyed were remote, if not nonexistent. See Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968) (District of Columbia police); Cooper v. California, supra. The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in "plain view" of evidence, fruits, or instrumentalities of a crime, or contraband. Cf. United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972).

Here we must decide whether a "search"* of the trunk of the 1967 Ford ****2529** was unreasonable solely because the local officer had not previously obtained a warrant. And, if that be answered in the negative, we must then determine whether the warrantless search was unreasonable within the meaning of the Fourth and Fourteenth Amendments. In answering these questions, two factual considerations deserve emphasis. First, the police had exercised ***443** a form of custody or control over the 1967 Thunderbird. Respondent's vehicle was disabled as a result of the accident, and constituted a nuisance along the highway. Respondent,

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being intoxicated (and later comatose), could not make arrangements to have the vehicle towed and stored. At the direction of the police, and for elemental reasons of safety, the automobile was towed to a private garage. Second, both the state courts and the District Court found as a fact that the search of the trunk to retrieve the revolver was "standard procedure in (that police) department," to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands. Although the trunk was locked, the car was left outside, in a lot seven miles from the police station to which respondent had been taken, and no guard was posted over it. For reasons not apparent from the opinion of the Court of Appeals, that court concluded that as "no further evidence was needed to sustain" the drunk-driving charge, "(t)he search must therefore have been for incriminating evidence of other offenses." 471 F.2d, at 283. While that court was obligated to exercise its incependent judgment on the underlying constitutional issue presented by the facts of this case, it was not free on this record to disregard these findings of fact. Particularly in nonmetropolitan jurisdictions such as those involved here, enforcement of the traffic laws and supervision of vehicle traffic may be a large part of a police officer's job. We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific motivation and the fact that the procedure he followed was "standard."

The Court of Appeals relied, and respondent now relies, primarily on ***444** Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), to conclude that the warrantless search was unconstitutional and the seized items inadmissible. In that case, the police received a telephone call at 3 a.m. from a caller who stated that "three suspicious men acting suspiciously" had been in a car in the business district of Newport, Kentucky, for five hours; four policemen investigated and, after receiving evasive explanations and learning that the suspects were unemployed and apparantly indigent, arrested the three for vagrancy. The automobile was cursorily searched, then towed to a police station and ultimately to a garage, where it was searched after the three men had been booked. That search revealed two revolvers in the glove compartment; a subsequent search of the trunk resulted in the seizure of various items later admitted in a prosecution for conspiracy to rob a federally insured bank. In that case the respondent attempted to justify the warrantless search of the trunk and seizure of the items therein "as incidental to a lawful arrest." Id., at 367, 84 S.Ct., at 883. The Court rejected the asserted "search incident" justification for the warrantless search in the following terms:

"But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." Ibid.

It would be possible to interpret Preston broadly, and to argue that it stands for the proposition that on those facts there could have been no constitutional justification advanced for the search. But we take the opinion as written, and hold that it stands only for the proposition that the search challenged there could not be justified as one incident to an arrest. ****2530** See Chambers v. Maroney, supra; Cooper v. California, supra. We believe that the instant case in controlled by principles ***445** that may be extrapolated from Harris v. United States, supra, and Cooper v. California, supra.

In Harris, petitioner was arrested for robbery. As petitioner's car had been identified leaving the site of the robbery, it was impounded as evidence. A regulation of the District of Columbia Police Department required that an impounded vehicle be searched, that all valuables be removed, and that a tag detailing certain information be placed on the vehicle. In compliance with this regulation, and without a warrant, an officer searched the car and, while opening one of the doors, spotted an automobile registration card, belonging to the victim, lying face up on the metal door stripping. This item was introduced into evidence at petitioner's trial for robbery. In rejecting the contention that the evidence was inadmissible, the Court stated:

"The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.

"Once the door had lawfully been opened, the registration card . . . was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." 390 U.S., at 236, 88 S.Ct., at 993.

In Cooper, the petitioner was arrested for selling heroin, and his car impounded pending forfeiture proceedings. A week later, a police officer searched the car ***446** and found, in the glove compartment, incriminating evidence subsequently

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admitted at petitioner's trial. This Court upheld the validity of the warrantless search and seizure with the following language:

"This case is not Preston, nor is it controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had 'legal title' to it or not—was closely related to his reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U.S., at 61—62, 87 S.Ct., at 791.

These decisions, while not on all fours with the instant case, lead us to conclude that the intrusion into the trunk of the 1967 Thunderbird at the garage was not unreasonable within the meaning of the Fourth and Fourteenth Amendments solely because a warrant had not been obtained by Officer Weiss after he left the hospital. The police did not have actual, physical custody of the vehicle as in Harris and Cooper, but the vehicle had been towed there at the officers' directions. These officers in a rural area were simply reacting to the effect of an accident—one of the recurring practical situations that results from the operation of motor vehicles and with which local police officers must deal every day. The Thunderbird was not parked adjacent ***447** to the dwelling place of the owner as in ****2531** Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure.

In Harris the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in Cooper it was to guarantee the safety of the custodians. Here the the justification, while different, was as immediate and constitutionally reasonable as those in Harris and Cooper: concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle. The record contains uncontradicted testimony to support the findings of the state courts and District Court. Furthermore, although there is no record basis for discrediting such testimony, it was corroborated by the circumstantial fact that at the time the search was conducted Officer Weiss was ignorant of the fact that a murder, or any other crime, had been committed. While perhaps in a metropolitan area the responsibility to the general public might have been discharged by the posting of a police guard during the night, what might be normal police procedure in such an area may be neither normal nor possible in Kewaskum, Wisconsin. The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable. Cf. Chambers v. Maroney, supra.

The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on ***448** the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions, see Cooper v. California, supra; Harris v. United States, supra; Chambers v. Maroney, supra, and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this. Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.

III

The Wisconsin Supreme Court ruled that the sock and the portion of the floor mat were validly seized from the 1960 Dodge. The Fond du Lac county officer who looked through the window of the Dodge after McKinney's body had been found saw the bloody seat and briefcase, but not the sock or floor mat. Consequently, these two items were not listed in the application for the warrant, but the Dodge was the item "particularly described" to be searched in the warrant. The warrant was validly issued and the police were authorized to search the car. The reasoning of the Wisconsin Supreme Court was that although these items were not listed to be

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seized in the warrant, the warrant was valid and in executing it the officers discovered the sock and mat in plain view and therefore could constitutionally seize them without a warrant.

***449** The Court of Appeals held that the seizure of the two items on September 13 could not be justified under the plain-view doctrine. The reasoning of that court hinged on its understanding that the warrant to search the Dodge had been returned and was functus officio by the time Officer Mauer of the ****2532** Crime Laboratory came upon the sock and the floor mat. The court stated:

"There was no continuing authority under the warrant issued the previous night (the 12th). First, these items were not described in the warrant and presumably were not observed that night (the 12th). Second, when the warrant was returned—before Mauer came on the scene—it was functus officio. A 'new ball game,' so to speak, began when Mauer made his 'inspection.' " 471 F.2d, at 286.

The record is so indisputably clear that the return of the warrant was filed on the 14th, not sometime prior to Mauer's search on the 13th, that we are somewhat at a loss to understand how the Court of Appeals arrived at its factual conclusion. The warrant to search the Dodge was issued on the 12th, and, although a return of the warrant was prepared by a Fond du Lac County officer at some time on the 13th (whether before or after Mauer's search is impossible to determine), it was not filed in the state court until the 14th, at which time a hearing was held. The seizures of the sock and the floor mat occurred while a valid warrant was outstanding, and thus could not be considered unconstitutional under the theory advanced below. As these items were constitutionally seized, we do not deem it constitutionally significant that they were not listed in the return of the warrant. The ramification of that "defect," if such it was, is purely a question of state law.

We therefore need not reach the question of whether the seizure of the two items from the Dodge would have ***450** been valid because the entire car had been validly seized as evidence and impounded pursuant to a valid warrant, cf. Harris v. United States, supra; Cooper v. California, supra, or whether a search of the back seat of this car, located as it was in an open field, required a search warrant at all. See Hester v. United States, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924).

The judgment of the Court of Appeals is reversed.

Judgment reversed.

Mr Justice BRENNAN, with whom Mr. Justice DOUGLAS, Mr. Justice STEWART, and Mr. Justice MARSHALL join, dissenting.

In upholding the warrantless search of respondent's rented Thunderbird, the Court purports merely to rely on our prior decisions dealing with automobile searches. It is clear to me, however, that nothing in our prior decisions supports either the reasoning or the result of the Court's decision today. I therefore dissent and would hold the search of the Thunderbird unconstitutional under the Fourth and Fourteenth Amendments.

The relevant facts are these. Respondent, an off-duty Chicago policeman, was arrested by police on a charge of drunken driving following a one-car automobile accident in which respondent severely damaged his rented 1967 Thunderbird. The car was towed from the scene of the accident to a private garage and, some two and one-half hours later, one of the arresting officers drove to the garage and, without a search warrant or respondent's consent, conducted a thorough search of the car for the alleged purpose of finding respondent's service revolver which was not on respondent's person and had not been found during an initial search of the car at the scene of the accident. In the trunk of the car, the officer found and seized numerous items that eventually linked respondent to the death of one Herbert McKinney and ***451** ultimately contributed to respondent's conviction for murder.

The Court begins its analysis by recognizing, as clearly it must, that the Fourth Amendment's prohibition against 'unreasonable searches and seizures' is shaped by the warrant clause, and thus that a warrantless search of private property is per se "unreasonable" under the Fourth Amendment unless within ****2533** one of the few specifically established and well-delineated exceptions. Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); Camara v. Municipal Court, 387 U.S. 523, 528—529, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967). At the same time, the Court also recognizes that one of the established exceptions to the warrant requirement is the search of an automobile on the highway where there is probable cause to support the search and "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Carroll v. United States, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). See also Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct.

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2022, 29 L.Ed.2d 564 (1971); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968). But the search of the Thunderbird plainly cannot be sustained under the "automobile exception," for our prior decisions make it clear that where, as in this case, there is no reasonable likelihood that the automobile would or could be moved, the "automobile exception" is simply irrelevant. Coolidge v. New Hampshire, supra, 403 U.S. at 461, 91 S.Ct. at 2035; Carroll v. United States, supra, 267 U.S. at 156, 45 S.Ct. at 286.

Another established exception to the warrant requirement is a search incident to a valid arrest. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). But the search of the Thunderbird cannot be sustained under this exception, because even assuming that such a search would have been within the permissible scope of a search incident to ***452** an arrest for drunken driving, it is clear that under Preston v. United States, 376 U.S. 364, 368, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964), "the search was too remote in time or place to have been made as incidental to the arrest."

A third exception to the warrant requirement is the seizure of evidence in "plain view." Thus, in Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), we upheld the seizure of an automobile registration card that fell within plain view of a police officer as he opened the door of an impounded automobile to roll up the window. But, as we cautioned in Coolidge, supra, 403 U.S. at 466, 91 S.Ct. at 2038, '(w)hat the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.' In Harris, the prior justification for the intrusion by the police was to roll up the windows and lock the doors 'to protect the car while it was in police custody.' 390 U.S., at 236, 88 S.Ct. at 993. '(T)he discovery of the card was not the result of a search,' we said, and 'in these narrow circumstances' the 'plain view' exception to the warrant requirement was fully applicable. In the present case, however, the sole purpose for the initial intrusion into the vehicle was to search for the gun. Thus, the seizure of the evidence from the trunk of the car can be sustained under the 'plain view' doctrine only if the search for the gun was itself constitutional. Reliance on the 'plain view' doctrine in this case is therefore misplaced since the antecedent search cannot be sustained.

Another exception to the warrant requirement is that which sustains a search in connection with the seizure of an automobile for purposes of forfeiture proceedings. In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), the Court upheld the warrantless search of an automobile after it had been lawfully impounded pursuant to a California statute mandating the seizure and forfeiture of any ***453** vehicle used to facilitate the possession or transportation of narcotics. There, however, the police ****2534** were authorized to treat the car in their custody as if it were their own, and the search was sustainable as an integral part of their right of retention. This case, of course, is poles away from Cooper. The Thunderbird was not subject to forfeiture proceedings. On the contrary, ownership of the car remained exclusively in respondent's lessor and the sole reason that the police took even temporary possession of the car was to remove it from the highway until respondent could claim it.

Clearly, therefore, the Court's decision today finds no support in any of the established exceptions. The police knew what they were looking for and had ample opportunity to obtain a warrant. Under those circumstances, our prior decisions make it clear that the Fourth Amendment required the police to obtain a warrant prior to the search. Carroll v. United States, supra, 267 U.S., at 156, 45 S.Ct., at 286. Thus, despite the Court's asserted adherence to the principles of our prior decisions, in fact the decision rests on a subjective view of what is deemed acceptable in the way of investigative functions performed by rural police officers. But the applicability of the Fourth Amendment cannot turn on fine-line distinctions between criminal and investigative functions. On the contrary, "(i)t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior," Camara v. Municipal Court, supra, 387 U.S., at 530, 87 S.Ct., at 1732, for "(t)he basic purpose of (the Fourth) Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Id., at 528, 87 S.Ct., at 1730. Thus, the fact that the professed purpose of the contested search was to protect the public safety rather than to gain incriminating evidence ***454** does not of itself eliminate the necessity for compliance with the warrant requirement. Although a valid public interest may establish probable cause to search, Camara, supra, and See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967), make clear that, absent exigent circumstances, the search must be conducted pursuant to a "suitably restricted search warrant." Camara, supra, 387 U.S., at 539, 87 S.Ct., at 1727. See also Almeida-Sanchez v. United States, supra. And certainly there were no

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exigent circumstances to justify the warrantless search made of the Thunderbird. For even assuming that the officer had reason to believe that respondent's service revolver was in the Thunderbird, the police had left the car in the custody of a private garage and did not return to look for the gun until two and one-half hours later. Moreover, although the arresting officers were at all times aware that respondent was an off-duty Chicago policeman, the officers never once inquired of respondent as to whether he was carrying a gun and, if so, where it was located. I can only conclude, therefore, that what the Court does today in the name of an investigative automobile search is in fact a serious departure from established Fourth Amendment principles. And since in my view that departure is totally unjustified, I would affirm the judgment of the Court of Appeals invalidating the search of the Thunderbird and remand the case to the District Court for determination whether the evidence seized during the search of the Dodge and the farm was the fruit of the unlawful search of the Thunderbird. See Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

All Citations

413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

* Petitioner argued before this Court that unlocking the trunk of the Ford did not constitute a "search" within the meaning of the Fourth Amendment. The thesis is that only an intrusion, into an area in which an individual has a reasonable expectation of privacy, with the specific intent of discovering evidence of a crime constitutes a search. Compare Haerr v. United States, 240 F.2d 533 (CA5 1957), with District of Columbia v. Little, 85 U.S.App.D.C. 242, 178 F.2d 13 (1949), aff'd on other grounds, 339 U.S. 1, 70 S.Ct. 468, 94 L.Ed. 599 (1950). But see Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Arguing that the officer's conduct constituted an 'inspection' rather than a 'search,' petitioner relies on our decision in Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), to validate the initial intrusion into the trunk, and then the plain-view doctrine to justify the warrantless seizure of the items.

We need not decide this issue. Petitioner conceded in the Court of Appeals that this intrusion was a search. Inasmuch as we believe that Harris and other decisions control this case even if the intrusion is characterized as a search, we need not deal with petitioner's belated contention.

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141 S.Ct. 1596
Supreme Court of the United States.

Edward A. CANIGLIA, Petitioner
v.
Robert F. STROM, et al.

No. 20-157
|
Argued March 24, 2021
|
Decided May 17, 2021

Synopsis
Background: Detainee, who was taken by police officers from his home to a hospital for a psychiatric evaluation, brought § 1983 action against city and the officers, alleging the officers violated the Fourth Amendment when they entered his home and seized him and his firearms without a warrant. The United States District Court for the District of Rhode Island, John J. McConnell, Chief Judge, 396 F.Supp.3d 227, granted summary judgment to city and officers. Detainee appealed. The United States Court of Appeals for the First Circuit, Selya, Circuit Judge, 953 F.3d 112, affirmed. Certiorari was granted.

The Supreme Court, Justice Thomas, held that police officers' community caretaking duties do not justify warrantless searches and seizures in the home.

Vacated and remanded.

Chief Justice Roberts filed a concurring opinion, in which Justice Breyer joined.

Justice Alito filed a concurring opinion.

Justice Kavanaugh filed a concurring opinion.

***1597** *Syllabus*[*]

During an argument with his wife, petitioner Edward Caniglia placed a handgun on the dining room table and asked his wife to "shoot [him] and get it over with." His wife instead left the home and spent the night at a hotel. The next morning, she was unable to reach her husband by phone, so she called the police to request a welfare check. The responding officers accompanied Caniglia's wife to the home, where they encountered Caniglia on the porch. The officers called an ambulance based on the belief that Caniglia posed a risk to himself or others. Caniglia agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. But once Caniglia left, the officers located and seized his weapons. Caniglia sued, claiming that the officers had entered his home and seized him and his firearms without a warrant in violation of the Fourth Amendment. The District Court granted summary judgment to the officers. The First Circuit affirmed, extrapolating from the Court's decision in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706, a theory that the officers' removal of Caniglia and his firearms from his home was justified by a "community caretaking exception" to the warrant requirement.

Held: Neither the holding nor logic of *Cady* justifies such warrantless searches and seizures in the home. *Cady* held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. In reaching this conclusion, the Court noted that the officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents. 413 U.S. at 441, 93 S.Ct. 2523. But searches of vehicles and homes are constitutionally different, as the *Cady* opinion repeatedly stressed. *Id.,* at 439, 440–442, 93 S.Ct. 2523. The very core of the Fourth Amendment's guarantee is the right of a person to retreat into his or her home and "there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495. A recognition of the existence of "community caretaking" tasks, like rendering aid to motorists in disabled vehicles, is not an open-ended license to perform them anywhere. Pp. 1599 – 1600.

953 F.3d 112, vacated and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. ROBERTS, C. J., filed a concurring opinion, in which BREYER, J., joined. ALITO, J., and KAVANAUGH, J., filed concurring opinions.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Opinion

Justice THOMAS delivered the opinion of the Court.

***1598** Decades ago, this Court held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). In reaching this conclusion, the Court observed that police officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents. *Id.*, at 441, 93 S.Ct. 2523. The question today is whether *Cady*'s acknowledgment of these "caretaking" duties creates a standalone doctrine that justifies warrantless searches and seizures in the home. It does not.

I

During an argument with his wife at their Rhode Island home, Edward Caniglia (petitioner) retrieved a handgun from the bedroom, put it on the dining room table, and asked his wife to "shoot [him] now and get it over with." She declined, and instead left to spend the night at a hotel. The next morning, when petitioner's wife discovered that she could not reach him by telephone, she called the police (respondents) to request a welfare check.

Respondents accompanied petitioner's wife to the home, where they encountered petitioner on the porch. Petitioner spoke with respondents and confirmed his wife's account of the argument, but denied that he was suicidal. Respondents, however, thought that petitioner posed a risk to himself or others. They called an ambulance, and petitioner agreed to go to the hospital for a psychiatric evaluation—but only after respondents allegedly promised not to confiscate his firearms. Once the ambulance had taken petitioner away, however, respondents seized the weapons. Guided by petitioner's wife—whom they allegedly misinformed about his wishes—respondents entered the home and took two handguns.

Petitioner sued, claiming that respondents violated the Fourth Amendment when they entered his home and seized him and his firearms without a warrant. The District Court granted summary judgment to respondents, and the First Circuit affirmed solely on the ground that the decision to remove petitioner and his firearms from the premises fell within a "community caretaking exception" to the warrant requirement. *Caniglia v. Strom*, 953 F.3d 112, 121–123, 131 and nn. 5, 9 (2020). Citing this Court's statement in *Cady* that police officers often have noncriminal reasons to interact with motorists on "public highways," 413 U.S. at 441, 93 S.Ct. 2523, the First Circuit extrapolated a freestanding community-caretaking exception that applies to both cars and homes. 953 F.3d at 124 ("Threats to individual and community safety are not confined to the ***1599** highways"). Accordingly, the First Circuit saw no need to consider whether anyone had consented to respondents' actions; whether these actions were justified by "exigent circumstances"; or whether any state law permitted this kind of mental-health intervention. *Id.,* at 122–123. All that mattered was that respondents' efforts to protect petitioner and those around him were "distinct from 'the normal work of criminal investigation,' " fell "within the realm of reason," and generally tracked what the court viewed to be "sound police procedure." *Id.,* at 123–128, 132–133. We granted certiorari. 592 U.S. ––––, 141 S.Ct. 870, 208 L.Ed.2d 436 (2020).

II

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The " 'very core' " of this guarantee is " 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).

To be sure, the Fourth Amendment does not prohibit all unwelcome intrusions "on private property," *ibid.*—only "unreasonable" ones. We have thus recognized a few permissible invasions of the home and its curtilage. Perhaps

most familiar, for example, are searches and seizures pursuant to a valid warrant. See *Collins v. Virginia*, 584 U.S. ——, —— – ——, 138 S.Ct. 1663, 1670–71, 201 L.Ed.2d 9 (2018). We have also held that law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to " 'render emergency assistance to an injured occupant or to protect an occupant from imminent injury.' " *Kentucky v. King*, 563 U.S. 452, 460, 470, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); see also *Brigham City v. Stuart*, 547 U.S. 398, 403–404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (listing other examples of exigent circumstances). And, of course, officers may generally take actions that " 'any private citizen might do' " without fear of liability. *E.g., Jardines*, 569 U.S. at 8, 133 S.Ct. 1409 (approaching a home and knocking on the front door).

The First Circuit's "community caretaking" rule, however, goes beyond anything this Court has recognized. The decision below assumed that respondents lacked a warrant or consent, and it expressly disclaimed the possibility that they were reacting to a crime. The court also declined to consider whether any recognized exigent circumstances were present because respondents had forfeited the point. Nor did it find that respondents' actions were akin to what a private citizen might have had authority to do if petitioner's wife had approached a neighbor for assistance instead of the police.

Neither the holding nor logic of *Cady* justified that approach. True, *Cady* also involved a warrantless search for a firearm. But the location of that search was an impounded vehicle—not a home—" 'a constitutional difference' " that the opinion repeatedly stressed. 413 U.S. at 439, 93 S.Ct. 2523; see also *id.,* at 440–442, 93 S.Ct. 2523. In fact, *Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car "parked adjacent to the dwelling place of the owner." *Id.*, at 446–448, 93 S.Ct. 2523 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).

Cady's unmistakable distinction between vehicles and homes also places into proper context its reference to "community caretaking." This quote comes from a portion of the opinion explaining that the "frequency ***1600** with which ... vehicle[s] can become disabled or involved in ... accident[s] on public highways" often requires police to perform noncriminal "community caretaking functions," such as providing aid to motorists. 413 U.S. at 441, 93 S.Ct. 2523. But, this recognition that police officers perform many civic tasks in modern society was just that—a recognition that these tasks exist, and not an open-ended license to perform them anywhere.

* * *

What is reasonable for vehicles is different from what is reasonable for homes. *Cady* acknowledged as much, and this Court has repeatedly "declined to expand the scope of ... exceptions to the warrant requirement to permit warrantless entry into the home." *Collins*, 584 U.S., at ——, 138 S.Ct. at 1672. We thus vacate the judgment below and remand for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice BREYER joins, concurring.

Fifteen years ago, this Court unanimously recognized that "[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." *Brigham City v. Stuart*, 547 U.S. 398, 406, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). A warrant to enter a home is not required, we explained, when there is a "need to assist persons who are seriously injured or threatened with such injury." *Id.,* at 403, 126 S.Ct. 1943; see also *Michigan v. Fisher*, 558 U.S. 45, 49, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009) (*per curiam*) (warrantless entry justified where "there was an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger" (internal quotation marks omitted)). Nothing in today's opinion is to the contrary, and I join it on that basis.

Justice ALITO, concurring.

I join the opinion of the Court but write separately to explain my understanding of the Court's holding and to highlight some important questions that the Court does not decide.

1. The Court holds—and I entirely agree—that there is no special Fourth Amendment rule for a broad category of cases involving "community caretaking." As I understand the term, it describes the many police tasks that go beyond criminal law enforcement. These tasks vary widely, and there is no clear limit on how far they might extend in the future. The category potentially includes any non-law-enforcement work that a community chooses to assign, and because of the breadth of activities that may be described as community caretaking, we should not assume that the Fourth Amendment's command

of reasonableness applies in the same way to everything that might be viewed as falling into this broad category.

The Court's decision in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), did not recognize any such “freestanding” Fourth Amendment category. See *ante*, at 1598 – 1599, 1599 – 1600. The opinion merely used the phrase “community caretaking” in passing. 413 U.S. at 441, 93 S.Ct. 2523.

2. While there is no overarching “community caretaking” doctrine, it does not follow that all searches and seizures conducted for non-law-enforcement purposes must be analyzed under precisely the same Fourth Amendment rules developed in criminal cases. Those rules may or may not be appropriate for use in various non-criminal-law-enforcement contexts. We do not decide that issue today.

***1601** 3. This case falls within one important category of cases that could be viewed as involving community caretaking: conducting a search or seizure for the purpose of preventing a person from committing suicide. Assuming that petitioner did not voluntarily consent to go with the officers for a psychological assessment,[1] he was seized and thus subjected to a serious deprivation of liberty. But was this warrantless seizure “reasonable”? We have addressed the standards required by due process for involuntary commitment to a mental treatment facility, see *Addington v. Texas*, 441 U.S. 418, 427, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); see also *O'Connor v. Donaldson*, 422 U.S. 563, 574–576, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Foucha v. Louisiana*, 504 U.S. 71, 75–77, 83, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), but we have not addressed Fourth Amendment restrictions on seizures like the one that we must assume occurred here, *i.e.*, a short-term seizure conducted for the purpose of ascertaining whether a person presents an imminent risk of suicide. Every State has laws allowing emergency seizures for psychiatric treatment, observation, or stabilization, but these laws vary in many respects, including the categories of persons who may request the emergency action, the reasons that can justify the action, the necessity of a judicial proceeding, and the nature of the proceeding.[2] Mentioning these laws only in passing, petitioner asked us to render a decision that could call features of these laws into question. The Court appropriately refrains from doing so.

4. This case also implicates another body of law that petitioner glossed over: the so-called “red flag” laws that some States are now enacting. These laws enable the police to seize guns pursuant to a court order to prevent their use for suicide or the infliction of harm on innocent persons. See, *e.g.,* Cal. Penal Code Ann. §§ 18125–18148 (West Cum. Supp. 2021); Fla. Stat. § 790.401(4) (Cum. Supp. 2021); Mass. Gen. Laws Ann., ch. 140, § 131T (2021). They typically specify the standard that must be met and the procedures that must be followed before firearms may be seized. Provisions of red flag laws may be challenged under the Fourth Amendment, and those cases may come before us. Our decision today does not address those issues.

5. One additional category of cases should be noted: those involving warrantless, nonconsensual searches of a home for the purpose of ascertaining whether a resident is in urgent need of medical attention and cannot summon help. At oral argument, THE CHIEF JUSTICE posed a question that highlighted this problem. He imagined a situation in which neighbors of an elderly woman call the police and express concern because the woman had agreed to come over for dinner at 6 p.m., but by 8 p.m., had not appeared or called even though she was never late for anything. The woman had not been seen leaving her home, and she was not answering the phone. Nor could the neighbors reach her relatives by phone. If the police entered the home without a warrant to see if she needed help, would that violate the Fourth Amendment? Tr. of Oral Arg. 6–8.

***1602** Petitioner's answer was that it would. Indeed, he argued, even if 24 hours went by, the police still could not lawfully enter without a warrant. If the situation remained unchanged for several days, he suggested, the police might be able to enter after obtaining “a warrant for a missing person.” *Id.,* at 9.

THE CHIEF JUSTICE's question concerns an important real-world problem. Today, more than ever, many people, including many elderly persons, live alone.[3] Many elderly men and women fall in their homes,[4] or become incapacitated for other reasons, and unfortunately, there are many cases in which such persons cannot call for assistance. In those cases, the chances for a good recovery may fade with each passing hour.[5] So in THE CHIEF JUSTICE's imaginary case, if the elderly woman was seriously hurt or sick and the police heeded petitioner's suggestion about what the Fourth Amendment demands, there is a fair chance she would not be found alive. This imaginary woman may have regarded her house as her castle, but it is doubtful that she would have wanted it to be the place where she died alone and in agony.

Our current precedents do not address situations like this. We have held that the police may enter a home without a warrant when there are "exigent circumstances." *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). But circumstances are exigent only when there is not enough time to get a warrant, see *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013); *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), and warrants are not typically granted for the purpose of checking on a person's medical condition. Perhaps States should institute procedures for the issuance of such warrants, but in the meantime, courts may be required to grapple with the basic Fourth Amendment question of reasonableness.

6. The three categories of cases discussed above are simply illustrative. Searches and seizures conducted for other non-law-enforcement purposes may arise and may present their own Fourth Amendment issues. Today's decision does not settle those questions.

* * *

In sum, the Court properly rejects the broad "community caretaking" theory on which the decision below was based. The Court's decision goes no further, and on that understanding, I join the opinion in full.

Justice KAVANAUGH, concurring.

I join the Court's opinion in full. I write separately to underscore and elaborate on THE CHIEF JUSTICE's point that the Court's decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid. See *ante,* at 1600 (ROBERTS, C. J., concurring). For example, as I will ***1603** explain, police officers may enter a home without a warrant in circumstances where they are reasonably trying to prevent a potential suicide or to help an elderly person who has been out of contact and may have fallen and suffered a serious injury.

Ratified in 1791 and made applicable to the States in 1868, the Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." As the constitutional text establishes, the "ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 573 U.S. 373, 381, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (internal quotation marks omitted). The Court has said that a warrant supported by probable cause is ordinarily required for law enforcement officers to enter a home. See U.S. Const., Amdt. 4. But drawing on common-law analogies and a commonsense appraisal of what is "reasonable," the Court has recognized various situations where a warrant is not required. For example, the exigent circumstances doctrine allows officers to enter a home without a warrant in certain situations, including: to fight a fire and investigate its cause; to prevent the imminent destruction of evidence; to engage in hot pursuit of a fleeing felon or prevent a suspect's escape; to address a threat to the safety of law enforcement officers or the general public; to render emergency assistance to an injured occupant; or to protect an occupant who is threatened with serious injury. See *Mitchell v. Wisconsin*, 588 U.S. ––––, ––––, 139 S.Ct. 2525, 2533, 204 L.Ed.2d 1040 (2019) (plurality opinion); *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 612, 135 S.Ct. 1765, 191 L.Ed.2d 856 (2015); *Kentucky v. King*, 563 U.S. 452, 460, 462, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); *Michigan v. Fisher*, 558 U.S. 45, 47, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009) (*per curiam*); *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990); *Michigan v. Clifford*, 464 U.S. 287, 293, and n. 4, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) (plurality opinion); *Mincey v. Arizona*, 437 U.S. 385, 392–394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Michigan v. Tyler*, 436 U.S. 499, 509–510, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *United States v. Santana*, 427 U.S. 38, 42–43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–299, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *Ker v. California*, 374 U.S. 23, 40–41, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (plurality opinion).

Over the years, many courts, like the First Circuit in this case, have relied on what they have labeled a "community caretaking" doctrine to allow warrantless entries into the home for a non-investigatory purpose, such as to prevent a suicide or to conduct a welfare check on an older individual who has been out of contact. But as the Court today explains, any such standalone community caretaking doctrine was primarily devised for searches of cars, not homes. *Ante,* at 1601 – 1602; see *Cady v. Dombrowski*, 413 U.S. 433, 447–448, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).

That said, this Fourth Amendment issue is more labeling than substance. The Court's Fourth Amendment case law already recognizes the exigent circumstances doctrine, which allows an officer to enter a home without a warrant if the "exigencies of the situation make the needs of law enforcement so compelling that the warrantless search

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is objectively reasonable under the Fourth Amendment." *Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943 (internal quotation marks omitted); see also *ante,* at 1601 – 1602. As relevant here, one such recognized "exigency" is the "need to assist persons who are seriously ***1604** injured or threatened with such injury." *Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943; see also *ante,* at 1600 (ROBERTS, C. J., concurring). The Fourth Amendment allows officers to enter a home if they have "an objectively reasonable basis for believing" that such help is needed, and if the officers' actions inside the home are reasonable under the circumstances. *Brigham City*, 547 U.S. at 406, 126 S.Ct. 1943; see also *Michigan v. Fisher*, 558 U.S. at 47–48, 130 S.Ct. 546.

This case does not require us to explore all the contours of the exigent circumstances doctrine as applied to emergency-aid situations because the officers here disclaimed reliance on that doctrine. But to avoid any confusion going forward, I think it important to briefly describe how the doctrine applies to some heartland emergency-aid situations.

As Chief Judge Livingston has cogently explained, although this doctrinal area does not draw much attention from courts or scholars, "municipal police spend a good deal of time responding to calls about missing persons, sick neighbors, and premises left open at night." Livingston, Police, Community Caretaking, and the Fourth Amendment, 1998 U. Chi. Leg. Forum 261, 263 (1998). And as she aptly noted, "the responsibility of police officers to search for missing persons, to mediate disputes, and to aid the ill or injured has never been the subject of serious debate; nor has" the "responsibility of police to provide services in an emergency." *Id.,* at 302.

Consistent with that reality, the Court's exigency precedents, as I read them, permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now. See, *e.g., Sheehan*, 575 U.S. at 612, 135 S.Ct. 1765; *Michigan v. Fisher*, 558 U.S. at 48–49, 130 S.Ct. 546; *Brigham City*, 547 U.S. at 406–407, 126 S.Ct. 1943. The officers do not need to show that the harm has already occurred or is mere moments away, because knowing that will often be difficult if not impossible in cases involving, for example, a person who is currently suicidal or an elderly person who has been out of contact and may have fallen. If someone is at risk of serious harm and it is reasonable for officers to intervene now, that is enough for the officers to enter.

A few (non-exhaustive) examples illustrate the point.

Suppose that a woman calls a healthcare hotline or 911 and says that she is contemplating suicide, that she has firearms in her home, and that she might as well die. The operator alerts the police, and two officers respond by driving to the woman's home. They knock on the door but do not receive a response. May the officers enter the home? Of course.

The exigent circumstances doctrine applies because the officers have an "objectively reasonable basis" for believing that an occupant is "seriously injured or threatened with such injury." *Id.,* at 400, 403, 126 S.Ct. 1943; cf. *Sheehan*, 575 U.S. at 612, 135 S.Ct. 1765 (officers could enter the room of a mentally ill person who had locked herself inside with a knife). After all, a suicidal individual in such a scenario could kill herself at any moment. The Fourth Amendment does not require officers to stand idly outside as the suicide takes place.[1]

***1605** Consider another example. Suppose that an elderly man is uncharacteristically absent from Sunday church services and repeatedly fails to answer his phone throughout the day and night. A concerned relative calls the police and asks the officers to perform a wellness check. Two officers drive to the man's home. They knock but receive no response. May the officers enter the home? Of course.

Again, the officers have an "objectively reasonable basis" for believing that an occupant is "seriously injured or threatened with such injury." *Brigham City*, 547 U.S. at 400, 403, 126 S.Ct. 1943. Among other possibilities, the elderly man may have fallen and hurt himself, a common cause of death or serious injury for older individuals. The Fourth Amendment does not prevent the officers from entering the home and checking on the man's well-being.[2]

To be sure, courts, police departments, and police officers alike must take care that officers' actions in those kinds of cases are reasonable under the circumstances. But both of those examples and others as well, such as cases involving unattended young children inside a home, illustrate the kinds of warrantless entries that are perfectly constitutional under the exigent circumstances doctrine, in my view.

With those observations, I join the Court's opinion in full.

All Citations

141 S.Ct. 1596, 209 L.Ed.2d 604, 21 Cal. Daily Op. Serv. 4474, 2021 Daily Journal D.A.R. 4725, 28 Fla. L. Weekly Fed. S 795

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The Court of Appeals assumed petitioner's consent was not voluntary because the police allegedly promised that they would not seize his guns if he went for a psychological evaluation. 953 F.3d 112, 121 (CA1 2020). The Court does not decide whether this assumption was justified.

2 See Brief for Petitioner 38–39, n. 4 (gathering state authorities); L. Hedman et al., State Laws on Emergency Holds for Mental Health Stabilization, 67 Psychiatric Servs. 579 (2016).

3 Dept. of Commerce, Bureau of Census, The Rise of Living Alone, Fig. HH–4 (2020), https://www.census.gov/content/dam/Census/ library /visualizations /time-series /demo /families-and-households /hh-4.pdf; Ortiz-Ospina, The Rise of Living Alone (Dec. 10, 2019), https://ourworldindata.org/living-alone; Smith, Cities With the Most Adults Living Alone (May 4, 2020), https://www.self.inc/blog/adults-living-alone.

4 See B. Moreland, R. Kakara, & A. Henry, Trends in Nonfatal Falls and Fall-Related Injuries Among Adults Aged #65 Years—United States, 2012–2018, 69 Morbidity and Mortality Weekly Rep. 875 (2020).

5 See, *e.g.,* J. Gurley, N. Lum, M. Sande, B. Lo, & M. Katz, Persons Found in Their Homes Helpless or Dead, 334 New Eng. J. Med. 1710 (1996).

1 In 2019 in the United States, 47,511 people committed suicide. That number is more than double the number of annual homicides. See Dept. of Health and Human Servs., Centers for Disease Control and Prevention, D. Stone, C. Jones, & K. Mack, Changes in Suicide Rates—United States, 2018–2019, 70 Morbidity and Mortality Weekly Rep. 261, 263 (2021) (MMWR); Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Report, Crime in the United States, 2019, p. 2 (2020).

2 In 2018 in the United States, approximately 32,000 older adults died from falls. Falls are also the leading cause of injury for older adults. B. Moreland, R. Kakara, & A. Henry, Trends in Nonfatal Falls and Fall-Related Injuries Among Adults Aged # 65 Years—United States, 2012–2018, 69 MMWR 875 (2020).

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333 Pa.Super. 382
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania
v.
Gerald LANDAMUS, Appellant.

Submitted May 4, 1984.
|
Filed Sept. 28, 1984.

Synopsis

Defendant was convicted in the Court of Common Pleas of Luzerne County, Criminal Division, at No. 150, 1981, Dalessandro, J., of burglary, and defendant appealed. The Superior Court, No. 1350 Philadelphia, 1983, Del Sole, J., held that since there was no probable cause to believe that defendant's car, which had been parked at curb adjacent to his property for approximately 14 days subsequent to the burglary, would yield evidence of the crime, no exigent circumstances, and no lawful inventory search or search pursuant to valid warrant, jewels seized from car without a search warrant should have been suppressed at trial.

Vacated and remanded.

Attorneys and Law Firms

****621** ***386** Philip T. Medico, Jr., Asst. Public Defender, Wilkes-Barre, for appellant.

Joseph Giebus, Asst. Dist. Atty., Wilkes-Barre, for Commonwealth, appellee.

Before CIRILLO, DEL SOLE and POPOVICH, JJ.

Opinion

DEL SOLE, Judge:

This appeal was taken from the Judgment of Sentence from a burglary conviction. The issue raised is whether physical evidence found from the search of Appellant's vehicle was properly admitted into trial.

The crucial facts are that on January 2, 1981, the Stella residence in Plains Township was burglarized and several pieces of jewelry were taken. Two weeks later on January 16, 1981, Dominick Augustine, a neighbor of the Stella's, accompanied police to Wilkes-Barre where he identified Appellant's automobile as being the same as the one he had seen near the Stella home on the night of the burglary. The original description he gave police was that the car was a blue Dodge, Pennsylvania license No. DDU 660, 760 or 670, and the car identified was a blue Dodge No. BBU–670. Appellant's car, which was parked at the curb adjacent to his property, was impounded. The car was reported by Whitney Klein, a neighbor and friend of Landamus', to have not been driven for two weeks (which would have been the night of the robbery). It is not clear from the record whether Appellant was arrested and charged with the burglary and theft prior to the impoundment of his vehicle. Both events, however, occurred within a short time of each other on January 16, 1981. Appellant was arrested in his home. Prior to applying to a magistrate on January 19 for ***387** a warrant to search the car, police made an inventory search. A diamond pin, a pair of earrings initialed with an "A" and an aqua-colored earring were found on and under the seats. Mrs. Stella identified them as her missing jewelry. The warrant was granted on the 19th, and a second search produced no new items.

The search warrant used to inventory the car was found to be invalidly executed by the Common Pleas Court under ****622** *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. U.S.,* 393 U.S. 410, 80 S.Ct. 584, 21 L.Ed.2d 637 (1969).

We must decide whether the impounding and inventorying of Appellant's vehicle without a warrant was lawful.

The Commonwealth claims that the items were properly discovered and admitted into trial based on a lawful, though warrantless, inventory search. There is no assertion that the items discovered were in "plain view" or that the seizure of the car was incident to a lawful arrest.

The Fourth Amendment, which was made applicable to the States through the Due Process Clause of the Fourteenth Amendment in *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), mandates that government searches be "reasonable". A true inventory search:

> (T)akes place when it is not coupled with the intent of discovering evidence of a crime. The inventory is conducted not for the purpose of uncovering incriminating evidence, but for the purpose of safeguarding the contents of the vehicle for the benefit of both the owner and the

police. *Commonwealth v. Brandt,* 244 Pa.Super. 154, 160, 366 A.2d 1238, 1241 (1976).

Although automobiles have been given less constitutional protection by the courts because of their mobility and the increased governmental interest in the efficient and unimpeded use of public highways, “it is clear that there is no ‘automobile exception’ as such and that constitutional protections are applicable to searches and seizures of a person's car.” ***388** *Commonwealth v. Holzer,* 480 Pa. 93, 389 A.2d 101 (1978). Instead of determining whether probable cause existed to justify the search and seizure, courts have analyzed such protective inventorying of automobiles using a standard of reasonableness, *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), thus encompassing the idea that these procedures are “searches” to be governed by the Fourth Amendment.

The U.S. Supreme Court wrote:

> The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts. *Coolidge v. New Hampshire,* 403 U.S. [443] at 509–510, 91 S.Ct. [2022 at] 2059, 29 L.Ed.2d 564 (Justice Black, concurring and dissenting).

It was determined in this case that Appellant had no access to his vehicle once he was arrested. Following *Commonwealth v. Brandt,* 244 Pa.Super. 154, 366 A.2d 1238 (1976), where there is no clear probable cause to justify such a search and seizure, the elements that the Commonwealth must show in order to legitimize such a search are: “First, the Commonwealth must show that the vehicle was lawfully in the custody of police. Secondly, the Commonwealth must show that the search was in fact an inventory search.” *Brandt,* 244 Pa.Super. at 162, 366 A.2d at 1242. Because this Court has defined a determination of an inventory search as a legal conclusion based on underlying facts rather than a factual conclusion, we are able to review the common pleas court's holding that what occurred here was indeed an inventory search. *Commonwealth v. Burgwin,* 254 Pa.Super. 417, 386 A.2d 19 (1978).

In determining whether the car was lawfully in the custody of police, we note that Appellant's vehicle was parked at the curb near his home, there was no obstruction of traffic, two weeks had passed since the robbery occurred, and reports indicated that the car had not been driven since that time. The common pleas court cited *Commonwealth v.* ***389** *Holzer,* 480 Pa. 93, 389 A.2d 101 (1978), as controlling in the determination that the seizure was lawful.

The Court in *Holzer* found that:

> It is reasonable, therefore, for constitutional purposes for police to seize and ****623** hold a car until a search warrant can be obtained, where the seizure occurs after the user or owner has been placed into custody, where the vehicle is located on public property, and where there exists probable cause to believe that evidence of the commission of the crime will be obtained from the vehicle. *Commonwealth v. Holzer,* 480 Pa. 93, 96, 389 A.2d 101, 106 (1978).

In *Holzer,* the police were concerned with losing evidence thought to be inside the vehicle because, even though defendant was incarcerated, a co-conspirator to the murder was unapprehended and defendant's girlfriend and family lived near where the car was located. The homicide was reported to have occurred in the car, and police seized it only two days after the crime. Given those facts, the Court found that police fears of losing valuable evidence were reasonable. The passage of time in this case, along with the fact that no testimony was offered to indicate concern that the car would be moved (since it had not been moved for two weeks), or that the car would yield valuable evidence of the crime, as in *Holzer,* leads to the conclusion that the seizure of the car without a warrant was not supported by the facts. More importantly, in *Holzer,* the Court took note that even after the car was impounded, no subsequent search of the car's interior was made until police had secured a warrant.

Under the second prong of the analysis, i.e. whether the search was in fact for inventorying purposes, the Court must be convinced that the procedure was meant to protect the car's contents for the owner and to insure the safety of police. *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). The Court paid specific attention to the fact that the seizure and inventorying of the car was done according to routine procedure and unlikely to be motivated by a desire to search for evidence. The ***390** car, which was illegally parked and ticketed several times, was impounded by police pursuant to motor vehicle laws. Marijuana was discovered during the inventorying of the car's contents, leading to charges of possession against the owner. In contrast, Appellant's car was not seized because it was obstructing traffic. The officers admitted that the purpose of impounding the vehicle was:

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Q: And, when you seized the car, what was your purpose?

A: That car was used in the commission of a crime. I seized it as evidence. (Stenographic Record of May 6, 1981, p. 35).

We can draw no other conclusion than police had a motive to search for evidence when they seized the car. The major obstacle to the success of the Commonwealth's argument that this was a valid inventory search is that the officers applied for a warrant to search the vehicle for evidence after they discovered the jewelry in the car. This strongly indicates that the motive behind their actions was to secure evidence against the Appellant.

The Commonwealth, in justifying the police action, makes reference to what has become a separate class of exceptions to Fourth Amendment protection. First articulated in *Coolidge v. New Hampshire,* 403 U.S. 443, 454, 91 S.Ct. 2022, 2031, 29 L.Ed.2d 564 (1971). The U.S. Supreme Court held:

The warrant requirement, however, is excused where exigent circumstances exist .. Exceptions arise where the need for prompt police action is imperative, either because evidence sought to be preserved is likely to be destroyed or secreted from investigation, or because the officer must protect himself from danger to his person by checking for concealed weapons.

This Court has further provided a two-part analysis: "The general rule dealing with warrantless automobile searches allows that a car may be searched or seized without a warrant if there are both exigent circumstances and probable cause to believe that the car will yield ****624** contraband or useful evidence for the prosecution of a crime." ***391** *Commonwealth v. Cooper,* 268 Pa.Super. 99, 407 A.2d 456 (1979). Such exigent circumstances were present in *Commonwealth v. Brandt,* 244 Pa.Super. 154, 366 A.2d 1238, 1242 (1976), where defendant's vehicle had struck a pole and he was physically fighting police in their attempts to help him; in *Opperman,* where the car was illegally parked and ticketed; in *Commonwealth v. Scott,* 469 Pa. 258, 356 A.2d 140 (1976), where the car was in a high crime area and stereo equipment was on the seat in "plain view"; and in *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), where defendant's automobile was disabled following an accident and the police observed that defendant was intoxicated and unable to provide for the towing of his vehicle. After he told police he was also an officer and was taken to the hospital, the police searched the trunk looking for his regulation revolver. The search was upheld, supported by the exigencies. Appellant's vehicle, in this case, was not illegally parked, nor was it in his control at the time of arrest to make it necessary to have the car towed. No jewels were seen in "plain view". There are simply no facts supporting an exigent circumstance. In *Commonwealth v. Burgwin,* 254 Pa.Super. 417, 386 A.2d 19 (1978), the warrantless search of a car trunk after defendant was in custody was struck down for lack of any exigency and for not being evidence of standard police procedure. The routine nature of this action is likewise absent under the present facts. We are also not persuaded that there was probable cause to believe evidence or the fruits of the crime would be found in the car. To quote the dissenting opinion of Judge Toole from the common pleas court decision below:

In the instant case, the vehicle was impounded not because there was probable cause to believe that evidence of the commission of the crime could be obtained from the vehicle, or because the vehicle was parked in violation of any law posing a threat to the safety of others, or because it was necessary to preserve evidence until a search warrant could be obtained ... The mere fact that a vehicle may have been involved in the commission of a ***392** crime does not automatically authorize its search and seizure. There is no testimony in this record to indicate any probable cause to believe that evidence of the commission of this burglary could be obtained from the vehicle. This is particularly true since the alleged burglary in this case took place approximately fourteen (14) days before the so-called inventory search. We further add that there is no testimony in the record indicating even a suspicion that the car could or would be moved from the area where is was parked and any evidence lost. (At page 3–4).

We also do not have a situation similar to that in the recent U.S. Supreme Court case of *U.S. v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The Court in *Leon* recognized a "good faith" exception for police who have obtained a warrant and reasonably relied on it to conduct a search, only to have the warrant subsequently found to be invalidly issued. Under our facts, the effort to procure a valid search warrant by police was done as an afterthought. The seizure and search had been accomplished, and the warrant was sought to legitimize the earlier illegal police conduct. The Court specifically preserved "the continued application of the rule to suppress evidence from the (prosecution's) case where a Fourth Amendment violation has been substantial and deliberate." *U.S. v. Leon,* 468 U.S. at p. ——, 104 S.Ct. at p. 3413. We have such a situation at hand.

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Since there was no probable cause to believe that the car would yield evidence of the crime, no exigent circumstances, no lawful inventory search or a search pursuant to a valid warrant, this evidence must be suppressed at trial.

****625** Judgment of Sentence is vacated and the case is remanded for a new trial.

Jurisdiction is relinquished.

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644 Pa. 27
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Victoria LIVINGSTONE, Appellant

No. 11 WAP 2016
|
Argued: November 2, 2016
|
Decided: November 27, 2017

Synopsis
Background: After being charged with general impairment driving under influence (DUI), highest rate of alcohol DUI, and careless driving, defendant filed pre-trial motion to suppress evidence of her blood alcohol content (BAC). Following evidentiary hearing, the Court of Common Pleas, Erie County, Criminal Division, No. CP–25–CR–0002750–2013, denied motion, and following stipulated non-jury trial, convicted defendant of all charges and sentenced her to an aggregate term of 24 months' intermediate punishment, with the first 90 days to be served on electronic monitoring, followed by probation, and fines and costs. Defendant appealed. The Superior Court, No. 1829 WDA 2014, Stabile, J., 2015 WL 9282636, affirmed. Defendant petitioned for allowance of appeal, which was granted.

Holdings: The Supreme Court, No. 11 WAP 2016, Todd, J., held that:

defendant was seized and subjected to investigatory detention, rather than mere encounter with police trooper, when trooper pulled alongside defendant's vehicle with emergency lights activated;

as a matter of first impression, reasonableness test applied to determination of whether public servant exception of community caretaking doctrine applied to justify seizure; and

as a matter of first impression, defendant's seizure was not justified under public servant exception of community caretaking doctrine.

Order reversed, judgment of sentence vacated, and remanded with directions.

Baer, J., filed opinion concurring in part and dissenting in part.

Donohue, J., filed opinion concurring in part and dissenting in part in which Wecht, J., joined.

Mundy, J., filed dissenting opinion.

****613** Appeal from the Order of the Superior Court entered December 21, 2015 at No. 1829 WDA 2014, affirming the Judgment of Sentence of the Court of Common Pleas of Erie County entered October 20, 2014 at No. CP–25–CR–0002750–2013, Ernest J. DiSantis, Jr., President Judge

Attorneys and Law Firms

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SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

Justice Todd announces the Judgment of the Court, and delivers the Opinion of the Court with respect to Parts I, II(A), II(B), and III. Chief Justice Saylor and Justice Dougherty join the opinion in full. Justice Baer joins Parts I, II(A), and II(B) of the opinion. Justices Donohue and Wecht join Parts I, II(A), and III of the opinion.

OPINION

JUSTICE TODD

***35** We granted review in this matter to consider whether Appellant, Victoria Livingstone, who was in a stopped vehicle on the side of the road, was subjected to an investigatory detention without reasonable suspicion of criminal activity[1] when a police officer, ostensibly seeking only to inquire ***36** about her need for assistance, pulled his patrol car, with its emergency lights activated, alongside her vehicle. For the reasons set forth below, we conclude that Appellant was subjected to an illegal investigatory detention.

Furthermore, although we take this opportunity to recognize the public servant "exception" to the warrant requirement under the community caretaking doctrine, which in certain circumstances will permit a warrantless seizure, we conclude that the doctrine does not justify the detention of Appellant under the facts of this case. Thus, we hold ****614** that the Superior Court erred in affirming the trial court's denial of Appellant's motion to suppress evidence obtained as a result of her illegal investigatory detention, and we reverse the Superior Court's decision and remand for further proceedings.

I. Background

On June 14, 2013, at approximately 9:30 p.m., Pennsylvania State Trooper Jeremy Frantz was traveling northbound on Interstate 79 in his marked police cruiser when he observed a vehicle pulled over onto the right shoulder of the road; the engine was running, but the hazard lights were not activated. Trooper Frantz activated his emergency lights and, with his passenger window down, pulled alongside the stopped vehicle. Appellant, the sole occupant of the vehicle, was sitting in the driver's seat and appeared to be entering an address into her vehicle's navigation system. According to Trooper Frantz's testimony at the suppression hearing, when he first made eye contact with Appellant, she gave him a "hundred mile stare," which Trooper Frantz described as "glossy eyes" and "looking through [him]." N.T. Suppression Hearing, 5/28/14, at 7. Trooper Frantz motioned for Appellant to roll down her window, and he asked her if she was okay. Appellant answered affirmatively. When asked where she was going, Appellant stated that she was traveling to New York for a dragon boat race. At that point, Trooper Frantz pulled his cruiser in front of Appellant's vehicle, exited the cruiser, and approached Appellant's vehicle on foot. At approximately the same time, another trooper pulled behind Appellant's vehicle, but, when ***37** he exited his vehicle, that trooper remained in front of his police cruiser and did not make contact with Appellant. *Id.* at 12.

When he reached Appellant's vehicle on foot, Trooper Frantz asked to see Appellant's driver's license, and, when asked if she had been drinking, Appellant replied that she had not, but that she would like to once she arrived at her destination. She explained that she had finished working at 8:00 p.m., and had been driving for approximately 90 minutes. The audio of Trooper Frantz's dashboard camera video, which was introduced at the suppression hearing, reveals that Appellant repeatedly told Trooper Frantz that she was "a CEO of five companies" and worked long hours. *Id.* at 10. She also repeatedly stated that she had two sons at the Citadel,[2] and she told Trooper Frantz that she was afraid of him, and afraid that her sons would get in trouble because of her being stopped. *Id.* at 11. Based on the appearance of her eyes and the fact that she was acting "confused," Trooper Frantz asked Appellant to exit her vehicle so that he could perform field sobriety tests. *Id.* He indicated that, at that point, "[s]he was an emotional wreck. She was crying, constantly repeating herself about the fact that she's a CEO of five companies." *Id.* at 13. Trooper Frantz then advised Appellant that he intended to administer a portable breathalyzer test ("PBT"), and, assuming it was clear, he would help her get to her destination. As neither of the troopers had a PBT in their cruisers, another officer brought one to the scene. The results of the PBT indicated the presence of alcohol in Appellant's system. As a result, Trooper Frantz placed Appellant under arrest, and transported her to the police barracks where an EMT administered a blood test. The test revealed that Appellant had a blood alcohol content (BAC) of .205%. Accordingly, Appellant was charged with DUI—General ****615** Impairment,[3] DUI—Highest Rate of Alcohol,[4] and Careless Driving.[5]

***38** On March 17, 2014, Appellant filed a pre-trial motion to suppress evidence of her BAC on the basis that, once Trooper Frantz activated his emergency lights and pulled alongside her vehicle, she was subjected to an investigative detention unsupported by reasonable suspicion. Following an evidentiary hearing, the Honorable Ernest J. DiSantis, Jr. denied the motion on June 18, 2014, concluding that Trooper Frantz, after observing Appellant's vehicle on the side of the interstate, had a duty to determine whether Appellant was in need of assistance, and his "act of approaching [Appellant's] vehicle with his overhead emergency lights was a mere encounter." Trial Court Opinion, 6/18/14, at 4–5. The trial court further determined that, once he observed the Appellant's confused demeanor and "glossy" eyes, "it was reasonable for him to continue his inquiry." *Id.* at 5. On October 20, 2014, at a stipulated non-jury trial, at which the trial court took judicial notice of the facts presented at the suppression hearing, Appellant was convicted of all charges, and sentenced to an aggregate term of 24 months intermediate punishment, with the first 90 days to be served on electronic monitoring, followed by probation, and fines and costs.

Appellant appealed her judgment of sentence to the Superior Court, wherein she argued that Trooper Frantz's act of pulling alongside her vehicle with his emergency lights activated, when her vehicle was stopped on the side of

the road, but the hazard lights were not activated and there were no visible signs of distress to the driver or vehicle, and when Trooper Frantz had not observed any vehicle violations or received any report of a vehicle in need of assistance, was an investigative detention and that the trial court erred in deeming it a mere encounter. The Superior Court affirmed Appellant's judgment of sentence in a unanimous, unpublished memorandum opinion. *Commonwealth v. Livingstone*, 1829 WDA 2014, 2015 WL 9282636 (Pa. Super. filed Dec. 21, 2015).

The Superior Court began its analysis by setting forth the following standard for determining whether the initial interaction between Appellant and Trooper Frantz constituted a mere encounter or an investigative detention:

> ***39** To determine whether a mere encounter rises to the level of an investigatory detention, we must discern whether, as a matter of law, the police conducted a seizure of the person involved. To decide whether a seizure has occurred, a court must consider all the circumstances surrounding the encounter to determine whether the demeanor and conduct of the police would have communicated to a reasonable person that he or she was not free to decline the officer's request or otherwise terminate the encounter. Thus, the focal point of our inquiry must be whether, considering the circumstances surrounding the incident, a reasonable person innocent of any crime, would have thought he was being restrained had he been in the defendant's shoes.

Id. at 3–4 (quoting *Commonwealth v. Collins*, 950 A.2d 1041, 1046–47 (Pa. Super. 2008)).

The Superior Court then rejected Appellant's claim that the activation of emergency lights on a police cruiser immediately renders an interaction between an officer ****616** and a citizen an investigative detention, noting that it rejected that same argument in *Commonwealth v. Johonoson*, 844 A.2d 556 (Pa. Super. 2004), *Commonwealth v. Conte*, 931 A.2d 690 (Pa. Super. 2007), and *Commonwealth v. Kendall*, 976 A.2d 503 (Pa. Super. 2009). In *Johonoson*, a state trooper was traveling on a rural road in the early morning when he observed a slow-moving vehicle with its flashers activated. Without using his turn signal, the driver, Johonoson, pulled his vehicle to the side of the road. The trooper pulled his cruiser behind the vehicle, activated his emergency lights, exited his cruiser, and approached the vehicle, where he noticed severe damage to both sides of the car. When he began to speak with Johonoson, the trooper immediately observed signs of intoxication. Johonoson subsequently was arrested for DUI. In a pretrial motion to suppress, Johonoson alleged, *inter alia*, that when the trooper pulled behind his vehicle and activated the patrol car's emergency lights, he was subjected to an investigatory detention without reasonable suspicion. The trial court denied the motion, and the Superior Court, in an alternative holding, ***40** affirmed. The court found that the fact that Johonoson had voluntarily pulled off the road and came to a full stop without any prompting from the trooper was critical to its determination. With respect to Johonoson's argument that the activated emergency lights were a signal that he was not free to leave,[6] thus rendering the interaction an investigative detention, the Superior Court stated:

> We recognize that flashing overhead lights, when used to pull a vehicle over, are a strong signal that a police officer is stopping a vehicle and that the driver is not free to terminate this encounter. The same is not necessarily true under the factual circumstances presented here. It is one traditional function of State Troopers, and indeed all police officers patrolling our highways, to help motorists who are stranded or who may otherwise need assistance. Such assistance is to be expected, and is generally considered welcome.
>
> Often, and particularly at night, there is simply no way to render this aid safely without first activating the police cruiser's overhead lights. This act serves several functions, including avoiding a collision on the highway, and potentially calling additional aid to the scene. Moreover, ***41** by activating the overhead lights, the officer signals to the motorist that it is actually a police officer (rather than a potentially ****617** dangerous stranger) who is approaching.
>
> By pulling over to the side of the road at 3:00 in the morning on a rural road, after driving slowly with his hazard lights on, Appellant should have had reason to expect that a police officer would pull over and attempt to render aid. Indeed, by his own repeated admissions, Appellant had recently been in a serious accident and was lost on a dark country road. Appellant is exactly the sort of person whom [the trooper] has a duty to assist. The fact that [the trooper] activated his lights in the course of doing so does not turn the interaction into an investigative detention. Rather, it remained a mere encounter for which no suspicion of illegal activity was required.

844 A.2d at 562 (emphasis omitted).

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In *Conte*, a police officer received a report of a disabled vehicle on the side of the road, and, upon seeing the vehicle, pulled behind it and activated his emergency lights. The officer then approached the driver, Conte, who had exited his vehicle, to ask if he needed help, and Conte indicated he had a flat tire. The officer noticed signs of intoxication, and Conte ultimately was arrested and charged with DUI. Conte filed a motion to suppress on the basis that the uniformed officer's arrival in his patrol car, with emergency lights flashing, instantly subjected him to an investigative detention unsupported by reasonable suspicion. The trial court denied the motion, and the Superior Court affirmed, quoting at length from *Johonoson*. The court determined that Conte was not subjected to an investigatory detention because "a reasonable person in [his] position would have understood [the officer's] arrival as an act of official assistance, and not as the start of an investigative detention." 931 A.2d at 693. The court further concluded that a reasonable person in Conte's position, "knowing the officer was simply carrying out a highly desirable public safety duty, would have felt free to decline the officer's offer of help or to otherwise terminate the encounter." *Id.* at 694.

***42** Finally, in *Kendall*, two police officers were on routine patrol at approximately 1:15 a.m. when they came upon a vehicle traveling in front of them. After nearly two or three minutes, the driver, Kendall, activated his turn signal and pulled onto the shoulder of the two-lane road, leaving his turn signal on. The officers pulled behind the vehicle, and, after running the license plate, activated their emergency lights. One of the officers exited the patrol car and approached the driver's side of the vehicle, asking Kendall why he had pulled over suddenly. Kendall stated that he did so to let the patrol car pass. At this time, the officer observed an open can of beer on the passenger seat and smelled alcohol on the driver's breath, and Kendall was arrested and charged with DUI. He filed a pretrial motion to suppress the evidence on the grounds that he was subjected to an investigatory detention without reasonable suspicion, which the trial court denied. On appeal, the Superior Court affirmed the trial court's denial of the motion to suppress, concluding that, in light of police officers' duty to render aid and assistance to motorists, the interaction between the officers and Kendall was a mere encounter, which required no level of suspicion. Citing *Conte* and *Johonoson*, the court reiterated that the activation of emergency lights does not transform a mere encounter into an investigatory detention. 976 A.2d at 505.

In the instant case, quoting at length from *Johonoson*, the Superior Court concluded that the record supported the trial court's conclusion that Trooper Frantz ****618** pulled his vehicle alongside Appellant's vehicle to see if she needed assistance. The court suggested that the "absence of outward signs of a vehicle being in distress does not bar an officer from conducting a safety check," and opined that, because "[d]rivers do not commonly stop their cars on an interstate at night, and doing so is generally associated with a motorist having some sort of problem," the circumstances were sufficient to suggest to Trooper Frantz that assistance might be needed. 1829 WDA 2014 at 8 (citing *Collins*, 950 A.2d at 1047).[7] Thus, the court ***43** determined that the interaction between Appellant and Trooper Frantz constituted a mere encounter and thus did not require reasonable suspicion of criminal activity. *Livingstone*, at 6.

Appellant filed a petition for allowance of appeal with this Court, and we granted review to consider the following issue: "Where a Police Officer approaches a voluntarily stopped motorist with [the police vehicle's] emergency lights activated, would a reasonable motorist feel that she was not free to leave prior to the approaching officer stopping to interact with her, or, simply passing her by?" *Commonwealth v. Livingstone*, 635 Pa. 269, 135 A.3d 1016 (2016) (order). We specifically directed the parties to address the potential application of a community caretaking exception, *see*, *e.g.*, *State v. Anderson*, 362 P.3d 1232 (Utah 2015) (holding that seizure of defendant ***44** who had stopped his car on the side of a rural highway at night and activated his vehicle's hazard lights was justified under the public servant exception to the community caretaking doctrine), under these circumstances.

II. Analysis

As Appellant challenges the Superior Court's decision affirming the trial court's denial of her motion to suppress, we first note our well established standard of review of claims regarding the denial of a suppression motion:

> We may consider only the Commonwealth's evidence and so much of the ****619** evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. An appellate court, of course, is not bound by the suppression court's conclusions of law.

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Commonwealth v. Gary, 625 Pa. 183, 91 A.3d 102, 106 (2014) (citation omitted). In reviewing questions of law, our standard of review is *de novo* and our scope of review is plenary. *Weaver v. Lancaster Newspapers, Inc.*, 592 Pa. 458, 926 A.2d 899, 903 (2007).

A. Seizure vs. Mere Encounter

In arguing that the Superior Court erred in affirming the trial court's denial of her motion to suppress, Appellant maintains that, at the moment Trooper Frantz pulled alongside her stopped vehicle, with his emergency lights activated, she was subjected to an investigative detention that was not supported by reasonable suspicion or probable cause, thus violating her right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.[8] In its brief, the Commonwealth asserts that the ***45** "initial interaction between Trooper Frantz and Appellant was a mere encounter," Commonwealth Brief at 2, but devotes its argument and analysis to whether Trooper Frantz's stop of Appellant was justified under the community caretaking doctrine. For the following reasons, we are constrained to agree with Appellant that, when Trooper Frantz pulled alongside her vehicle, with his emergency lights activated, Appellant was subjected to an investigative detention.

The Fourth Amendment provides:

> The 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The United States Constitution does not forbid all searches and seizures; rather, it forbids *unreasonable* searches and seizures. *Terry*, 392 U.S. at 9, 88 S.Ct. 1868. A determination of whether a search is reasonable requires balancing the public interest in conducting the search or seizure against an individual's right to be free from arbitrary intrusions by law enforcement officers. *Id.* at 20–21, 88 S.Ct. 1868. Furthermore, in the context of the Fourth Amendment, a person is considered seized "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). In evaluating those circumstances, the crucial inquiry is whether the officer, "by means of physical force or a show of authority," has restrained a citizen's freedom of movement. *Id.* at 553, 100 S.Ct. 1870; *Strickler*, 757 A.2d at 890.

As a preliminary matter, we emphasize that the issue of whether an individual has been seized is distinct from the ***46** issue of ****620** whether that seizure was reasonable. The fact that a search may be deemed reasonable pursuant to an "exception"[9] to the warrant requirement does not mean that the individual was not subjected to a seizure in the first instance. For example, in the context of the community caretaking doctrine exception to the warrant requirement, the Supreme Court of Illinois explained, "if community caretaking were just another name for consensual encounters, there would have been no need for courts to formulate the exception in the first place." *People v. McDonough*, 239 Ill.2d 260, 346 Ill.Dec. 496, 940 N.E.2d 1100, 1107 (2010) ("[T]he community caretaking doctrine 'is analytically distinct from consensual encounters and is invoked to validate a search or seizure as reasonable under the [F]ourth [A]mendment. *It is not relevant to determining whether police conduct amounted to a seizure in the first place*." (emphasis original)); *see also State v. McCormick*, 494 S.W.3d 673, 675 (Tenn. 2016) ("[T]he community caretaking doctrine is analytically distinct from consensual police-citizen encounters and is instead an exception to the state and federal constitutional warrant requirements which may be invoked to validate as reasonable a warrantless seizure of an automobile."); *State v. Crawford*, 659 N.W.2d 537, 543 (Iowa 2003) ("Implicit in any community caretaking case is the fact that there has been a seizure within the meaning of the Fourth Amendment. Otherwise there would be no need to apply a community caretaking exception.").

As noted above, the trial court in the instant case concluded that "Trooper Frantz was under a duty to determine whether [Appellant] needed assistance," such that Trooper Frantz's "act of approaching [Appellant's] vehicle with his overhead emergency lights was a mere encounter." Trial Court Opinion, 6/18/14, at 4–5 (citing *Conte*, *supra* and *Kendall*, *supra*). Moreover, in affirming the trial court's order, the Superior Court held that the trial court's determination that Trooper Frantz pulled alongside Appellant's vehicle in order to conduct a "safety check" was supported by the record, and, therefore, that the interaction was a mere encounter. ***47** *Livingstone*, 1829 WDA 2014 at 7, 10. In focusing on whether

Trooper Frantz had a duty to determine whether Appellant was in need of assistance, and whether it was reasonable for him to conclude that she might, the lower courts conflated the threshold issue of whether Appellant was seized—i.e., whether a reasonable person in Appellant's shoes would have believed that she was free to leave—with the issue of whether the seizure was reasonable.[10] ****621** Thus, we must first determine whether Appellant was seized by considering whether a reasonable person in Appellant's shoes would have believed she was free to leave when Trooper Frantz pulled his patrol car, with its emergency lights activated, alongside her vehicle.

To determine whether a citizen's movement has been restrained, courts must consider the totality of the circumstances, "with no single factor dictating the ultimate conclusion as to whether a seizure has occurred." *Strickler*, 757 A.2d at 890. In *Mendenhall*, the high Court indicated that the following factors suggest a seizure occurred: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance ***48** with the officer's request might be compelled." 446 U.S. at 554, 100 S.Ct. 1870. The Court explained that, absent evidence of the factors identified above, "otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* at 555, 100 S.Ct. 1870.

Similarly, in *Commonwealth v. Jones*, this Court explained that, in order to determine when a "stop" has occurred, "subtle factors as the demeanor of the police officer, the location of the confrontation, the manner of expression used by the officer in addressing the citizen, and the content of the interrogatories or statements," must be considered. 474 Pa. 364, 378 A.2d 835, 839–40 (1977) (recognizing that, while a police uniform is a symbol of authority, a uniform is not, in and of itself, a sufficient exercise of force to render an interaction between an officer and a citizen a "stop"). The pivotal inquiry is whether, in light of the facts and circumstances identified above, "a reasonable man, innocent of any crime, would have thought (he was being restrained) had he been in the defendant's shoes." *Id.* at 840 (citation omitted). The *Jones/Mendenhall* standard has been consistently followed in Pennsylvania in determining whether the conduct of the police amounts to a seizure, or whether there is simply a mere encounter between citizen and police officer. *Commonwealth v. Matos*, 543 Pa. 449, 672 A.2d 769, 774 (1996).

It is undeniable that emergency lights on police vehicles in this Commonwealth serve important safety purposes, including ensuring that the police vehicle is visible to traffic, and signaling to a stopped motorist that it is a police officer, as opposed to a potentially dangerous stranger, who is approaching. *See Johonoson*, 844 A.2d at 562. Moreover, we do not doubt that a reasonable person may recognize that a police officer might activate his vehicle's emergency lights for safety purposes, as opposed to a command to stop. Nevertheless, upon consideration of the realities of everyday life, particularly the relationship between ordinary citizens and law enforcement, we simply cannot pretend that a reasonable person, innocent of any crime, would not interpret the activation of ***49** emergency lights on a police vehicle as a signal that he or she is not free to leave.

Indeed, the Pennsylvania Driver's Manual ("PDM") instructs drivers how to proceed "if [they] are stopped by police." The PDM first provides: "You will know a police officer wants you to pull over when he or she activates the flashing red and blue lights on top of the police vehicle." Pa. Driver's Manual at 78, *available at* http://www.dot.state.pa.us/Public/DVSPubsForms/BDL/BDLManuals. The PDM further ****622** "recommends" that drivers follow certain procedures "[a]nytime a police vehicle stops behind you." *Id.* Those procedures include turning off the engine and radio, rolling down a window to enable communication with the officer, limiting their movements and the movements of passengers; placing their hands on the steering wheel; keeping the vehicle doors closed and remaining inside the vehicle; and keeping their seatbelt fastened. *Id.* If these instructions do not explicitly instruct motorists who are already stopped on the side of the road that they are not free to leave when a police vehicle, with its emergency lights activated, pulls alongside their vehicle, we conclude that it is eminently reasonable that a motorist would believe he or she is not free to leave under these circumstances.

Moreover, pursuant to Pennsylvania's Motor Vehicle Code, a driver of a motor vehicle "who willfully fails or refuses to bring his vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police officer, when given a visual and audible signal to bring the vehicle to a stop," may be convicted of a second-degree misdemeanor. 75 Pa.C.S. § 3733(a), (a.2). A police officer's signal may be "by hand, voice, emergency lights or siren." *Id.* § 3733(b). Section

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3325(a) of the Motor Vehicle Code, titled "Duty of driver on approach of emergency vehicle," similarly provides:

> **(a) General rule.**—Upon the immediate approach of an emergency vehicle making use of an audible signal and visual signals meeting the requirements and standards set forth in regulations adopted by the department, the driver of every other vehicle shall yield the right-of-way and ***50** shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection *and shall stop and remain in that position until the emergency vehicle has passed,* except when otherwise directed by a police officer or an appropriately attired person authorized to direct, control or regulate traffic.

Id. § 3325(a) (emphasis added).

The fact that motorists risk being charged with violations of the Motor Vehicle Code if they incorrectly assume they are free to leave after a patrol car, with its emergency lights activated, has pulled behind or alongside of them further supports our conclusion that a reasonable person in Appellant's shoes would not have felt free to leave.

The appellate courts of many of our sister states have reached the same conclusion. For example, in *State v. Morris*, 276 Kan. 11, 72 P.3d 570 (2003), an undercover officer observed Morris sitting in a parked pick-up truck, with the engine running, on a rocky jetty-breaker area at a lake. The officer had seen Morris earlier in the day while conducting surveillance of an apartment building as part of an investigation of a possible methamphetamine lab. Upon seeing Morris in his parked truck, the undercover officer radioed for two additional officers, who arrived in a marked police vehicle. By the time the two officers arrived, Morris had turned off the engine, and the officers pulled their vehicle behind the truck, activated their emergency lights, and illuminated the back of the truck with spotlights. The three officers approached the truck, requested Morris' identification, and, upon noticing a chemical odor from the truck, asked Morris to exit the truck. A search of the truck revealed materials used in the manufacturer of methamphetamine. Morris filed a pretrial motion to suppress the evidence, and, although he did not raise the precise argument that he was subjected to an unlawful ****623** investigative detention when the officers pulled up behind him and activated their emergency lights, the Kansas Supreme Court nevertheless addressed the issue:

> ***51** The officers' conduct, the activation of the emergency lights in a remote area off a roadway, was a show of authority which would communicate to a reasonable person that there was an intent to intrude upon freedom of movement. "Few, if any, reasonable citizens, while parked, would simply drive away and assume that the police, in turning on the emergency flashers, would be communicating something other than for them to remain." *Lawson v. State*, [120 Md.App. 610, 707 A.2d 947 (Md. App. 1998)]. In fact, it is unlawful for a driver to fail to stop when a police officer signals the driver by using emergency lights. K.S.A. 8–1568 (fleeing and eluding).

72 P.3d at 577.

In *State v. Anderson*, *supra*, the Utah Supreme Court suggested that even where the circumstances would suggest that police assistance was needed or welcomed, a seizure occurs if a reasonable person in the motorist's shoes would not feel free to leave after being approached by a police vehicle with its emergency lights activated. The defendant, Anderson, had stopped his car on the side of a rural highway on a cold December evening, and turned on the vehicle's hazard lights. Two county deputies noticed the vehicle as they drove down the highway. Due to the late hour, cold weather, and hazard lights, the deputies pulled their patrol car behind the defendant's, and activated their red and blue emergency lights. The deputies approached Anderson on foot, asked him to exit his car, and ultimately discovered marijuana and drug paraphernalia in his vehicle. Prior to trial, Anderson sought to suppress evidence of the drugs and paraphernalia on the basis that he had been subjected to an investigative detention unsupported by reasonable suspicion when the deputies pulled their police cruiser with its lights activated behind his parked vehicle; the motion was denied and Anderson was convicted.

On appeal, the Utah Supreme Court first examined whether Anderson had been seized for purposes of the Fourth Amendment, which the Court noted required a determination as to "whether a reasonable person parked on the side of an empty highway at night would believe that she was free to leave if a ***52** police vehicle with its red and blue overhead lights engaged pulled over directly behind her car." 362 P.3d at 1235–36. The high Court acknowledged the State's argument that "a police vehicle's overhead lights are not always used as a show of authority," and "may be used for officer or public safety and to convey to the occupants of a vehicle that the approaching officer does not present a threat."

Id. at 1236. However, in response to the State's contention that, under the circumstances, a reasonable motorist would know that the police officer was using the overhead lights for safety purposes and not a show of authority, the high Court explained:

> Even though we may presume that a reasonable person knows that police officers may use their overhead lights for reasons other than as a command to stop, that does not mean that the average motorist [who was parked on the side of an empty highway at night when a police vehicle with its emergency lights activated pulled directly behind her] would assume that the officers had no interest in detaining the vehicle and would feel free to drive away. At best, the use of a police vehicle's overhead lights while pulling behind a car parked on the side of the ****624** road is ambiguous. The lights may signal the presence of a police vehicle for safety reasons, or they may convey the message that the officers wish to seize the vehicle parked in front of them. Faced with this ambiguity, "[f]ew, if any, reasonable citizens, while parked, would simply drive away" upon an assumption that the police did not wish to detain them. *Morris,* 72 P.3d at 577 (citation omitted). The consequences of wrongly guessing the officer's intent in engaging the overhead lights and driving away could, in theory, be severe. Attempting "to flee or elude a peace officer" after receiving "a visual or audible signal from a peace officer to bring the vehicle to a stop" is a third-degree felony. Utah Code § 41–6a–210(1). The potential of even being accused of a felony would constrain a reasonable motorist from driving away under the facts of this case. *See* *Morris,* 72 P.3d at 577 (citing Kansas's fleeing-an-officer statute as a reason why a reasonable ***53** person would not feel free to leave); *Lawson v. State,* 120 Md.App. 610, 707 A.2d 947, 951 (1998) (citing a Maryland statute for the same purpose).

Id.

Numerous other jurisdictions, including Arkansas, California, Connecticut, Florida, Idaho, Maryland, Montana, North Dakota, Oregon, Tennessee, Vermont, Virginia, Washington, and Wyoming, have likewise concluded that a seizure occurs when a police officer pulls his police vehicle, with its emergency lights activated, behind a parked or stopped vehicle. *See* *Hammons v. State,* 327 Ark. 520, 940 S.W.2d 424, 428 (1997) (defendant sitting in parked car was seized when police activated blue light; light was display of authority that would indicate to reasonable person he was not free to leave); *People v. Brown*, 61 Cal.4th 968, 190 Cal.Rptr.3d 583, 353 P.3d 305, 312 (2015) (defendant sitting in parked car was seized when officer pulled his patrol car behind the defendant's car and activated his overhead emergency lights because a reasonable person in defendant's position would have perceived the actions as a show of authority requiring that he submit by remaining where he was); *State v. Donahue,* 251 Conn. 636, 742 A.2d 775, 780 (1999) (defendant was seized when officer pulled behind his parked vehicle and activated the patrol car's red, yellow, and blue flashing lights); *Smith v. State*, 87 So.3d 84, 88 (Fla. Dist. Ct. App. 4th 2012) (defendant sitting in vehicle that was legally parked on the side of a residential street was seized when a police officer pulled diagonally to defendant's vehicle and activated his emergency lights and spotlight because defendant would not have felt free to leave); *State v. Mireles*, 133 Idaho 690, 991 P.2d 878, 880 (Idaho Ct. App. 1999) (officer's act of activating emergency lights, although not necessarily intended to create a detention, constituted a technical, *de facto* detention commanding the defendant to remain stopped under state statute, such that he would not have believed he was free to leave); *Lawson v. Maryland,* 120 Md.App. 610, 707 A.2d 947, 951 (1998) (defendant in parked car was seized when police activated emergency lights because activation of the emergency lights was a ***54** show of authority that would communicate to a reasonable person that he was not free to move away); *State v. Graham*, 340 Mont. 366, 175 P.3d 885, 889 (2007) (defendant who was sitting in his parked truck on a dirt pullout was seized when deputy pulled her patrol car behind the truck and activated her emergency lights because a reasonable person would not have felt free to leave); *State v. Thompson*, 793 N.W.2d 185, 187 (N.D. 2011) (defendant who pulled into a parking ****625** spot was seized when police officer stopped directly behind the defendant's vehicle and activated his patrol car's emergency lights because a reasonable person would not believe he was free to leave under such circumstances); *State v. Walp,* 65 Or.App. 781, 672 P.2d 374, 375 (1983) (use of emergency lights after defendant had stopped car on his own accord was sufficient show of authority and a reasonable person would not have felt free to leave); *State v. Pulley*, 863 S.W.2d 29, 30 (Tenn. 1993) (defendant sitting in parked car at gas station was seized when police officer pulled his patrol car behind him and activated his blue lights); *State v. Burgess,* 163 Vt. 259, 657 A.2d 202, 203 (1995) (defendant sitting in vehicle with engine running and parking lights on in lawful pull-off area was subjected to seizure when officer pulled his patrol car behind the defendant's vehicle and activated his blue lights, even if officer subjectively intended to activate his blue lights for safety reasons); *Wallace v. Commonwealth*, 32 Va.App. 497,

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528 S.E.2d 739, 741–42 (2000) (driver of vehicle parked in driveway was seized when police officer parked his patrol car behind him and activated its emergency lights because a reasonable person would not have felt free to leave); *State v. Stroud,* 30 Wash.App. 392, 634 P.2d 316, 318 (1981) (occupants of parked vehicle were seized when officers pulled up behind them and activated patrol car's emergency lights and headlights because such action constituted a show of authority sufficient to convey to any reasonable person that he or she was not free to leave, and risked being charged with misdemeanor if he or she tried to do so); *McChesney v. State*, 988 P.2d 1071, 1075 (Wyo. 1999) (where police vehicle with its emergency lights activated pulled behind a vehicle that had turned into a parking lot, defendant was seized for purposes of ***55** Fourth Amendment because a reasonable person would not have believed he was free to leave, particularly where state statute prohibited a driver from attempting to elude a police vehicle after being given a "visual or audible signal to bring the vehicle to a stop").

As we conclude that a reasonable person in Appellant's shoes would not have felt free to leave after Trooper Frantz pulled his patrol car, with its emergency lights activated, alongside her vehicle, we are constrained to hold that Appellant was seized and subjected to an investigative detention. Given that it is undisputed that the seizure was not supported by any degree of suspicion of criminal activity, we will proceed to determine whether it was otherwise justified under the Fourth Amendment.

B. The Community Caretaking Doctrine

In order to protect individuals against unreasonable searches and seizures, a right guaranteed by the Fourth Amendment, law enforcement generally must obtain a warrant prior to conducting a search: "A search warrant indicates that the police have convinced a neutral magistrate upon a showing of probable cause, which is a reasonable belief, based on the surrounding facts and totality of circumstances, that an illegal activity is occurring or evidence of a crime is present." *Commonwealth v. Petroll*, 558 Pa. 565, 738 A.2d 993, 998 (1999). Further, "a search without a warrant may be proper where an exception applies and the police have probable cause to believe a crime has been or is being committed." *Id.* at 999 (citing, *inter alia*, *Commonwealth v. Riedel,* 539 Pa. 172, 651 A.2d 135, 139 & n.1 (1994) (noting that exceptions include actual consent, implied consent, search incident to arrest, and exigent circumstances)). Moreover, some warrantless searches have been held not to violate state or federal constitutional ****626** privacy rights, even absent probable cause, for officer safety or administrative reasons. *See Petroll*, 738 A.2d at 999 (citing *Commonwealth v. Morris*, 537 Pa. 417, 644 A.2d 721 (1994) (protective search); *Colorado v. Bertine,* 479 U.S. 367, 371–72, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987) (inventory search); ***56** *New York v. Burger*, 482 U.S. 691, 702–03, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (administrative search of a closely regulated business)).

The Commonwealth maintains that, even if Appellant was subjected to a seizure, that seizure was reasonable under the community caretaking "exception" to the Fourth Amendment's warrant requirement.[11] Appellant, conversely, argues that application of the doctrine is not supported under the facts of this case. The United States Supreme Court first recognized a community caretaking exception to the warrant requirement in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). Therein, the Court considered whether police officers violated a vehicle owner's Fourth Amendment rights when, without obtaining a warrant, they searched the trunk of a parked vehicle because they reasonably believed that the trunk contained a loaded service revolver that could endanger the public if left unsecured. The vehicle owner had been arrested one day earlier for drunk driving and identified himself as a police officer. In determining that the search of the trunk was reasonable, the Court observed that police officers "frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441, 93 S.Ct. 2523. The high Court further opined that, "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less ***57** intrusive' means does not, by itself, render the search unreasonable." *Id.* at 447, 93 S.Ct. 2523.

The community caretaking doctrine has been characterized as encompassing three specific exceptions: the emergency aid ****627** exception; the automobile impoundment/inventory exception; and the public servant exception, also sometimes referred to as the public safety exception. *See State v. Ryon*, 137 N.M. 174, 108 P.3d 1032, 1042 (2005) (community caretaker exception encompasses three distinct doctrines: the emergency aid doctrine, the automobile impoundment and inventory doctrine, and the public servant doctrine); *State v.*

Acrey, 148 Wash.2d 738, 64 P.3d 594, 600 (2003) (*en banc*) (community caretaking function exception to the warrant requirement encompasses not only search and seizure of automobiles, but also situations involving either emergency aid or routine checks on health and safety); *State v. Kurth*, 813 N.W.2d 270, 277 (Iowa 2012) (community caretaking activity consists of three subcategories: the emergency aid exception, the automobile impoundment/inventory exception, and the public servant exception noted in *Cady, supra*).

Each of the exceptions contemplates that the police officer's actions be motivated by a desire to render aid or assistance, rather than the investigation of criminal activity. *See Ryon*, 108 P.3d at 1043 ("The common characteristic of [the three exceptions of the community caretaking doctrine] is that the intrusion upon privacy occurs while police are acting as community caretakers; their actions are motivated by 'a desire to aid victims rather than investigate criminals.' "); *Corbin v State*, 85 S.W.3d 272, 277 (Tex. Crim App. 2002) ("[A] police officer may not properly invoke his community caretaking function if he is primarily motivated by a non-community caretaking purpose."); *Commonwealth v. Waters*, 20 Va.App. 285, 456 S.E.2d 527, 530 (1995) ("[n]o seizure, however limited, is a valid exercise of the community caretaking function if credible evidence indicates that the stop is a pretext for investigating criminal activity.").

***58** In *Commonwealth v. Lagenella*, 623 Pa. 434, 83 A.3d 94, 103 (2013), this Court acknowledged the "community care-taking functions" of police when we considered the legality of an inventory search of a vehicle lawfully impounded pursuant to standard police policy. We have not, however, addressed the public servant or the emergency aid exceptions under the community caretaking doctrine, although more than half of our sister states have done so.[12] *See People v. Ray*, 21 Cal.4th 464, 88 Cal.Rptr.2d 1, 981 P.2d 928, 931 (1999) (warrantless entry into home justified under emergency aid exception); *Williams v. State*, 962 A.2d 210, 216 (Del. 2008) (approach and questioning of defendant walking on highway median was not a seizure, and, even if it was, seizure was justified under public safety exception); *Hawkins v. United States*, 113 A.3d 216, 221–22 (D.C. 2015) (warrantless entry ***59** into idling car justified under public safety exception); *State v. Maddox*, 137 Idaho 821, 54 P.3d 464, 467 (2002) (detention of motorist driving off-road not justified under public ****628** safety doctrine); *People v. McDonough*, 239 Ill.2d 260, 346 Ill.Dec. 496, 940 N.E.2d 1100, 1109 (2010) (police officers' approach of vehicle stopped on shoulder of highway at night justified under public safety exception); *Kurth*, 813 N.W.2d at 278 (Iowa court holding detention not justified under public servant exception); *State v. Neighbors*, 299 Kan. 234, 328 P.3d 1081, 1089–90 (2014) (initial warrantless entry into apartment justified under emergency aid exception); *Poe v. Commonwealth*, 169 S.W.3d 54, 58 (Ky. Ct. App. 2005) (rejecting application of public safety exception under facts of the case); *State v. Pinkham*, 565 A.2d 318, 320 (Me. 1989) (warrantless entry may be justified by "safety reasons"); *Wilson v. State*, 409 Md. 415, 975 A.2d 877, 891 (2009) (seizure not justified under public servant exception); *Commonwealth v. Fisher*, 86 Mass.App.Ct. 48, 13 N.E.3d 629, 632–34 (2014) (warrantless seizure of individual in vehicle justified under public servant exception); *People v. Slaughter*, 489 Mich. 302, 803 N.W.2d 171, 180 (2011) (community caretaking doctrine applies to firefighters); *Trejo v. State*, 76 So.3d 684, 689 (Miss. 2011) (under facts of case, vehicle stop not justified under public servant exception); *State v. Graham*, 175 P.3d at 890 (Montana) (seizure not justified under public safety exception); *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335, 338 (2007) (vehicle stop justified under public servant exception); *State v. Rincon*, 122 Nev. 1170, 147 P.3d 233, 237 (2006) (recognizing community caretaking exception); *State v. Boutin*, 161 N.H. 139, 13 A.3d 334, 337–38 (2010) (under facts of case, seizure not justified under public servant exception); *State v. Vargas*, 213 N.J. 301, 63 A.3d 175, 177 (2013) (warrantless entry into defendant's apartment not justified by emergency aid exception); *Ryon*, 108 P.3d at 1041 (New Mexico) (holding warrantless entry into defendant's home not justified under emergency aid exception); *State v. Smathers*, 232 N.C.App. 120, 753 S.E.2d 380, 382 (2014) (formally recognizing community caretaking doctrine); *State v. Dunn*, 131 Ohio St.3d 325, 964 N.E.2d 1037, 1042 (Ohio 2012) (seizure of individual justified under ***60** emergency aid exception); *State v. Kleven*, 887 N.W.2d 740, 743 (S.D. 2016) (seizure justified under public servant exception); *State v. McCormick*, 494 S.W.3d 673, 686 (Tenn. 2016) (seizure justified under public servant exception); *Hernandez v. State*, 376 S.W.3d 863, 877 (Tex. Ct. App. 2012) (seizure not justified under public servant exception); *Anderson*, 362 P.3d at 1240 (Utah) (holding seizure justified under public servant exception); *State v. Hinton*, 198 Vt. 167, 112 A.3d 770, 773 (2014) (seizure justified under public servant exception); *Knight v. Commonwealth*, 61 Va.App. 297, 734 S.E.2d 716, 721 (2012) (community caretaking doctrine did not justify police officer's search of defendant's backpack); *Acrey*, 64 P.3d at 603 (Washington) (holding detention of juvenile justified under community caretaking doctrine); *Ullom v. Miller*, 227 W.Va. 1, 705 S.E.2d 111, 121

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(2010) (seizure justified under public safety exception); *State v. Kramer*, 315 Wis.2d 414, 759 N.W.2d 598, 605 (2009) (seizure justified under public servant exception); *Morris v. State*, 908 P.2d 931, 935 (Wyo. 1995) (search of defendant's wallet not justified under public servant exception).

The Supreme Court of Delaware described the basis for the community caretaking doctrine as follows:

> The modern police officer is a "jack-of-all-emergencies," with " 'complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses'; by default or design he is also expected 'to aid individuals who are in danger of physical harm,' 'assist those who cannot care for themselves,' ****629** and 'provide other services on an emergency basis.' " To require reasonable suspicion of criminal activity before police can investigate and render assistance in these situations would severely hamstring their ability to protect and serve the public.

Williams, 962 A.2d at 216–17 (internal citations and footnote omitted).

Similarly, the Tennessee Supreme Court observed that the "widespread adoption of the community caretaking doctrine as an exception to the warrant requirement reflects the reality ***61** that modern society expects police officers to fulfill various responsibilities," noting:

> Police officers wear many hats: criminal investigator, first aid provider, social worker, crisis intervener, family counselor, youth mentor and peacemaker, to name a few. They are charged with the duty to protect people, not just from criminals, but also from accidents, natural perils and even self-inflicted injuries. We ask them to protect our property from all types of losses—even those occasioned by our own negligence. They counsel our youth. They quell disputes between husband and wife, parent and child, landlord and tenant, merchant and patron and quarreling neighbors. Although they search for clues to solve crime, they also search for missing children, parents, dementia patients, and occasionally even an escaped zoo animal. They are society's problem solvers when no other solution is apparent or available.

McCormick, 494 S.W.3d at 683 (citation omitted).

This Court likewise recognizes that the role of police is not limited to the detection, investigation, and prevention of criminal activity. Rather, police officers engage in a myriad of activities that ensure the safety and welfare of our Commonwealth's citizens. Indeed, we want to encourage such laudable activity. However, even community caretaking activity must be performed in accordance with Fourth Amendment protections. Ultimately, we agree that the public servant exception may be employed consistent with these protections.

In recognition of the overarching requirements of the Fourth Amendment, courts have adopted a variety of tests for determining whether the public servant exception justifies a warrantless search or seizure. In *Anderson, supra*, the Utah Supreme Court opined that the same balancing test used in determining whether a seizure is reasonable under the Fourth Amendment—balancing an individual's interest in being free from police intrusion and the State's legitimate interest in the public welfare—is applicable to determining whether a seizure is justified pursuant to the community caretaking doctrine, and instructed:

> ***62** In applying this balancing test in the context of a community caretaking stop, courts must first evaluate the degree to which an officer intrudes upon a citizen's freedom of movement and privacy. In doing so, courts should look to both "the degree of overt authority and force displayed" in effecting the seizure, and the length of the seizure. Second, courts must determine whether "the degree of the public interest and the exigency of the situation" justified the seizure for community caretaking purposes. In other words, how serious was the perceived emergency and what was the likelihood that the motorist may need aid? If the level of the State's interest in investigating whether a motorist needs aid justifies the degree to which an officer interferes with the motorist's ****630** freedoms in order to perform this investigation, the seizure is not "unreasonable" under the Fourth Amendment.

362 P.3d at 1239 (internal citations omitted).

Applying this test, the *Anderson* court first concluded that police officers' "seizure" of a motorist who was in a parked car on the side of a highway, at night and in below-zero temperatures, with his vehicle's hazard lights on, was "minimally invasive" of the motorist's right to be free from arbitrary interferences by police because (1) the vehicle was parked, not traveling down the highway; (2) there was no unduly excessive display of authority or force, in that the only show of authority was the trooper's use of his overhead flashing lights and he did not draw his weapon or shout commands; and (3) the officers detained the motorist

only long enough to approach his vehicle and ask whether he needed aid. *Id.* at 1239–40. With regard to the second inquiry—the seriousness of the perceived emergency and the likelihood that the motorist needed aid—the court opined that a "reasonable officer would have cause to be concerned about the welfare of a motorist [who was] parked on the side of a highway with his hazard lights flashing just before 10:00 p.m." in very cold temperatures. *Id.* at 1240. Accordingly, the court held that the seizure was justified under the community caretaking doctrine. *Id.*

***63** Wisconsin also has adopted a balancing test to determine whether an officer's actions are reasonable under the community caretaker function, balancing the "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." *Kramer*, 759 N.W.2d at 610. The stronger the public need and the more minimal the intrusion upon the individual's liberty, the more likely the police action will be deemed reasonable. *Id.* at 611. The Wisconsin Supreme Court has cited the following factors as relevant in assessing the balance between the public interest and a citizen's liberty interest:

> (1) the degree of the public interest and 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.

After considering the above factors, the court in *Kramer* determined that a police officer's act of pulling behind a vehicle that was legally parked on the side of the road at night with its hazard lights activated, and the officer's activation of his own emergency lights, was reasonable under the community caretaker function because (1) the public has an interest in ensuring that police assist motorists who may be stranded, particularly at night; (2) the degree of overt authority was slight, as the officer's use of his emergency lights was for safety purposes, as was his act of pulling behind the driver's vehicle as opposed to beside it, which would have blocked a lane of traffic; (3) an automobile was involved; and (4) if the driver was ill, a delay in help may have been fatal, and if the driver's vehicle was not working, the driver may have attempted to walk along the highway, putting himself in danger. *Id.* at 611–12.

This balancing test is also used in Illinois. In *McDonough*, the Illinois Supreme Court explained that, in determining whether a seizure is justified under the community caretaker ***64** exception, it "must ****631** balance a citizen's interest in going about his or her business free from police interference against the public's interest in having police officers perform services in addition to strictly law enforcement." 346 Ill.Dec. 496, 940 N.E.2d at 1109. In concluding that a police officer's approach of a motorist's car, which was pulled to the side of a four-lane highway at night, was justified under the community caretaker exception, the court noted that the public has an interest in ensuring that police officers offer assistance to stranded motorists; the highway was busy; and the officer activated his emergency lights because it was dark and there was a lot of traffic. *Id.* 346 Ill.Dec. 496, 940 N.E.2d at 1109–10.

While the above courts utilize a balancing test to determine whether a seizure was justified under the community caretaking doctrine, many state courts have adopted variations of what has been referred to as a "reasonableness test." Montana, for example, has adopted the following three-part test:

> First, as long as there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, then that officer has the right to stop and investigate. Second, if the citizen is in need of aid, then the officer may take appropriate action to render assistance or mitigate the peril. Third, once, however, the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating ... the protections provided by the Fourth Amendment.

State v. Lovegren, 310 Mont. 358, 51 P.3d 471, 475–76 (2002).

In *Lovegren*, a police officer observed a legally parked vehicle on the side of a highway, with its motor running but its headlights off. He approached the vehicle, and, seeing that the driver appeared to be asleep, knocked on the window. When the driver did not respond, the officer opened the vehicle door and the driver woke up and stated that he'd been drinking. The Montana Supreme Court concluded that the officer "had objective, specific and articulable facts suggesting that Lovegren might be in need of assistance. While Lovegren might ***65** simply have been asleep, he might just as likely have been ill and unconscious and in need of help." *Id.* at 476.

In *Williams*, the Supreme Court of Delaware specifically adopted the three-part test established by the Montana Supreme Court in *Lovegren*. *Williams*, 962 A.2d at 219 ("We adopt [the *Lovegren*] test to ensure that investigations conducted in Delaware under the community caretaker doctrine are reasonable."). The *Williams* court held that a police officer's act of pulling his vehicle approximately ten feet behind the defendant, who was walking along the median of a highway at 3:50 a.m. on a cold and windy night, activating his strobe light, and asking the defendant if he needed a ride, was reasonable under the public servant exception under the community caretaking doctrine. *Id.* at 221. Specifically, it noted that the officer articulated objective and specific facts —the weather and the hour of the morning—that would lead an experienced officer to conclude that the defendant needed assistance. *Id.*

The Tennessee Supreme Court, in *McCormick*, adopted a test similar to the *Lovegren* test, and held that the community caretaking exception will justify a warrantless search if:

> the State establishes that (1) the officer possessed specific and articulable facts which, viewed objectively and in the totality of the circumstances, reasonably warranted a conclusion that a ****632** community caretaking action was needed, such as the possibility of a person in need of assistance or the existence of a potential threat to public safety; and (2) the officer's behavior and the scope of the intrusion were reasonably restrained and tailored to the community caretaking need.

494 S.W.3d at 687 (citation omitted).

Utilizing this test, the court determined that a police officer's act of approaching a vehicle that was parked between the entrance of a parking lot and the roadway, with its engine running, radio and headlights on, and a man slumped over the steering wheel, was necessary and reasonable because the occupant of the vehicle was "either asleep or unconscious, with ***66** his vehicle protruding partially onto the public roadway, placing him at risk of injury or death from a rear end collision." *Id.* at 688. Thus, the court held that the officer's actions were justified under the community caretaking function.

In *Kleven*, the South Dakota Supreme Court implicitly adopted a reasonableness test when it explained that the following elements must be established in order for the community caretaking doctrine exception to apply:

> the purpose of community caretaking must be the objectively reasonable independent and substantial justification for the intrusion; the police action must be apart from the detection, investigation, or acquisition of criminal evidence; and the officer should be able to articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion.

887 N.W.2d at 743 (citation omitted). Noting that "the community caretaking function is more akin to a health and safety check," the court held that police officers' entry into a vehicle that was parked on the side of the road at 2:00 a.m., with its engine running, where the driver appeared to be sleeping or passed out, in a location where the officers had seen the vehicle in the same spot an hour earlier, was justified under the community caretaking doctrine because it was reasonable for the officers to believe the driver might need assistance. *Id.*

The West Virginia Supreme Court, in *Ullom*, adopted a test that includes the three prongs of the test utilized in South Dakota, but added an additional requirement that the state establish that, "[g]iven the totality of the circumstances, a reasonable and prudent police officer would have perceived a need to promptly act in the proper discharge of his or her community caretaker duties." 705 S.E.2d at 122. In *Ullom*, the court concluded that a state trooper who observed the defendant's vehicle, which had its parking lights on and was parked in front of a gate blocking a dirt road at dusk, was reasonable under the community caretaking doctrine because "a reasonable and prudent officer in such a setting would have reasonably suspected that an occupant of the vehicle was in need of ***67** immediate help," and because the officer's motivation was to check on her safety. *Id.* at 123.

Vermont and Mississippi likewise have adopted tests that require police officers to be able to point to specific and articulable facts which would reasonably suggest that an individual was in need of assistance. Indeed, in *Hinton*, the Vermont Supreme Court observed that its test for the community caretaking exception for a traffic stop "has consistently turned on whether there were specific and articulable facts objectively leading the officer to reasonably believe that the defendant was in distress or needed assistance, or reasonably prompted an inquiry in that regard." 112 A.3d at 773–74 (citation omitted). In *Trejo*, the Supreme Court of Mississippi ****633** explained that, in applying the community caretaking function, the "ultimate standard" is reasonableness, and, in evaluating whether a stop is objectively reasonable, it looks to whether the officer can

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point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. 76 So.3d at 689.

A number of states have adopted tests which encompass elements of both the balancing and reasonableness tests. In *Hawkins*, for example, the Court of Appeals for the District of Columbia adopted "a hybrid of the reasonableness and balancing tests, in light of the totality of the circumstances, to assess whether an officer's community caretaking conduct comports with the Fourth Amendment:"

> In order for a law enforcement officer's community caretaking conduct to be reasonable, the government must show: 1) by specific and articulable facts that the government's conduct was totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute; 2) the government's conduct was reasonable considering the availability, feasibility, and effectiveness of alternatives to the officer's action; 3) the officer's action ended when the citizen or community was no longer in need of assistance; 4) the government's interests outweigh the citizen's interest in being free from minor government interference. This court does ***68** not require the government to pursue the least restrictive means of correcting the problem.

113 A.3d at 221–22. The *Hawkins* court held that, under the foregoing test, an officer's entry into an idling vehicle in a parking lot in order to turn it off after approaching the individual standing outside of the vehicle was reasonable under the community caretaking function. *Id.* at 222–23.

Similarly, the New Hampshire Supreme Court, in *Boutin*, explained that, in order to justify a seizure of a motorist under the community caretaking exception, a police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." 13 A.3d at 337 (citation omitted). The court noted that, in determining whether a seizure by a police officer acting in a non-investigatory capacity is reasonable, it must "balance the governmental interest in the police officer's exercise of his or her community caretaking function and the individual's interest in being free from arbitrary government interference." *Id.* (citation omitted). Under this standard, the *Boutin* court determined that a police officer's act of parking behind a motorist's vehicle—which was parked legally in a pull-off area, but was facing the opposite direction of traffic —and activating his emergency lights was not reasonable because the officer did not offer any specific and articulable facts suggesting that the occupant of the vehicle needed assistance, other than the fact that it was dark and there was snow on the ground. *Id.*

Finally, we note that several courts, including the Nebraska Supreme Court, have adopted a "totality of the circumstances" test to determine the reasonableness of a stop, which requires a general assessment of "the totality of the circumstances surrounding the stop, including 'all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced officer by inference and deduction' " that assistance might be needed. *Bakewell*, 730 N.W.2d at 339. In *Bakewell*, the court determined that an officer's act of pulling behind the defendant's vehicle after the defendant pulled ****634** off the road was justified under the community caretaking ***69** exception because the defendant's vehicle had slowed down five times while traveling on the highway before it pulled off the road completely and, "[c]onsidering the totality of the circumstances, it was reasonable" for the officer to conclude that the defendant was lost or that something was wrong with the defendant or his vehicle. *Id.*; *see also* *State v. Wixom*, 130 Idaho 752, 947 P.2d 1000, 1002 (1997) (to be justified pursuant to a community caretaking function, the intrusive action of the police must be reasonable in view of all the surrounding circumstances, and the officer's stop of a vehicle in order to locate witnesses to an earlier accident was not reasonable).

In the instant case, Appellant urges this Court to adopt the "reasonableness test" set forth by the Montana Supreme Court in *Lovegren*, which requires, *inter alia*, that a police officer point to specific and articulable facts which led him or her to believe that assistance was necessary, and an objective assessment by the court as to whether the officer's belief was reasonable. Appellant's Brief at 30. In this regard, Appellant emphasizes:

> An officer's *hunch* his or her assistance *may* be needed is insufficient. Someone who has legally and safely pulled over on the side of the road may be looking at a map, talking on a cell phone, sending a text message, or picking up an item dropped on the floor of the car. These are all otherwise lawful activities; distracting activities drivers are encouraged to avoid engaging in while driving, or actually criminally punished for performing.

Id. at 31 (emphasis original). In its brief discussion, based on its citations to *McDonough* and *Anderson*, *supra*, the Commonwealth seemingly supports the use of a balancing test, although it also argues that Trooper Frantz's actions

were reasonable. Commonwealth's Brief at 10. After careful consideration, we conclude that the reasonableness test best accommodates the interests underlying the public servant exception while simultaneously protecting an individual's Fourth Amendment right to be free from unreasonable searches and seizures.

***70** Specifically, we first hold that, in order for the public servant exception of the community caretaking doctrine to apply, police officers must be able to point to specific, objective, and articulable facts that would reasonably suggest to an experienced officer that a citizen is in need of assistance. *See Lovegren*, 51 P.3d at 475–76 ("as long as there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, then that officer has the right to stop and investigate"); *Williams*, 962 A.2d at 219 (if there are "objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in apparent peril, distress or need of assistance, the police officer may stop and investigate for the purpose of assisting the person"); *McCormick*, 494 S.W.3d at 687 (community caretaking exception will justify a warrantless seizure if, *inter alia*, "the officer possessed specific and articulable facts which, viewed objectively and in the totality of the circumstances, reasonably warranted a conclusion that a community caretaking action was needed"); *Kleven*, 887 N.W.2d at 743 (an officer "should be able to articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion"); *Ullom*, 705 S.E.2d at 122 (same).

As Appellant suggests, there are many reasons why a driver might pull to the side of a highway: the driver may need to look at a map, answer or make a telephone call, ****635** send a text message,[13] pick something up off the floor, clean up a spill, locate something in her purse or in his wallet, retrieve something from the glove compartment, attend to someone in the back seat, or, as in the instant case, enter an address into the vehicle's navigation system. Pulling to the side of the road to perform any of these activities is encouraged, as a momentary distraction while driving may result in catastrophic consequences.

The Illinois Supreme Court observed in *McDonough*:

> ***71** Most people who appear to be in distress would welcome a genuine offer of police assistance. But permitting police to search or seize whenever they might be pursuing community-caretaking goals risks undermining constitutional protections. The challenge of [the] community-caretaking doctrine is to permit helpful police to fulfill their function of assisting the public, while ensuring that searches for law-enforcement purposes satisfy the requirements of the Fourth Amendment.

346 Ill.Dec. 496, 940 N.E.2d at 1109 (quoting M. Dimino, *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 Wash. & Lee L. Rev. 1485, 1562–63 (2009)). Requiring an officer to articulate specific and objective facts that would suggest to a reasonable officer that assistance is needed will cabin reliance on the exception and enable courts to properly assess its employment.

Second, we hold that, in order for the public servant exception of the community caretaking doctrine to apply, the police caretaking action must be independent from the detection, investigation, and acquisition of criminal evidence. As noted above, this is a common requirement to warrantless searches under all three exceptions of the community caretaking doctrine, including the emergency aid exception and the automobile impoundment/inventory exceptions. To describe this requirement, courts have utilized various terminology. In *Cady*, the high Court observed that police officers often engage in community caretaking functions which are "totally divorced" from the detection or investigation of crime. 413 U.S. at 441, 93 S.Ct. 2523.[14] The South Dakota Supreme Court, in *Kleven*, ***72** explained that, for a warrantless search to be permissible under the community caretaking doctrine, "the police action must be *apart from* the detection, investigation, or acquisition of criminal evidence." 887 N.W.2d at 743 (emphasis added); *see also Ullom*, 705 S.E.2d at 122 ("The police officer's ****636** action must be apart from the intent to arrest, or the detection, investigation, or acquisition of criminal evidence."). In *McDonough*, the Illinois Supreme Court approved a warrantless search under the community caretaking exception because, *inter alia*, the "defendant's seizure was *unrelated to* the investigation of crime." 346 Ill.Dec. 496, 940 N.E.2d at 1109 (emphasis added). The North Dakota Supreme Court has explained that police action taken under the community caretaking doctrine must be "*separate* from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *City of Fargo v. Sivertson*, 571 N.W.2d 137, 140 (N.D. 1997) (emphasis added). Regardless of the language used, a critical component of the community caretaking doctrine is that the police officer's action be based on specific and articulable facts which, viewed objectively

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and independent of any law enforcement concerns, would suggest to a reasonable officer that assistance is needed.

We are not suggesting, however, that an officer's contemporaneous subjective concerns regarding criminal activity will preclude a finding that a seizure is valid under the community caretaking function. The Wisconsin Supreme Court addressed a similar argument in *Kramer*, wherein the motorist argued that the "totally divorced" language from *Cady* "means that the officer must have ruled out any possibility of criminal activity before the community caretaker function is bona fide." 759 N.W.2d at 606. In rejecting the motorist's suggestion, the court reasoned:

> ***73** [T]he nature of a police officer's work is multifaceted. An officer is charged with enforcing the law, but he or she also serves as a necessary community caretaker when the officer discovers a member of the public who is in need of assistance. As an officer goes about his or her duties, an officer cannot always ascertain which hat the officer will wear—his law enforcement hat or her community caretaker hat. For example, an officer may come upon what appears to be a stalled vehicle and decide to investigate to determine if assistance is needed; however, the investigation may show that a crime is being committed within the vehicle. Therefore, from the point of view of the officer, he or she must be prepared for either eventuality as the vehicle is approached. Accordingly, the officer may have law enforcement concerns, even when the officer has an objectively reasonable basis for performing a community caretaker function.
>
> To conclude otherwise would ignore the multifaceted nature of police work and force police officers to let down their guard and unnecessarily expose themselves to dangerous conditions.
>
> Furthermore, to interpret the "totally divorced" language in *Cady* to mean that an officer could not engage in a community caretaker function if he or she had any law enforcement concerns would, for practical purposes, preclude police officers from engaging in any community caretaker functions at all. This result is neither sensible nor desirable.

759 N.W.2d at 608–09 (internal citations omitted). The court concluded that, "in a community caretaker context, 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." *Id.* at 608; *see also* *Smathers*, 753 S.E.2d at 386 (adopting an "objective method of inquiry ****637** into the purpose of a seizure in the community caretaking context," and declining to adopt a test where subjective concerns of crime prevention and investigation negate public safety concerns); ***74** *cf Brigham City, Utah v. Stuart*, 547 U.S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively* justify [the] action.' The officer's subjective motivation is irrelevant." (emphasis original, citations omitted)).

We agree that it is not realistic or wise to expect an officer to ignore the nature of his or her role in law enforcement—or its inherent dangers—in order for the public servant exception of the community caretaking doctrine to apply. Thus, so long as a police officer is able to point to specific, objective, and articulable facts which, standing alone, reasonably would suggest that his assistance is necessary, a coinciding subjective law enforcement concern by the officer will not negate the validity of that search under the public servant exception to the community caretaking doctrine. We caution, however, that "when the community caretaking exception is involved to validate a search or seizure, courts must meticulously consider the facts and carefully apply the exception in a manner that mitigates the risk of abuse." *McCormick*, 494 S.W.3d at 688.

Finally, we hold that, in order for the public servant exception to apply the level of intrusion must be commensurate with the perceived need for assistance. *See* *McCormick*, 494 S.W.3d at 687 (the officer's behavior and the scope of the intrusion must be "reasonably restrained and tailored to the community caretaking need"); *Lovegren*, 51 P.3d at 476 ("if the citizen is in need of aid, then the officer may take appropriate action to render assistance or mitigate the peril.... [O]nce, however, the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating ... the protections provided by the Fourth Amendment."); *Williams*, 962 A.2d at 219 (same). Such a determination requires an assessment of the circumstances surrounding the seizure, including, but not necessarily limited to, the degree of authority or force displayed, the ***75** length of the seizure, and the availability of alternative means of assistance.[15]

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To summarize, in order for a seizure to be justified under the public servant exception to the warrant requirement under the community caretaking doctrine, the officer must point to specific, objective, and articulable facts which would reasonably suggest to an experienced officer that assistance was needed; the police action must be independent from the detection, investigation, and acquisition of criminal evidence; and, based on a consideration of the surrounding circumstances, the action taken by police must be tailored to rendering assistance or mitigating the peril. Once assistance has been provided or the peril mitigated, further police action will be evaluated under traditional Fourth Amendment jurisprudence.

C. Application of the Public Servant Exception under the Community Caretaking Doctrine

Applying the standard we have adopted today, we must now determine ****638** whether the seizure of Appellant was justified under the public servant exception. A review of the record reveals that Trooper Frantz was on routine patrol on Interstate 79 at approximately 9:30 p.m. on June 14, 2013 when he observed Appellant's vehicle on the right shoulder of the road. At the suppression hearing, Trooper Frantz testified:

> I pulled beside her with my window already down, just, number one, to make sure, see if anybody was in this vehicle, and then, if there was, to make contact with her and then see if she needed any assistance. Nine out of ten times usually they're on their cell phone, I just give them a quick wave and I'm on my way.

N.T. Suppression Hearing, 5/28/14, at 7.

We have no reason to doubt Trooper Frantz's statement that he pulled alongside Appellant's vehicle simply to check to see whether she needed assistance. However, regardless of his ***76** intentions, based on our review of the record, Trooper Frantz was unable to articulate any specific and objective facts that would reasonably suggest that Appellant needed assistance. Indeed, Trooper Frantz conceded that he had not received a report of a motorist in need of assistance, and did not observe anything that outwardly suggested a problem with Appellant's vehicle. Moreover, although it was dark, the weather was not inclement. Finally, Appellant, who was inside her vehicle, did not have her hazard lights on.

Thus, we are constrained to hold that Trooper Frantz's seizure of Appellant was not justified under the public servant exception, and, therefore, that the evidence obtained as a result of that seizure should have been suppressed at trial.

III. Conclusion

In summary, we conclude that, because a reasonable person in Appellant's position would not have felt free to leave after Trooper Frantz pulled his patrol car, with its emergency lights activated, alongside her vehicle, Appellant was seized and subjected to an investigative detention. Furthermore, we recognize that a warrantless search or seizure may nonetheless be deemed reasonable under the Fourth Amendment when conducted pursuant to the public servant exception to the warrant requirement under the community caretaking doctrine. However, we hold that Trooper Frantz's seizure of Appellant was not justified under the public servant exception, and, thus, that the evidence obtained as a result of Trooper Frantz's investigative detention of Appellant should have been suppressed. For these reasons, we reverse the order of the Superior Court, vacate Appellant's judgment of sentence, and remand the matter to the Superior Court for remand to the trial court for further proceedings.

Chief Justice Saylor and Justice Dougherty join the opinion in full.

Justice Baer joins Parts I, II(A), and II(B) of the opinion and files a concurring and dissenting opinion.

Justice Donohue joins Parts I, II(A), and III of the opinion and files a concurring and dissenting opinion in which Justice Wecht joins.

Justice Mundy files a dissenting opinion.

JUSTICE BAER, Concurring and Dissenting

***77** I agree with the majority's elimination of the legal fiction that a police officer engages in a mere encounter, which need not be supported by any level of suspicion under the Fourth Amendment of the U.S. Constitution, when the officer activates the vehicle's overhead emergency lights and ****639** approaches a stopped motorist parked on the side of an interstate highway. As the majority ably articulates, because a reasonable person would not feel free to leave under these circumstances, they are subjected to an investigative detention, which, ordinarily, must be supported by reasonable suspicion. I further agree with the majority's adoption of a

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discrete exception to the Fourth Amendment, which permits the seizure outlined above, notwithstanding the lack of reasonable suspicion of criminal activity, when an officer is acting pursuant to his community caretaking function.

I write separately, however, because I would hold that under the factual predicate before us, the seizure in the case *sub judice* was justified pursuant to the community caretaker exception. Therefore, while I join Parts I, II–A, and II–B of the majority opinion, I respectfully dissent from the majority's ultimate determination in Parts II–C and III that the challenged evidence in this case should have been suppressed.

As the majority observes, the community caretaker doctrine generally encompasses three distinct exceptions to the Fourth Amendment: "the emergency aid exception; the automobile impoundment/inventory exception; and the public servant exception, also sometimes referred to as the public safety exception." Majority Opinion, at 626 (citations omitted). The instant matter implicates the public servant exception, which recognizes that police officers frequently perform functions beyond law enforcement in order to promote ***78** general safety and welfare in the communities in which they serve. Majority Opinion, at 628–30.

To determine whether an officer acted pursuant to his role as a public servant, the majority adopts a "reasonableness test," under which courts consider whether the officer has articulated specific facts reasonably suggesting that a citizen is in need of assistance. *See* Majority Opinion, at 629–34 (providing an overview of the disparate approaches to community caretaker seizures and adopting the "reasonableness test"). Specifically, the majority holds that in order for a seizure to be justified under the public servant exception: "[1] the officer must point to specific, objective, and articulable facts which would reasonably suggest to an experienced officer that assistance was needed; [2] the police action must be independent from the detection, investigation, and acquisition of criminal evidence; and, [3] based upon a consideration of the surrounding circumstances, the action taken by police must be tailored to rendering assistance or mitigating peril." Majority Opinion, at 637. The majority further holds that, once assistance has been provided or the peril has been mitigated, further police action will be evaluated under traditional Fourth Amendment jurisprudence. *Id.* While I agree with the majority's legal test defining the community caretaker doctrine generally, and the public service exception specifically, I disagree with its application of the exception to the facts raised herein.

During the suppression hearing in this case,[1] Trooper Jeremy Frantz initially testified regarding his general duties while on highway patrol. In addition to enforcing the law, Trooper Frantz stated that his duties frequently include assisting stopped or stranded motorists. N.T., 5/28/14, at 5. ****640** Trooper Frantz testified that when he comes across a stopped vehicle, he usually checks to see whether anyone in the vehicle is injured or in need of medical assistance. *Id.* He further ***79** testified that he occasionally assists stopped motorists with directions or with changing a tire if necessary. *Id.* at 5–7.

On the evening in question, Trooper Frantz was traveling on Interstate 79 when he observed a parked vehicle on the right hand berm of the highway. *Id.* at 7. In conjunction with his general responsibility to check on the safety of motorists, Trooper Frantz pulled alongside the vehicle in order to see whether assistance was needed. From this perspective, Trooper Frantz immediately observed signs of Appellant's intoxication, giving Trooper Franz reasonable suspicion to investigate further.

Applying the test for the public servant exception to the Fourth Amendment adopted by the majority, I would hold that the specific and articulable facts (that Appellant's car was stopped on the shoulder of a highway, rather than a rest stop, gas station, or the like) warranted the minimal intrusion of Trooper Frantz slowly approaching in his vehicle and peering at Appellant to ensure her well-being. Specifically, I would find that these facts presented an objective basis for concluding that Appellant may have been in peril. Therefore, I respectfully dissent from the majority's ultimate conclusion that the evidence obtained as a result of the seizure should have been suppressed.

The majority concludes that because Appellant's hazard lights were not activated and there was no inclement weather at the time of the seizure, there were no outward signs of distress sufficient to warrant rendering aid in this instance. Majority Opinion, at 637–38. Respectfully, I find this view myopic and, indeed, a disservice to the good citizens of Pennsylvania who may be in desperate need of available help, but will not receive it because of the majority's misguided attempt to protect their constitutional rights at the expense of their physical well-being.

Moreover, there is an additional peril at play here; the danger that another vehicle traveling at high speed will drift into

the one parked on the shoulder of the highway, casing a catastrophic accident. Indeed, the Commonwealth took this ***80** position at the suppression hearing, contending that Trooper Frantz was performing his public safety duty in trying to minimize the safety risk posed by Appellant's vehicle being parked on the berm of an interstate highway. *See* N.T., 5/28/14, at 35 (stating that Trooper Franz was "basically trying to clear up the highway to get the motorist going—to get going on their way and not potentially causing a hazard by being on the side of the road"); *see also* N.T., 5/28/14 at 5 (Trooper Frantz, while testifying as to his general duties while on highway patrol, stating that "[I] just assist them any way that they need to help them to get on the—as fast as they can to get them out of that area"). Thus, in addition to having grounds for believing that Appellant may have needed assistance, Trooper Frantz had an objective basis to be concerned for the overall safety of the highway because a parked vehicle located on the shoulder of an interstate highway without hazard lights obviously presents a potential safety risk to other motorists.

For the reasons set forth above, I conclude that the seizure in this case was reasonable for Fourth Amendment purposes under the community caretaker doctrine and that suppression was unwarranted. Therefore, I respectfully dissent from the majority's decision to reverse the lower courts and vacate Appellant's judgment of sentence.

JUSTICE DONOHUE, Concurring and Dissenting

****641** I join the Majority in holding that Ms. Livingstone was subjected to an investigative detention when Trooper Franz pulled his marked cruiser—emergency lights activated —alongside her parked vehicle on the shoulder of I–79. The Court's express rejection of the myth that a reasonable person in the circumstances presented would have believed she was free to leave finally comports the law with reality. Because Trooper Franz concededly lacked reasonable suspicion that any criminal activity was underway when he detained Ms. Livingstone, we must address whether the seizure was nonetheless justified. Accordingly, we decide whether Pennsylvania should, pursuant to a "community caretaking" rationale, recognize ***81** a "public servant" exception to the Fourth Amendment's warrant requirement.

I agree with the Majority that adopting a public servant exception is appropriate and I would also hold that the exception has no application under the facts presented here.[1] I write separately because I diverge from the Majority on two points. First, I believe it is critical to recognize that *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), did not create an exception to the Fourth Amendment warrant requirement that is nearly as broad or intrusive as the one we recognize today. *Cady* is foundational because it recognized that, in addition to law enforcement, police legitimately perform community caretaking functions which may, in part, provide the rationale for recognizing an exception to the warrant requirement. *Id.* at 441, 93 S.Ct. 2523. That said, the warrantless seizure of an individual motorist contemplated here is poles apart from the warrantless inventory search of an impounded automobile, conducted pursuant to standard police procedure, validated by *Cady.* Because, drawing from *Cady*, we recognize today that our police officers sometimes legitimately detain motorists solely in the pursuit of rendering aid, I agree that we should validate such seizures by also recognizing a public servant exception to the Fourth Amendment's warrant requirement in specifically defined circumstances.

Second, in light of the magnitude of the government intrusion we are authorizing today, I strongly disagree with the "independent from" language employed in the second prong of the Majority's "reasonableness" test. In my view, we must, at ***82** a minimum, hold true to the parameters established in *Cady* when relying on the caretaking function of our police officers to allow a seizure. I view *Cady*'s requirement that the caretaking function must be totally divorced from any law enforcement purpose to be an essential safeguard to protecting the Fourth Amendment rights of Pennsylvania motorists, on whom this new "public servant" exception will have an enormous impact. *See Cady*, 413 U.S. at 441, 93 S.Ct. 2523.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, ****642** against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

U.S. Const. amend. IV. The high Court has explained that the Fourth Amendment imposes two requirements: all searches and seizures must be reasonable, and a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. *Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (citing *Payton v. New York,* 445 U.S. 573,

584, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). This is because "the basic purpose of the Fourth Amendment ... is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).[2]

***83** While a warrant is generally necessary, Fourth Amendment jurisprudence has developed so that a search or seizure may be deemed reasonable absent a warrant if one of a few well-defined exceptions applies. *Birchfield v. North Dakota*, ––– U.S. ––––, 136 S.Ct. 2160, 2173, 195 L.Ed.2d 560 (2016). These exceptions include, inter alia, exigent circumstances, *see Kentucky,* 563 U.S. 452, 131 S.Ct. 1849; the "plain view" exception, *see Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); searches incident to arrest, *see United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); consent searches, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); and automobile searches, *see California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). A police officer may also briefly ****643** detain a person without a warrant or probable cause, so long as the officer possesses a reasonable suspicion that the individual is or is about to be engaged in criminal activity. *See United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *see also Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (validating pat down for weapons for protection of officer, absent probable cause, if officer has "reason to believe he is dealing with an ***84** armed and dangerous individual"). Additionally, in recognition that police officers have certain administrative duties, the United States Supreme Court has sanctioned warrantless inventory searches of automobiles in lawful police custody, absent probable cause or reasonable suspicion, where the searches are performed pursuant to standardized procedures. *See, e.g., Harris v. United States*, 390 U.S. 234, 237, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

Cady is an inventory search case.[3] In *Cady*, the Supreme Court considered whether a driver's Fourth Amendment rights had been violated when local Wisconsin police conducted a warrantless search of his car. The driver had been involved in a one-car accident the day before. Following the accident, police arrested the man—who identified himself as a member of the Chicago police force—for drunk driving. They had his disabled car towed to a garage some distance from the police station, where it sat unguarded. Because the driver sustained injuries in the accident, he was taken to the hospital for treatment.

Early the next day, one of the local officers searched the car, including the trunk, for the driver's service revolver. The officer was under the impression that members of the Chicago police force were required to carry their revolvers at all times. Because the driver did not have a revolver when he was arrested, the officer believed the weapon might be in the car and could pose a danger to the public if discovered by vandals. During the search, the officer found various items covered with blood, including a nightstick with the driver's name stamped on it. Confronted with this information, the driver authorized his attorney to disclose to police that there was a dead body lying on his brother's nearby farm. The driver was subsequently convicted of first-degree murder.

***85** The *Cady* Court relied on two of its prior "inventory search" cases to validate the officer's search for the revolver. *See Cady*, 413 U.S. at 445–47, 93 S.Ct. 2523 (discussing *Harris*, 390 U.S. 234, 88 S.Ct. 992, and *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967)). In *Harris*, the high Court deemed a warrantless automobile search reasonable under the "narrow circumstances" presented therein because a police department regulation required officers to inventory impounded vehicles for the purpose of safeguarding the owner's property. *Harris*, 390 U.S. at 236, 88 S.Ct. 992. In *Cooper*, the driver of a car was arrested for selling heroin. The Court in *Cooper* explained that a warrantless search of the vehicle one week later was justified because the officers were required by state law to impound the car pending forfeiture proceedings, and "it would be unreasonable to hold that the police, having to retain the car in their custody [for many months,] had no right, even for their own protection, to ****644** search it." *Cooper*, 386 U.S. at 61–62, 87 S.Ct. 788. In each case, the Supreme Court emphasized the importance of the police department regulation (*Harris*) and the state law (*Cooper*) as essential safeguards for cabining officer discretion in the absence of probable cause or exigent circumstances.

Similarly, the *Cady* Court explained that certain factual considerations supported the finding that the warrantless search was reasonable. First, because the disabled car represented a nuisance on the highway (and because the driver was incapacitated) the police exercised custody or control over the car to remove it from the road for reasons of safety. *Cady*, 413 U.S. at 442–43, 93 S.Ct. 2523. Second, the search of the car's trunk occurred pursuant to " 'standard

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procedure in (that police) department,' to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.* at 443, 93 S.Ct. 2523. The Court explained that "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle" was a justification "as immediate and constitutionally reasonable" as the justifications in *Harris* and *Cooper*. *Id.* at 447, 93 S.Ct. 2523. Critically, the record in *Cady* ***86** contained uncontradicted testimony that the purpose of the officer's search was to protect the public, a purpose that was unassailable since, at the time of the search, the officer had no idea that a murder, or any other crime, had been committed. *Id.* Recognizing community caretaking functions of police officers, the high Court stated "local police officers ... frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, **totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute**." *Id.* at 441, 93 S.Ct. 2523 (emphasis added).

The high Court has cited *Cady* to justify subsequent warrantless inventory searches, consistently emphasizing the importance of standardized procedures to constrain police conduct where neither probable cause nor reasonable suspicion operate to do so. *See Colorado v. Bertine*, 479 U.S. 367, 375, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987) (upholding warrantless inventory search in light of fact that officer discretion was "exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity"); *Illinois v. Lafayette*, 462 U.S. 640, 643, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) (explaining that "a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront"); *South Dakota v. Opperman*, 428 U.S. 364, 367–76, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (deferring to "police caretaking procedures designed to secure and protect vehicles and their contents within police custody").

By contrast, in the forty plus years since it decided *Cady,* the United States Supreme Court has neither established a broad "community caretaker" exception to the warrant requirement nor relied upon *Cady* to sanction warrantless police conduct not cabined by standardized procedure. While recognizing that seizing a citizen is, by degrees of magnitude, more intrusive than the warrantless inventory search validated in *Cady*, I nonetheless would adopt a "public servant" exception ***87** because *Cady*'s tenet that police perform a caretaking function remains viable. Police officers can and do, in the line of duty, effectuate seizures for the sole purpose of ****645** rendering assistance[4] and citizens of this Commonwealth have come to expect that police officers will not turn a blind eye to motorists in distress.

Although *Cady* recognized this caretaker function as one of the bases for allowing an exception to the warrant requirement, it bears repeated emphasis that the decision was based on the equal recognition that standard police procedure was followed and that the caretaking function was totally divorced from any law enforcement function.

Given the magnitude of the government intrusion, *Cady*'s requirement that community caretaking conduct by police must be "totally divorced" from any law enforcement purpose is all the more crucial in recognizing the public servant exception for seizures of motorists. Accordingly, I have serious concerns about a core aspect of the test set forth by the Majority. To justify a warrantless seizure under our newly created exception, the Majority requires:

> [T]he officer must point to specific, objective, and articulable facts which would reasonably suggest to an experienced officer that assistance was needed; the police action must be independent from detection, investigation, and acquisition of criminal evidence; and, based on a consideration of the surrounding circumstances, the action taken by police must be tailored to rendering assistance or mitigating the peril.

Majority Op. at 637.[5] The Majority's second prong ignores *Cady*'s clear mandate, replacing the words ***88** "totally divorced" with the much weaker "independent from." In my view, any application of the public servant exception must be strictly limited to circumstances in which the police action in question is, as in *Cady*, "totally divorced" from investigating crime, and must be motivated solely by the police officer's objectively reasonable belief that someone is in need of assistance. *See Cady*, 413 U.S. at 441, 93 S.Ct. 2523. The integrity of the Fourth Amendment cannot countenance a lesser standard.

The warrant requirement cannot be abrogated where the purported performance of the community caretaking function is comingled with the investigation and detection of criminal activity. The "independent from" test adopted by the Majority

allows the two distinct functions to coexist such that seizures that were actually motivated by an officer's desire to investigate a crime may be validated so long as there were also "specific, objective, and articulable facts" indicating that someone might need assistance. *See* Majority Op. at 637–38. To allow any amount of criminal investigative motivation into a warrantless detention of a motorist is a sword to the heart of the Fourth Amendment, absent at least reasonable suspicion. I would hold that if an officer is motivated to any degree by a desire to investigate crime, the individual seized must be afforded his or her full panoply of Fourth Amendment rights.

The Majority posits that the high Court's "totally divorced" language in ****646** *Cady* "was more of an observation ... rather than a specific requirement." Majority Op. at 635 n. 14. This position is not supported by the facts of the case or the statements of the *Cady* Court. In no uncertain terms, the *Cady* Court relied on "community caretaking functions" as the basis for the exception where such police conduct is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441, 93 S.Ct. 2523. Moreover, in *Cady*, the search was in fact "totally divorced" from any investigative purpose. As specifically noted by the high Court, the officer in *Cady* was motivated by "concern for the safety of the general ***89** public who might be endangered if an intruder removed a revolver from the trunk of the vehicle" while simultaneously, the officer was "ignorant of the fact that a murder, or any other crime, had been committed." *Id.* at 447, 93 S.Ct. 2523. Coupled with the finding that the officer followed standard procedure, it was critical to the *Cady* Court's holding that the officer's purpose had nothing to do with a desire to investigate a crime.

Citing language from sister state courts and *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), the Majority posits that "a coinciding subjective law enforcement concern by the officer will not negate the validity of an objectively reasonable caretaking seizure." Majority Op. at 637. In *Brigham City*, the United States Supreme Court explained that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively* justify [the] action.' The officer's subjective motivation is irrelevant." *Brigham City*, 547 U.S. at 404, 126 S.Ct. 1943.[6] I would argue, however, that *Brigham City* does not foreclose consideration of an officer's motives under a public servant caretaking exception. In that case, the high Court held that police could enter a home without a warrant when there were people inside "who are seriously injured or threatened with such injury." *Id.* at 403, 126 S.Ct. 1943. In so doing, the Court rejected an argument that the officers' conduct was unreasonable because it was motivated more by the desire to make an arrest than by a desire to "save lives and property," stating that "the subjective motivations of the individual officers ... have no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment." *Id.* ***90** (citing *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

It cannot be ignored that the subjective intent of the officers in *Brigham City* was in fact irrelevant because the situation in *Brigham City* presented "an exigency or emergency." *Id.* Where exigent circumstances demand immediate police response, the emergency itself permits the exercise of police discretion because society does not expect a police officer to turn a blind eye where conditions present an imminent risk of serious harm. *See id.*; *see also* Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 Wash. & Lee L. Rev. 1485, 1534 (Fall 2009). With respect to the public servant exception, however, a failure ****647** to consider subjective motivation permits courts to review police conduct less strictly in circumstances where the potential for arbitrariness is the greatest—namely, where there is neither an emergency nor probable cause to believe a crime has been committed. Dimino, 66 Wash. & Lee L. Rev. at 1534.[7]

Notably, in the instant matter, we are not faced with a mixed motive scenario. The police officer's testimony indicates that he was motivated to detain Ms. Livingstone solely because he believed she might need assistance. Nothing in the record suggests that his purpose was clouded by investigative aims. The seizure here was unreasonable because the officer's subjective motivation to render assistance was not substantiated ***91** by specific, objective factors. Absent any articulable indicia of distress, it was objectively unreasonable for the officer to detain Ms. Livingstone, regardless of his professed belief that she might need help.

Thus, while the intent to act as a caretaker is not in itself sufficient to justify a warrantless seizure, probing the subjective intent to so act is necessary. Moreover, for that motivation to be "totally divorced" from a law enforcement purpose, it must stand alone.[8] Where an officer testifies that he was motivated to any degree by a desire to investigate a possible criminal violation, our inquiry into

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the reasonableness of the seizure is over because it was unconstitutional. If, on the other hand, an officer professes that his caretaking motives were pure,[9] I would require that the police officer's belief that a person seized needed help must be objectively reasonable (as evidenced by articulable facts), and that the seizure must be tailored in scope to address the caretaking purpose.

We are today injecting realism into our jurisprudence by recognizing that a police officer in a vehicle with emergency lights ablaze effectuates a seizure of a motorist who, under such circumstances, cannot be deemed to believe that he or she is free to ****648** leave. By recognizing the significant constitutional dimension of this act by a police officer, in my view, we must also strictly circumscribe the situations in which we countenance the intrusion in the absence of the Fourth Amendment's warrant requirement protections. For the reasons previously stated, I would require that the police officer's motivation to provide aid and assistance—to "caretake"—must ***92** be pure and thus totally divorced from the investigation or detection of a crime. Because, the Majority expressly allows the comingling of caretaking and law enforcement functions to avoid the warrant requirement, I dissent from that aspect of the Majority Opinion. I join the remainder of the Majority Opinion.

Justice Wecht joins this concurring and dissenting opinion.

JUSTICE MUNDY, Dissenting

I respectfully dissent from the Majority's judgment in this case. Like the trial court and the Superior Court, I conclude that Trooper Frantz's initial interaction with Appellant amounted to a mere encounter. Therefore, I would not address the community caretaking exception, and would affirm the order of the Superior Court.

As the Majority acknowledges, the Fourth Amendment generally presents two distinct inquires. First, whether a search or seizure was effectuated, and second, if there was a search or seizure, whether it was constitutionally reasonable. *See* Majority Op. at 619–20. The instant appeal only presents us with the first question.

The standard as to whether a seizure has occurred is an objective one, looking at the totality of the circumstances. *Commonwealth v. Lyles*, 626 Pa. 343, 97 A.3d 298, 302 (2014). This inquiry "is ultimately centered on whether the suspect has in some way been restrained by physical force or show of coercive authority." *Id.* (citation omitted). The Supreme Court of the United States has observed that "[e]xamples of circumstances [include] the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (plurality) (citations omitted). In addition, the Court has held that "when a person has no desire to leave for reasons unrelated to the police presence, the coercive effect of the encounter can be ***93** measured better by asking whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter[.]" *Brendlin v. California*, 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (internal quotation marks and citations omitted).

In *Commonwealth v. Au*, 615 Pa. 330, 42 A.3d 1002 (2012), an officer encountered the defendant while on patrol in the "early morning hours" when the officer saw a vehicle parked in a business's parking lot. *Id.* at 1003. The officer testified that it was unusual to see a car parked in that location at that hour, so he pulled his marked police car up next to the vehicle and used his headlights to illuminate the passenger side. *Id.* However, the officer did so without blocking the vehicle's path to leave the premises. *Id.* The officer then approached the vehicle with a flashlight and asked Au for identification. *Id.* When Au opened the glove compartment to retrieve his identification, he revealed two baggies of marijuana. *Id.* at 1004.

Relevant to this appeal, Au maintained that his interaction with the officer was an investigative detention, and the Superior ****649** Court agreed. *Id.* at 1004–05. This Court reversed, concluding that the circumstances indicated a mere encounter, and that the officer's request for Au's identification did not elevate that mere encounter to a seizure. *Id.* at 1009. We explained that the officer did not "activate the emergency lights on his vehicle; position his vehicle so as to block the car that Appellee was seated in from exiting the parking lot; brandish his weapon; make an intimidating movement or overwhelming show of force; make a threat or a command; or speak in an authoritative tone." *Id.* at 1008 (internal citations omitted). We continued by noting, "[i]n terms of the use of the arresting officer's headlights and flashlight, this was in furtherance of the officer's safety, and we conclude it was within the ambit of acceptable, non-escalatory factors." *Id.*

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The only substantive difference between this case and *Au* is that Trooper Frantz used his emergency lights instead of his headlights as a safety measure. The Majority identifies no other distinguishing factor in its mere encounter analysis. *See generally* Majority Op. 619–26. Therefore, ***94** the inquiry comes down to whether or not Trooper Frantz's use of his emergency lights transformed what would otherwise be a mere encounter into an investigative detention.

I conclude it does not. As this Court noted in *Au*, the use of headlights to peer into the passenger compartment of the vehicle was rooted in safety. *Au*, 42 A.3d at 1008. Here, Trooper Frantz activated his emergency lights as a safety precaution, not just for his own safety, but for that of other motorists on Interstate 79 as well.[1] This is consistent with the Superior Court's conclusion in this case, as well as in past cases. *See* Super. Ct. Op. at 10 (stating, "[h]ere ... the suppression court, considering the totality of circumstances, concluded the trooper approached the vehicle to conduct a safety check[ ]"); *Commonwealth v. Kendall*, 976 A.2d 503, 508 (Pa. Super. 2009) (stating "it is reasonable for an officer to activate overhead lights to ensure his or her own safety as well as the safety of the driver, and to notify passing vehicles of their presence[ ]"); *Commonwealth v. Conte*, 931 A.2d 690, 694 (Pa. Super. 2007) (stating, "[i]n a nighttime, highway setting ... the citizen would interpret the officer's activation of overhead lights not as a signal of detention, but rather ... as a means to both alert other motorists of a roadside emergency and reassure the stranded citizen about the officer's identity[ ]"); *Commonwealth v. Johonoson*, 844 A.2d 556, 562 (Pa. Super.) (stating that the activation of emergency lights "serves several functions, including avoiding a collision on the highway, and potentially calling additional aid to the scene ... [and] signals to the motorist that it is actually a police officer (rather than a potentially dangerous stranger) who is approaching[ ]"), *appeal denied*, 581 Pa. 673, 863 A.2d 1144 (2004).

***95** This is also consistent with notions of common sense and roadside safety. Law enforcement officers have a duty "to help motorists who are stranded or who may otherwise need assistance." *Commonwealth v. Fuller*, 940 A.2d 476, 479 (Pa. Super. 2007) (citation omitted). In addition, courts have consistently recognized the inherent ****650** dangers of traffic stops. *See generally* *Pennsylvania v. Mimms,* 434 U.S. 106, 110, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (per curiam).[2] However, the Majority's *per se* rule forces an officer to choose between two equally hazardous scenarios. First, the officer keeps the emergency lights off, pulls up behind the vehicle, and approaches the driver in the dark. Second, the officer declines to intervene at all, and keeps driving down the highway. The first option would require an officer to ignore the obvious safety risks inherent in traffic stops; likely frighten or alarm the driver, who may not recognize it is law enforcement as opposed to a stranger approaching; and needlessly fail to alert passing motorists of the presence of an emergency vehicle positioned on a busy interstate highway. Furthermore, it would be a dereliction of duty for an officer to keep driving past a car pulled over on the side of an interstate at night without, at a minimum, ascertaining whether those in the vehicle required help. I would not force law enforcement officials to make such a choice when striving to carry out their duties.

A police car's emergency lights serve multiple purposes. They can be used to signal a vehicle to pull over and stop, or they can signal traffic to clear a path and allow police vehicles to pass when they are responding to an emergency. In any circumstance, they no doubt serve to identify the vehicle as one being operated by law enforcement; the identification would certainly be met with relief by a stranded motorist who is being approached by a vehicle at night.

***96** In this case, the lights were used both to signal to Appellant that assistance had arrived if needed, and for other traffic on Interstate 79 to go around the two cars. Several state courts have correctly noted that whether the activation of emergency lights escalates the encounter to a seizure depends on the totality of the circumstances in each individual case. *See, e.g.*, *State v. Thompson*, 284 Kan. 763, 166 P.3d 1015, 1045 (2007) (concluding motorist encounter was consensual and not a seizure, even though emergency lights were activated, they were used as a safety measure and "not [as] a clear show of authority[ ]"); *State v. Walters*, 123 N.M. 88, 934 P.2d 282, 287 (N.M. Ct. App. 1996) (concluding that driver was not seized where officer pulled beside parked car and activated emergency lights for safety reasons), *cert. denied*, 123 N.M. 83, 934 P.2d 277 (1997); *State v. Halfmann*, 518 N.W.2d 729, 731 (N.D. 1994) (holding that no seizure occurred where motorist pulled over to the side of a highway of her own volition and officer's use of emergency lights were "a procedural precaution ... to maintain traffic flow, and was not meant to inhibit Halfmann's liberty[ ]"); *Randall v. State*, 440 S.W.3d 74, 79 (Tex. App.) (concluding that no seizure occurred where officer pulled behind parked car with emergency lights activated, noting in particular that the emergency lights were only for safety purposes, especially

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since car was already stopped), *rev. denied*, 382 S.W.3d 389 (Tex. Crim. App. 2012).

Here, the Majority concludes that a seizure occurred because Trooper Frantz activated his emergency lights and pulled next to an already stationary vehicle. Majority Op. at 621. Because we must look at ****651** the totality of the circumstances, it is not relevant solely that Trooper Frantz activated his emergency lights, but under what circumstances. Here, the unrebutted evidence at the suppression hearing showed that Trooper Frantz was traveling on a busy interstate highway at night and saw a car pulled over on the right side of the highway. *See* N.T., 5/28/14, at 6–7. In addition, the record showed that Appellant had no desire to keep driving at the time of the encounter because she was trying to put an address into her vehicle's GPS system, which is why ***97** her vehicle was running when Trooper Frantz pulled alongside it. *Id.* at 9. There was no testimony that Trooper Frantz displayed a weapon, physically touched Appellant's person, or used any language or tone of voice that would indicate "compliance with [his] request might be compelled." *Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870. Nor does the record show the existence of any other coercive effects such that "a reasonable person would [not] feel free to decline the officers' requests or otherwise terminate the encounter." *Brendlin*, 551 U.S. at 255, 127 S.Ct. 2400. In my view, an officer pulling alongside someone and asking whether that person is all right, even with emergency lights activated, is not in itself so coercive as to render the encounter a seizure within the meaning of the Fourth Amendment. To the contrary, taking all of the circumstances together, one can only conclude that Trooper Frantz effectuated a mere encounter.

In sum, although the Majority identifies the totality of the circumstances standard, it announces a *per se* rule that whenever police activate emergency lights during an encounter, it is automatically a seizure. *See* Majority Op. at 621. This is incompatible with settled Fourth Amendment principles. The totality of the circumstances reveals that Trooper Frantz's initial interaction with Appellant was nothing more than a mere encounter. Therefore, it is unnecessary in this case to consider adoption of the community caretaking doctrine since Appellant's motion to suppress was properly denied on this basis alone.[3] Accordingly, I would affirm the order of the Superior Court. I respectfully dissent.

All Citations

644 Pa. 27, 174 A.3d 609

Footnotes

1 This Court has recognized three categories of interaction between citizens and the police. The first is a mere encounter, or request for information, which need not be supported by any level of suspicion. *Commonwealth v. Strickler*, 563 Pa. 47, 757 A.2d 884, 889 (2000). The second category of interaction, an investigative detention or *Terry* stop, *see Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), "subjects an individual to a stop and period of detention but is not so coercive as to constitute the functional equivalent of an arrest." *Strickler*, 757 A.2d at 889. To survive constitutional scrutiny, "an investigative detention must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity and may continue only so long as is necessary to confirm or dispel such suspicion." *Id.* Finally, an arrest or custodial detention must be supported by probable cause to believe the person is engaged in criminal activity. *Id.*

2 The Citadel is a military college in South Carolina.

3 75 Pa.C.S. § 3802(a)(1).

4 75 Pa.C.S. § 3802(c).

5 75 Pa.C.S. § 3714(a).

6 In *Johonoson*, the court opined that the "free to leave" test, discussed *infra*, was inapposite, and that the relevant inquiry was "whether a reasonable person would feel free to 'decline the officer's requests or otherwise terminate the encounter' once the officer approaches the driver and begins asking questions." 844 A.2d at 563 (citing *Commonwealth v. Smith*, 575 Pa. 203, 836 A.2d 5 (2003)). Similarly, in *Conte*, the court determined that a reasonable person in the appellant's position "would have felt free to decline the officer's offer of help or to otherwise terminate the encounter," 931 A.2d at 694, but stated that the "same result would have attained under the 'free to leave' test ... if appellant had introduced evidence ...

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that an alternate ride awaited him" at the time the officer's patrol car arrived. *Id.* at n.3. However, our decision in *Smith*, wherein the defendant was approached by police officers while she was on a bus, simply recognized that, pursuant to *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), the proper inquiry where an individual is approached in the confines of a bus is not whether a reasonable person would feel free to leave, as that belief might be the result of the individual's decision to board the bus for travel, rather than coercive conduct on the part of police, but rather whether, taking into account all of the circumstances surrounding the encounter, a reasonable person would have felt free to decline to answer an officer's questions.

7 In this regard, the Superior Court distinguished its decisions in *Commonwealth v. Hill*, 874 A.2d 1214 (Pa. Super. 2005), and *Commonwealth v. Fuller*, 940 A.2d 476 (Pa. Super. 2007). In *Hill*, a police officer was patrolling a rural road in the early morning when he observed a vehicle pull to the side of the road. The officer pulled his police cruiser behind the vehicle, activated his emergency lights, and approached the vehicle on foot, at which point he discovered that the driver, Hill, was intoxicated. The Superior Court held that Hill had been subjected to an investigative detention without reasonable suspicion because, unlike in *Johonoson*, there were no circumstances that would lead a reasonable person to believe that the officer had pulled behind Hill with his emergency lights activated in order to render assistance.

Similarly, in *Fuller*, police officers were traveling in their police cruiser shortly after midnight when they caught up to a truck traveling in the same direction. The driver, Fuller, slowed down to an approximate stop, and then pulled onto the berm of the road. The officers pulled their police vehicle behind the truck and activated their emergency lights. One of the officers approached Fuller on foot, and noticed signs of intoxication. When asked why he had pulled off the road, Fuller replied "because you guys were behind me." 940 A.2d at 477. The Superior Court vacated Fuller's sentence, holding that he had been subjected to an investigative detention without reasonable suspicion; the court noted that the officer who stopped Fuller testified that the officer believed the activation of the emergency lights was a signal to the motorist that he was not free to leave and that the officer agreed that Fuller would interpret the lights in the same manner.

In the instant case, the Superior Court noted that, in *Fuller* and *Hill*, the officers initially witnessed the motorists driving on the road and did not observe anything that would suggest that the motorists needed assistance, whereas in the instant case, Appellant's vehicle was "parked" on an interstate at night, which is "unusual." *Livingstone*, 1829 WDA 2014 at 7.

8 Although Appellant also cites Article I, Section 8 of the Pennsylvania Constitution, she does not contend that the Pennsylvania Constitution provides any greater privacy protection under the facts of this case than does the Fourth Amendment, nor does she cite any cases for such a proposition. Thus, we analyze this case purely under the federal Constitution.

9 *See* note 11, *infra*.

10 We note that, in the cases relied on by the Superior Court below, including *Johonoson*, *Conte*, and *Kendall*, the courts' decisions likewise were based in part on its belief that the motorists should have expected that a police officer might approach them and attempt to render aid. In *Johonoson*, the court opined, "[b]y pulling over to the side of the road at 3:00 in the morning on a rural road, after driving slowly with his hazard lights on, Appellant should have had reason to expect that a police officer would pull over and attempt to render aid." 844 A.2d at 562. In *Conte*, the court similarly held "[t]he evidence introduced at the suppression hearing shows that a reasonable person in Appellant's position would have understood [the officer's] arrival as an act of official assistance, and not as the start of an investigative detention." 931 A.2d at 693. In *Kendall*, the Superior Court stated:

> While we have held that the applicable standard in determining whether an interaction rises to the level of an investigative detention hinges on whether "a reasonable person believe[s] he was not free to go and was subject to the officer's orders," this should not be the only standard in situations like the one at hand. ... It has been suggested in case law that this determination might turn on whether the driver had reason to believe that officer is simply carrying out his duty to render aid.

976 A.2d at 508.

11 In referring to circumstances in which a warrantless search will be deemed reasonable absent probable cause, courts often use the phrase "exception to the warrant requirement," *see*, *e.g.*, *Bertine*, 479 U.S. at 371, 107 S.Ct. 738 ("inventory

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searches are now a well-defined exception to the warrant requirement of the Fourth Amendment"). In our view, this is somewhat of a misnomer, as use of the phrase "exception to the warrant requirement" suggests that a warrant generally would be required; yet, as we discuss below, a search conducted under the community caretaking doctrine, when viewed objectively, must be independent from the investigation of criminal activity, and thus, in such circumstances, there would be no basis upon which to obtain a warrant in the first instance. Nevertheless, as most courts characterize the community caretaking doctrine as an "exception" to the warrant requirement, we will occasionally employ that language as well.

12 In *Commonwealth v. Davido*, 630 Pa. 217, 106 A.3d 611 (2014), we determined that police officers' warrantless entry into a home where a domestic disturbance had been reported was justified pursuant to "exigent circumstances" because the police received no response when they knocked and reasonably inferred that someone inside was in need of emergency assistance. However, the exigent circumstances exception is distinct from the emergency aid exception that falls under the community caretaking doctrine. As the California Supreme Court aptly explained:

> [T]he emergency aid doctrine is not a subcategory of the exigent circumstances exception to the warrant requirement. Rather, it is a subcategory of the community caretaking exception, a distinctly different principle of Fourth Amendment jurisprudence. "When the police act pursuant to the exigent circumstances exception, they are searching for evidence or perpetrators of a crime. Accordingly, in addition to showing the existence of an emergency leaving no time for a warrant, they must also possess probable cause that the premises to be searched contains such evidence or suspects. In contrast, the community caretaker exception is only invoked when the police are not engaged in crime-solving activities." With respect to Fourth Amendment guaranties, this is the key distinction: "the defining characteristic of community caretaking functions is that they are totally unrelated to the criminal investigation duties of the police."

Ray, 88 Cal.Rptr.2d 1, 981 P.2d at 933 (internal citations omitted). Nevertheless, we acknowledge that we have, on occasion, conflated the two concepts. *See* *Commonwealth v. Miller*, 555 Pa. 354, 724 A.2d 895, 900 (1999) (holding that trial court's finding of "exigent circumstances" was supported by the record and justified warrantless entry into house, despite trial court's finding that police "were not investigating a crime, but rather, were responding to requests from concerned family members").

13 Indeed, 75 Pa.C.S. § 3316(a) prohibits the operation of a vehicle "while using an interactive wireless communications device to send, read or write a text-based communication while the vehicle is motion."

14 There is some debate as to whether the high Court's "totally divorced" language was intended to be observational or prescriptive. At least one court has included this precise language in its test for determining whether a warrantless search was permissible under the community caretaking doctrine. *See, e.g.,* *Hawkins*, 113 A.3d at 222 (D.C. Court of Appeals specifically holding that, in order for a seizure to be permissible under the community caretaking doctrine, the police action be "totally divorced" from the detection and investigation of criminal activity). Other courts, however, have concluded that "*Cady* was merely observing that community caretaker functions are 'totally divorced' from an officer's law enforcement function because a different facet of police work is paramount in a community caretaker function than is paramount in a law enforcement function." *Kramer*, 759 N.W.2d at 609; *see also* *McCormick*, 494 S.W.3d at 687 ("We do not interpret [the language of *Cady*] as requiring consideration of a police officer's subjective intentions."). We likewise are of the view that the high Court's statement in *Cady* was more of an observation by the Court rather than a specific requirement.

15 These factors are consistent with the evaluation of the level of intrusion into the citizen's freedom required under the balancing test. *See* *Anderson*, 362 P.3d at 1239; *Kramer*, 759 N.W.2d at 611.

1 As the majority observes, our well-settled standard of review regarding denial of a motion to suppress requires that we consider only the Commonwealth's evidence and so much of the evidence of the defense that remains uncontradicted. Majority Opinion, at 619 (citing *Commonwealth v. Gary*, 625 Pa. 183, 91 A.3d 102, 106 (2014)).

1 We are considering a community caretaker exception to the warrant requirement, under limited circumstances, pursuant to the Fourth Amendment of the United States Constitution. No party has raised, and we do not address, whether such an exception would pass muster under Article I, Section 8 of the Pennsylvania Constitution. I note that this Court has interpreted Article I, Section 8 as providing privacy protections beyond those ensured by the United States Constitution. *See* *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 899 (1991) (emphasizing that the Pennsylvania Constitution

"has historically been interpreted to incorporate a strong right of privacy, and an equally strong adherence to the requirement of probable cause under Article 1, Section 8").

2 The Fourth Amendment does not contemplate a benevolent, or "caretaking," government. Rather, "the central meaning of the Fourth Amendment is distrust of police power and discretion" and its "underlying vision ... places the magistrate as a buffer between the police and the citizenry, so as to prevent the police from acting as judges in their own cause." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 201, 213–14 (1993) (noting that the Fourth Amendment "synchronizes with other parts of the Constitution designed to limit governmental powers"); *cf.* Ronald J. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 Geo. Wash. L. Rev. 529, 558 (1978) ("The Bill of Rights ... and the fourth amendment in particular are restrictions on unfettered governmental power rather than reflections of natural law rights.").

Jurists and scholars alike have described the broad principle in similar terms. *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) (The framers "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."); *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886) ("[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."); Jacob W. Landynski, *Search and Seizure and the Supreme Court* 47 (1966) ("[T]he Fourth Amendment embodies a spiritual concept: the belief that to value the privacy of home and person and to afford it constitutional protection against the long reach of government is no less than to value human dignity, and that this privacy must not be disturbed except in case of overriding social need, and then only under stringent procedural safeguards.")

3 Justice Brennan poignantly recognized that the *Cady* Majority Opinion represented "a serious departure from established Fourth Amendment principles." *Cady,* 413 U.S. at 454, 93 S.Ct. 2523 (Brennan, J., dissenting) (urging that a professed purpose to protect public safety should not, absent exigent circumstances, "eliminate the necessity for compliance with the warrant requirement").

4 For example, since 1929, Pennsylvania State Police have been required to memorize a Call of Honor which, among other obligations, recognizes the "duty to be of service to anyone who may be in danger or distress." *See* Pennsylvania State Police Call of Honor, https://www.psp.pa.gov/About%20Us/Pages/Call-of-Honor.aspx (last visited July 26, 2017).

5 Additionally, the Majority states, and I agree, that "once assistance has been provided or the peril mitigated, further police action will be evaluated under traditional Fourth Amendment jurisprudence." Majority Op. at 637.

6 It has been noted that the modern Supreme Court's focus on the "reasonableness clause" of the Fourth Amendment, *see, e.g., United States v. Rabinowitz,* 339 U.S. 56, 65, 70 S.Ct. 430, 94 L.Ed. 653 (1950), undermines the broad principle of the limitations on government power the framers intended to declare, while minimizing the import of the warrant requirement. *Id.* at 69, 70 S.Ct. 430 (Frankfurter, J. dissenting); Maclin, 35 Wm. & Mary L. Rev. at 228.

7 The Supreme Court expressed its preference for an objective reasonableness analysis in *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), as well. There, the Court rejected an argument that a police officer's detention of a motorist based on probable cause to believe a traffic violation had occurred was nonetheless unreasonable where the officer's true motive was to investigate possible drug dealing activity. *Id.* at 811, 116 S.Ct. 1769. "Only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable **on the basis of probable cause to believe that a violation of the law has occurred."** *Id.* (emphasis added). Thus, *Whren*'s distaste for considering an officer's subjective motivations was tied to the existence of an independent legal justification (probable cause) for the warrantless conduct. In the case of a public servant exception, no such independent legal justification for the warrantless conduct exists, as probable cause and reasonable suspicion are, by definition, lacking. Requiring that the officer lack a subjective intent to investigate a crime constrains police action in the absence of traditional constraints.

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8 If police officers cannot conduct themselves purely for the purpose of rendering aid, we should not adopt a public service exception to the warrant requirement. However, as noted, experience teaches that police officers can and do render aid for the sole purpose of assisting motorists in distress.

9 In this regard, the defendant must be given the opportunity to test the police officer's motivation. By way of example, I highlight the facts of *State v. Kurth*, 813 N.W.2d 270 (Iowa 2012). There, the Iowa Supreme Court invalidated the seizure of a driver in a parked vehicle upon observing the evidence that the police officer's action of calling in the license plate number on the defendant's vehicle before effectuating the seizure was "inconsistent with a public safety purpose but is certainly consistent with an investigative purpose." *Id.* at 279.

1 Indeed, the Motor Vehicle Code generally requires drivers passing an "emergency response area" to "pass in a lane not adjacent to that of the emergency response area, if possible[.]" 75 Pa.C.S. § 3327(a)(1). However, "if passing in a nonadjacent lane is impossible, illegal or unsafe, [the motorist must] pass the emergency response area at a careful and prudent reduced speed reasonable for safely passing the emergency response area." *Id.* § 3327(a)(2).

2 Indeed, according to the Federal Bureau of Investigation's 2015 statistics, six law enforcement officers were "feloniously killed" during traffic stops or pursuits and 3,972 were assaulted. In addition, seven officers were accidentally killed during traffic stops, traffic pursuits, directing traffic or similar duties. *See* About Law Enforcement Officers Killed and Assaulted, 2015, Federal Bureau of Investigation, https://ucr.fbi.gov/leoka/2015 (last visited May 26, 2017).

3 I agree with both the Majority and Justice Baer that law enforcement officers engage in community caretaking as an essential and important part of their duties. However, I disagree that we need to tamper with the Fourth Amendment to create a new exception in order to recognize this long-standing function of law enforcement, which is clearly articulated and established in our jurisprudence.

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NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania
v.
Kashif M. ROBERTSON, Appellant

No. 1606 MDA 2017
|
Filed February 5, 2019

Appeal from the Judgment of Sentence Entered August 16, 2017, In the Court of Common Pleas of Dauphin County, Criminal Division at No(s): CP-22-CR-0002594-2016

BEFORE: OTT, J., McLAUGHLIN, J., and FORD ELLIOTT, P.J.E.

MEMORANDUM BY McLAUGHLIN, J.:

***1** Kashif M. Robertson appeals from the judgment of sentence entered following his convictions for fleeing and eluding a police officer, possession of drug paraphernalia, driving on a sidewalk, failure to stop at stop sign, and failure to signal.[1] He challenges the denial of his motion to suppress, the sufficiency of the evidence, and the court's instructions to the jury. We affirm.

Police arrested and charged Robertson with the above crimes in March 2016, and Robertson filed a motion to suppress. The trial court held a hearing on the motion at which the Commonwealth presented the following evidence.

Harrisburg City Police Officer Robert Fleagle testified that at approximately 3:45 a.m. on March 14, 2016, he was on patrol in a police SUV with Officer Angel Diaz. N.T. (Suppression Hearing), 6/22/17, at 9, 18. Both officers were in full uniform. ***Id.*** at 9. As they were driving down a narrow two-way street with cars parked on both sides, they noticed a car parallel-parked on the opposite side of the street with two motionless occupants. ***Id.*** at 10, 20-21, 28. Both Officer Fleagle and Officer Diaz testified that the person sitting in the driver's seat, later identified as Robertson, appeared to be sleeping. ***Id.*** at 10, 21, 28-29, 38, 45-46. Both officers also testified that there were no lights on in the car, and that they did not initially notice whether the car was running. ***Id.*** at 16, 29, 44.

Officer Fleagle testified that "in [his] 18 years as a patrolman for Harrisburg City, [the police have] had numerous situations that could be somebody with a health issue, somebody may be just asleep, maybe a DUI, [or that] somebody might be dead." ***Id.*** at 11. He also said that the police have encountered "people who are actually shot in vehicles before, [and we] came across them that they were dead in the vehicle." ***Id.*** Officer Fleagle stated that he and Officer Diaz therefore "wanted to check on their welfare and see what was going on." ***Id.*** He elaborated,

> we didn't know if it was medical, if he's just asleep or if it's a DUI. I mean, let's be honest. I'm looking for criminal activity at that time, I'm not going to, you know, lie to you. But, you know, I didn't know if he was – if something was wrong with him or if they were just drunk, high, or just sleeping.

Id. at 23-24.

Officer Fleagle pulled the police SUV alongside the driver's side of the parked car, leaving two or three feet of space between the vehicles. ***Id.*** at 10, 18. Both officers testified that the placement of the SUV blocked Robertson's car from leaving. ***Id.*** at 12, 19, 23, 43.

Officer Fleagle shined a floodlight inside the car and confirmed that both occupants were asleep. ***Id.*** at 10, 23.[2] Robertson's seat was leaning partially backward, and the passenger, a woman, had leaned her seat all the way back. ***Id.*** at 10, 29. Robertson and the passenger awoke. ***Id.*** at 11, 23. Officer Fleagle lowered his window and asked Robertson if he was okay. ***Id.*** at 11, 23-24. According to Officer Fleagle, Robertson stared blankly at him, with a "thousand-yard stare," and did not lower his window. ***Id.*** at 11. Officer Diaz similarly testified that "they both looked towards us with a thousand-yard stare. They had, like, a surprised look on their face[s] and were very slow with their movements." ***Id.*** at 29. Officer Diaz concluded that "they appeared to be under the influence of drugs or something," and that "from the way they looked over to me, I believed them – from my experience at the time that they might be – at least the driver might be under the influence." ***Id.*** at 29, 43. This assessment took "no longer than a minute." ***Id.*** at 43.

***2** Because the officers suspected that the occupants might be under the influence of drugs and alcohol, Officer Diaz

decided they should investigate further. ***Id.*** at 32, 44-45. Officer Fleagle then backed up the police SUV so that the front of its bumper was in line with the front of Robertson's car. ***Id.*** at 12, 24. The officers' vehicle continued to block Robertson's car from leaving, and Officer Fleagle testified that Robertson was not free to leave at that time. ***Id.*** at 24-26.

While Officer Diaz walked to the rear of the car, Officer Fleagle approached Robertson's driver's-side window on foot, tapped on the window, and asked Robertson again if he was okay. ***Id.*** at 12. Officer Fleagle testified that both Robertson and the female passenger "had a blank look on their face, kind of confused, moving slow." ***Id.*** at 12. Officer Fleagle asked Robertson to lower his window, and Robertson lowered it three inches. ***Id.*** at 12, 25. Officer Fleagle asked Robertson for identification, and Robertson "just looked at [him]" and "was fumbling around." ***Id.*** at 12. Officer Fleagle also stated that Robertson "seemed lethargic, confused, he had a blank stare on his face, and he was fumbling at one point when I asked him for his ID." ***Id.*** at 14, 25. Robertson never said "one word" to Officer Fleagle, but did produce an ID. ***Id.*** at 13-15, 25. Both officers testified that it was around this time that they smelled the odor of burnt marijuana emanating from inside the vehicle. ***Id.*** at 12, 25, 32-33.

Officer Fleagle stepped away to investigate Robertson's identification. ***Id.*** at 25. Officer Diaz approached the drivers' window, and asked Robertson and the passenger if they were on probation or parole; they responded in the negative. ***Id.*** at 33. Officer Diaz asked the passenger for an ID, but she said she did not have one with her. ***Id.*** at 33. Officer Diaz testified that he asked Robertson if he had recently smoked marijuana, and Robertson said that he had not. ***Id.*** at 33. Officer Diaz told Robertson that he could smell it, and Robertson admitted to smoking "at least one marijuana cigarette." ***Id.*** at 33. Robertson spoke using only one or two words, not full sentences. ***Id.*** at 34. According to Officer Diaz, Robertson was moving slowly, with bloodshot eyes, and continually reached for his left waistband. ***Id.*** at 33-34. Officer Diaz testified that he shined a flashlight into the car, and saw a clear plastic baggie containing what appeared to be marijuana. ***Id.*** at 34. Officer Diaz then asked Robertson to give him the bag, and when he did, Officer Diaz placed it atop the car. ***Id.*** at 15, 34-35. Officer Diaz also observed a black scale next to the gearshift. ***Id.*** at 35. During his interactions with Robertson, Officer Diaz noticed that Robertson's car was running, because he could see occasional exhaust fumes. ***Id.*** at 34.

Officer Diaz asked Robertson to step out of the vehicle. ***Id.*** at 37. Instead of complying, Robertson started to close the window. ***Id.*** at 37. Officer Diaz told Robertson that if he did not stop, he would smash the window. ***Id.*** at 37. Robertson continued rolling up the window, and Officer Diaz shattered it. ***Id.*** at 37. Robertson then put the car in reverse and backed onto the sidewalk, almost striking Officer Fleagle, and drove away. ***Id.*** at 16, 35-36, 49. Officer Fleagle never heard Robertson start the car before reversing. ***Id.*** at 16.

A third police officer, John Rosinski, who was just arriving at the scene, pursued Robertson's fleeing vehicle. ***Id.*** at 36, 49. Officer Rosinski testified that Robertson ignored stop signs, failed to signal, and drove at a high rate of speed. ***Id.*** at 49-50. Eventually, the car came to a stop at a dead end, and Robertson jumped out and fled on foot. ***Id.*** at 50. Officer Rosinski yelled to the female passenger to stay in the vehicle and chased Robertson on foot, but lost sight of him. ***Id.*** When Officer Rosinski returned to the vehicle, the passenger was no longer there. ***Id.*** Inside the vehicle, in plain view, he saw another bag of suspected marijuana on the driver's seat; a small digital scale on the floor; and scattered pieces of mail addressed to Robertson on the backseat. ***Id.*** at 50, 52-53.

3** The court denied Robertson's motion to suppress, and Robertson proceeded to a jury trial. At trial, which took place on August 16, 2017, the Commonwealth presented the testimony of the three police officers and introduced into evidence the two plastic bags of marijuana. N.T. (Trial), 8/16/17, at 35. The parties stipulated that the bags contained in all 0.27 grams of marijuana. ***Id. at 36-37. The prosecution did not introduce the digital scale into evidence. Robertson testified in his own defense, and argued that he fled from the police to protect himself and his passenger from danger, after Officer Diaz shattered his window with the handle of a firearm. ***Id.*** at 80.

After the close of evidence and arguments, the court instructed the jury. Because Robertson had argued that he was justified in fleeing from the police in self-defense, the court instructed the jury on the "justification defense," in relation to the charge of fleeing and eluding an officer. ***Id.*** at 120-22. The court explained,

> conduct the actor reasonably believes to be necessary to avoid an imminent harm or evil to himself or another is justifiable if [(1)] the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged[,] and (2) the [statute defining the offense does not] provide[ ] exceptions or

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> defenses dealing with the specific situation involved[,] and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Id. at 121-22. Robertson did not object.

After deliberating for approximately one hour, the jury asked the court to repeat the elements of fleeing and eluding a police officer. ***Id.*** at 129. The court reinstructed the jury on the elements of that crime, but did not reinstruct on the justification defense. ***Id.*** at 129-30. Robertson objected, and the court explained that it did not reinstruct the jury on the justification defense because the jury had only asked for the elements of fleeing and eluding, and not justification. ***Id.*** at 132.

The jury found Robertson guilty of fleeing and eluding an officer and possession of drug paraphernalia. The trial court then found Robertson guilty of the summary offenses of driving on a sidewalk, failure to stop at stop sign, and failure to signal, but acquitted him of driving under the influence of a controlled substance. The court then immediately sentenced Robertson to a total of eight to twenty-three months' incarceration followed by 12 months' probation.

On September 1, 2017, the trial court docketed receipt of Robertson's post-sentence motion. The motion was stamped as received by the Dauphin County Clerk of Courts on August 29, 2017, and dated as mailed by Robertson from prison on August 25, 2017. The court denied the motion on September 27, 2017, and Robertson filed a notice of appeal on October 10, 2017.

Robertson raises the following issues:

> I. Did not the court err in denying [Robertson's] Motion to Suppress when the police effected a seizure of [Robertson's] person under Article 1, Section 8, of the Pennsylvania Constitution without reasonable suspicion and when [Robertson's] subsequent flight and discarding of evidence is deemed not to constitute an abandonment under Article 1, Section 8, of the Pennsylvania Constitution?
>
> II. Was not the evidence insufficient to sustain a conviction for the offense of possessing drug paraphernalia?
>
> III. Did not the court err in failing to re-instruct the jury on the defense of justification when it re-instructed the jury on the elements of the offense of fleeing and eluding?

Robertson's Br. at 6.

On November 13, 2017, while this appeal was pending, Robertson filed in this Court an "Application to Acknowledge August 25, 2017, as Date of Filing of Post-Sentence Motion Pursuant to 'Prisoner Mailbox Rule.' " According to Robertson, the deadline for him to file his post-sentence motion was August 28, 2017. ***See*** Pa.R.Crim.P. 720(1) (allowing defendant ten days from date of sentencing to file post-sentence motion); 1 Pa.C.S.A. § 1908 (providing that when the last day of a period falls on a Saturday, Sunday, or holiday, it is excluded from the computation of time). He asserts that he mailed his post-sentence motion *pro se* from prison on August 25, 2016, and points out that the trial court's noting receipt of the motion on August 29 proves that he could have mailed it no later than August 28, the due date. Robertson therefore argues that his motion should be deemed timely pursuant to the prisoner mailbox rule. ***See*** Pa.R.A.P. 121(a) (providing that mailings from *pro se* defendants in prison are deemed filed on the date that they are given to prison authorities for mailing). The prisoner mailbox rule is clearly applicable to Robertson's mailing, and we therefore grant Robertson's application.

4** The more difficult question is whether the trial court properly entertained his *pro se* post-sentence motion, such that Robertson's Notice of Appeal was timely. It is unclear from the certified record whether Robertson had counsel when he submitted his *pro se* motion, and a trial court generally may not consider the *pro se* filings of a represented party. ***See Commonwealth v. Ali, 10 A.3d 282, 293 (Pa. 2010) (stating *pro se* filing of a represented defendant was a "legal nullity").

Although Robertson had sought to represent himself at the outset of this case, by the time of trial, he was represented by counsel, and counsel filed a Pa.R.A.P. 1925(b) statement and appellate brief. Nothing in the certified record suggests that Robertson knowingly, intelligently, and voluntarily waived counsel for purposes of post-sentence motions. Nonetheless, the trial court apparently did not think his post-sentence motion was a "legal nullity" and ruled on it on the merits. Robertson relied on the entry of the order disposing of that motion as triggering the 30-day clock for him to file an appeal.

It thus appears from the certified record that either Robertson improperly lacked counsel at the post-sentence motion stage, or the trial court's ruling on his motion misled him about the deadline for him to file his appeal. Notably, neither the trial court nor the Commonwealth is of the opinion that Robertson improperly engaged in hybrid representation such

that his appeal is untimely. Under the circumstances presented here, we will deem Robertson's appeal to be timely. ***See Commonwealth v. Leatherby***, 116 A.3d 73, 79 (Pa.Super. 2015) (*en banc*).

I. Suppression

In his first issue, Robertson argues that the police seized him when they first blocked his car and shined a floodlight in his eyes. Robertson contends that the seizure violated his rights under the federal and state Constitutions because the police did not have reasonable suspicion at that time that he was committing a crime. According to Robertson, when the officers blocked his car, all they observed was someone sleeping in a legally parked car, who was awakened by a floodlight. He argues that there were no signs of criminal activity, such as indications that Robertson had recently been driving the car or that the motor was running. Robertson argues that because the seizure was illegal, the evidence recovered thereafter, including the bags of marijuana that Robertson discarded, should be suppressed as tainted by the illegal detention. ***See*** Robertson's Br. at 33-35. Robertson further argues that the seizure cannot be supported by the "community caretaking" exception to the warrant requirement, because the police "lacked any objective basis to believe" that Robertson "needed assistance." ***See*** Robertson's Reply Br. at 10.

We review the denial of a motion to suppress to determine whether the certified record supports the factual findings of the suppression court, and reverse only if there is an error in the legal conclusions drawn from those factual findings. ***Commonwealth v. Gould***, 187 A.3d 927, 934 (Pa.Super.), *appeal denied*, 194 A.3d 1040 (Pa. 2018). Our standard of review of the trial court's legal conclusions is *de novo*, and the scope, plenary. ***Commonwealth v. Wilmer***, 194 A.3d 564, 567 (Pa. 2018).

A warrantless seizure by the police violates a citizen's constitutional rights unless it is a brief detainment based on "reasonable suspicion that the individual is or is about to be engaged in criminal activity" or qualifies under certain established exceptions to the warrant requirement. ***Id.*** at 568. Police interaction with a citizen rises to the level of a detainment or seizure when, under an objective consideration of the circumstances, a reasonable person would not believe he or she was free to leave. ***Commonwealth v. Mulholland***, 794 A.2d 398, 401 (Pa.Super. 2002). It is settled that a seizure occurs when uniformed police purposefully park their vehicle in such a way as to block the path of an occupied vehicle. ***See Gould***, 187 A.3d at 936-37 & n.9; ***Mulholland***, 794 A.2d at 402.

5** Here, the uncontradicted evidence established that Robertson's vehicle was unable to legally exit its parking space when the police pulled their SUV alongside of it, shined the floodlight inside, rolled down the window, and asked Robertson if he was all right. It was therefore at this moment that Robertson was detained for purposes of our analysis. ***See Gould, 187 A.3d at 936-37 & n.9; ***Mulholland***, 794 A.2d at 402. The trial court concluded that the police had reasonable suspicion to support an investigatory detention after this initial interaction. ***See*** Trial Court Opinion, filed, 12/15/17, at 8-9. However, we may affirm the trial court on any basis. ***See Commonwealth v. Clouser***, 998 A.2d 656, 661 n.3 (Pa.Super. 2010). Our *de novo* review leads us to the conclusion that the officers' actions were justified under the public servant exception.

The public servant exception to the warrant requirement falls under the umbrella of the "community caretaking doctrine." ***Wilmer***, 194 A.3d at 568-69. Our Supreme Court has deemed this exception to apply when police officers are "able to point to specific, objective, and articulable facts that would reasonably suggest to an experienced officer that a citizen is in need of assistance." ***Commonwealth v. Livingstone***, 174 A.3d 609, 634 (Pa. 2017). The resulting actions of the police "must be independent from the detection, investigation, and acquisition of criminal evidence" and "must be tailored to rendering assistance or mitigating the peril." ***Id.*** at 635. However, as the standard is an objective one, "a coinciding subjective law enforcement concern by the officer will not negate the validity of that search under the public servant exception to the community caretaking doctrine." ***Id.*** at 637. The reasonableness inquiry must allow "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving," and take into consideration "that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture." ***Commonwealth v. Coughlin***, — A.3d ——, 2018 PA Super 304, at 4 (Nov. 14, 2018) (*en banc*) (quoting ***Commonwealth v. Ford***, 175 A.3d 985, 990 (Pa.Super. 2017), *appeal denied*, 190 A.3d 580 (Pa. 2018)).[3]

Here, Officer Fleagle testified that when he saw Robertson, who was leaning back and motionless in his car at 3:45

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a.m., he was concerned, based on his 18 years' experience as a police officer in Harrisburg, that Robertson might be sick, might be dead, or might be under the influence of an intoxicant that would prevent him from safely driving. N.T. (Suppression) at 11, 23-24. We conclude that these are "specific, objective, and articulable facts that would reasonably suggest to an experienced officer that a citizen is in need of assistance." ***Livingstone***, 174 A.3d at 634–37. Accordingly, Officer Fleagle pulled the police SUV alongside the car and shined a light inside. Under the circumstances, we hold that this action was sufficiently tailored to further investigate whether the occupants needed aid.

6** Officer Fleagle testified that during the interaction that followed, while he was shining the floodlight into the car, Robertson stared at him blankly, with a "thousand-yard-stare," did not lower his window, and did not answer when Officer Fleagle asked if he was all right. N.T. (Suppression) at 11. Officer Diaz also testified that Robertson and his passenger both had a "thousand-yard stare," and were "very slow with their movements." ***Id. at 29. "[F]rom the way [Robertson and the passenger] looked at [him]," Officer Diaz believed the occupants to be intoxicated. ***Id.*** at 29, 43. These uncontradicted facts reasonably suggested that the car's occupants may have needed assistance and that further investigation was warranted. Thus, the police parked their car and attempted to further engage Robertson, to determine whether he and the passenger were all right.

Although the trial court credited the officers' testimony that their investigation was motivated by the desire to check on the welfare of the car's occupants, ***see*** Trial Ct. Op. at 5, 9, the credibility of their subjective intent of the officers is not relevant to the objective reasonableness query. ***Livingstone***, 174 A.3d at 637. Nor does the fact that the law enforcement officers expressed a coinciding objective to search for signs of criminal activity negate the reasonableness of their actions in this scenario. ***Id.*** Obviously, rending assistance to a person incapacitated by drug use may result in the discovery of evidence of crimes such as drug possession or driving under the influence. That the police may discover such evidence in addition to offering assistance does not negate the obvious concern that a person debilitated by drug use may need immediate medical attention.

Robertson does not contest that after the police officers parked, exited their vehicle, and tapped on his window, the officers' interactions did not render the necessary reasonable suspicion or probable cause to support their further detainment of Robertson. Thus, we affirm the trial court's denial of Robertson's suppression motion.

II. Sufficiency

In his second issue, Robertson argues that the plastic bags containing marijuana were insufficient evidence to support a conviction of possession of drug paraphernalia. Robertson cites ***Commonwealth v. Miller***, 130 A.3d 1 (Pa.Super. 2015), in which we held that the burnt paper wrapping of a single joint of marijuana did not constitute paraphernalia. Robertson further argues that there was insufficient evidence to prove that Robertson possessed the digital scale found in his vehicle, which was observed in the common area of the vehicle, between him and the passenger. Robertson states that his mere knowledge of the presence of the contraband was insufficient to prove he constructively possessed it. ***See*** Robertson's Br. at 38-41.[4]

A challenge to the sufficiency of the evidence will not prevail when the trial evidence, "and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to enable the fact finder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt." ***Commonwealth v. Diamond***, 83 A.3d 119, 126 (Pa. 2013) (quoting ***Commonwealth v. Fears***, 836 A.2d 52, 58-59 (Pa. 2003)). The Commonwealth may sustain its burden to prove each element of the charged offenses through the use of wholly circumstantial evidence. ***Id.*** (citation omitted). "Because evidentiary sufficiency is a question of law, our standard of review is *de novo* and our scope of review is plenary." ***Id.*** (citation omitted).

***7** We first address Robertson's contention that two plastic bags containing marijuana do not constitute drug paraphernalia under the statute. Robertson was convicted of possession of drug paraphernalia under 35 P.S. § 780-113(a)(32), which prohibits "[t]he use of, or possession with intent to use, drug paraphernalia for the purpose of ... packing, repacking, storing, [or] containing ... a controlled substance in violation of this act." 35 P.S. § 780-113(a)(32). "Drug paraphernalia" is defined by 35 P.S. § 780-102, as

> all equipment, products and materials of any kind which are used, intended for use or designed for use in ... packaging, repackaging, storing, [or] containing ... a

controlled substance in violation of this act. It includes, but is not limited to:

...

(9) Capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use or designed for use in storing or concealing controlled substances.

35 P.S. § 780-102.

Because the statute explicitly includes containers intended for use in packaging and storing small quantities of controlled substances,[5] we conclude that the plastic bags containing Robertson's marijuana were contemplated by the statute's definition of drug paraphernalia. We are unpersuaded that ***Miller*** demands a different result, as that case confronted only the question of whether the statute's definition of drug paraphernalia included the burning paper encasing a single joint. ***See Miller***, 130 A.3d at 6. Moreover, precedent has established that the storage containers of controlled substances, including bags containing marijuana, constitute paraphernalia. ***See, e.g., Commonwealth v. Caban***, 60 A.3d 120, 133 (Pa.Super. 2012) (finding cellophane in which marijuana was wrapped constituted paraphernalia), *overruled on other grounds by* ***In re L.J.***, 79 A.3d 1073 (Pa. 2013); ***Commonwealth v. Coleman***, 984 A.2d 998, 1002 (Pa.Super. 2009) (holding glass vials and glassine baggie containing drugs and sock they were stored in were paraphernalia); ***Commonwealth v. Pitner***, 928 A.2d 1104, 1109 (Pa.Super. 2007) (holding bag containing marijuana qualified as paraphernalia).

As we hold that the bags containing marijuana were sufficient evidence of drug paraphernalia, we need not address Robertson's argument that there was insufficient evidence that he possessed the digital scale found in his car. However, considering that the Commonwealth can prove that contraband was both jointly and constructively possessed by showing that a defendant had knowledge of the existence and location of contraband, ***see Commonwealth v. Thompson***, 428 A.2d 223, 224 (Pa.Super. 1981), and that "a jury need not ignore presence, proximity and association" in determining whether the defendant had knowledge of and power over the contraband found at the scene, ***Commonwealth v. Vargas***, 108 A.3d 858, 869 (Pa.Super. 2014) (*en banc*) (citation omitted), we conclude that there was sufficient evidence that Robertson constructively possessed the digital scale. Robertson's mail was scattered across the backseat of the vehicle, Robertson was driving the vehicle, and Officer Diaz easily noticed the scale next to the stick shift. Robertson's challenges to the sufficiency of the evidence of possession of drug paraphernalia are without merit.

III. Jury Instructions

***8** In his final issue, Roberson argues that the trial court erred in refusing to re-instruct the jury on the justification defense when it re-charged the jury on the elements of the corresponding crime of fleeing and eluding. According to Robertson, it was fundamentally unfair to explain the elements of the crime without also explaining what negates those elements. Robertson also complains that the court erroneously believed it was not permitted to reinstruct on a point that the jury did not specifically request.

We review the denial of a request to give a jury instruction for whether the court abused its discretion or committed an error of law. ***See Commonwealth v. Phillips***, 946 A.2d 103, 110 (Pa.Super. 2008).

Robertson has set forth no authority establishing that the jury must be reinstructed on the elements of a defense when it reinstructed on the elements of the corresponding crime. And we are not persuaded that the result here was fundamentally unfair, where the jury submitted a total of five questions to the court, none of which displayed confusion regarding the court's earlier explanation of the justification defense.

We are instead guided by this Court's decision in ***Commonwealth v. Akers***, 572 A.2d 746 (Pa.Super. 1990). In that case, during deliberations, the jury requested that the trial court repeat the instructions regarding first and second degree murder. ***Akers***, 572 A.2d at 755. The trial court declined the defendant's request "to recharge the jury on all degrees of homicide." ***Id.*** We reiterated that a trial court "may properly confine supplemental instructions to the particular question asked by the jury despite a defendant's request for additional instructions." ***Id.*** (quoting ***Commonwealth v. Haddle***, 413 A.2d 735, 738 (Pa.Super. 1979)). We held that there was "no abuse of discretion in the trial court's confining its supplemental instructions to the specific areas of the jury's inquiry." ***Id.*** Here, the decision whether to reinstruct the jury on the defense of justification was within the purview of the trial court, and we discern no abuse of discretion.

Having found no basis on which to provide relief, we affirm Robertson's judgment of sentence.

Judgment of sentence affirmed.

All Citations

Not Reported in Atl. Rptr., 2019 WL 441003

Footnotes

1 ***See*** 75 Pa.C.S.A. § 3733(a); 35 P.S. § 780-113(a)(32); and 75 Pa.C.S.A. §§ 3703(a), 3323(b), and 3334(a), respectively.

2 Officer Fleagle also testified that he first observed the female passenger once he turned the floodlight on, contradicting his earlier testimony that he had initially seen two people in the car. N.T. (Suppression) at 29.

3 As our Supreme Court acknowledged:

> The modern police officer is a jack-of-all-emergencies, with complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses; by default or design he is also expected to aid individuals who are in danger of physical harm, assist those who cannot care for themselves, and provide other services on an emergency basis. To require reasonable suspicion of criminal activity before police can investigate and render assistance in these situations would severely hamstring their ability to protect and serve the public.

Livingstone, 174 A.3d at 628-29 (quoting ***Williams v. State***, 962 A.2d 210, 216 (Del. 2008)) (internal quotation marks omitted).

4 Robertson does not argue that the evidence was insufficient because the officers did not introduce the scale as physical evidence at trial, or assert that the scale did not qualify as paraphernalia under the statute.

5 Under Subsection (a)(31), a small amount of marijuana is less than 30 grams. ***See*** 35 P.S. § 780-113(a)(31).

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125 Nev. 142
Supreme Court of Nevada.

Sean Andrew HANNON, Appellant,
v.
The STATE of Nevada, Respondent.

No. 50594.
|
May 21, 2009.
|
As Modified June 2, 2009.
|
Rehearing Denied July 31, 2009.
|
Reconsideration En Banc Denied Sept. 15, 2009.

Synopsis

Background: After his motion to suppress evidence was denied, defendant pled nolo contendere in the Second Judicial District Court, Washoe County, Jerome Polaha, J., to one count of possession of a controlled substance. Defendant appealed.

The Supreme Court, Parraguirre, J., held that reported domestic disturbance to which officer responded did not represent an emergency of the sort justifying a warrantless entry into the residence, abrogating *Geary v. State,* 91 Nev. 784, 544 P.2d 417, *State v. Hardin,* 90 Nev. 10, 518 P.2d 151.

Reversed.

Attorneys and Law Firms

****344** Dennis A. Cameron, Reno, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Joseph R. Plater, Deputy District Attorney, Washoe County,

Before PARRAGUIRRE, DOUGLAS and PICKERING, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

***143** In this appeal, we consider whether an emergency reason existed for a warrantless entry into a private residence. In resolving this issue, we bring our standard for emergency home entries into conformity with the recent United States Supreme Court decision ****345** in *Brigham City v. Stuart,* 547 U.S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). Under that standard, the warrantless entry into appellant's apartment was unlawful as there was no objectively reasonable basis to believe that the two occupants or any undisclosed third party may have been in danger inside. Accordingly, we conclude that the district court erred in denying appellant's motion to suppress the evidence of marijuana recovered during a subsequent search and reverse the district court's judgment of conviction.

FACTS AND PROCEDURAL HISTORY

On the afternoon of July 29, 2006, appellant Sean Andrew Hannon and his girlfriend, Lea Robinson, were overheard arguing in their apartment. During the argument, Robinson became emotional, screamed at Hannon, and slammed the bathroom door against the wall.

Having overheard "yelling and screaming [and] thumping against the walls" in Hannon's apartment, a neighbor called 911 to report a possible domestic disturbance. In response, Officer Eric Friberg and his trainee were dispatched to the scene. Before knocking on Hannon's door, the officers confirmed with the neighbor what he had overheard.

***144** Although approximately 45 minutes had elapsed since the argument had dissipated, Robinson answered the door red-faced, crying, and breathing hard. As Robinson opened the door, Officer Friberg observed Hannon in the background in a tank top and underwear. He appeared to be flushed and "angry."

Speaking to Robinson through the cracked door, Officer Friberg explained that he was responding to a possible domestic disturbance and asked if she was injured. Robinson replied no, though she admitted having a verbal argument with Hannon earlier that day. Robinson was then asked whether anyone else was inside and whether they were injured. Robinson answered that nobody was injured and that nobody else was inside except Hannon.

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Despite these reassurances, Officer Friberg stated that he "needed to come inside to check everybody's welfare and make sure everybody was okay." He then asked Robinson for permission to enter. Robinson refused to allow the officers to enter and asked if they had a warrant. The officers then sought permission from Hannon. Again, the officers were told that they could not come inside the apartment.

Although he had twice been denied entry, Officer Friberg persisted by "push [ing] the [apartment] door slightly open." As the officers crossed the unit's threshold, Hannon ran into the kitchen and threw a dark bag into a cupboard, prompting Officer Friberg to push his way past Robinson into the apartment. According to Officer Friberg, he forcibly entered the apartment, not because of Hannon's sudden dash to the kitchen, but to protect the safety of its occupants.

Once inside, the officers conducted a protective sweep and observed marijuana and assorted paraphernalia on the living room table and marijuana leavings on the kitchen counter. Based on these observations, Officer Friberg advised his sergeant by phone that he wanted to seek a warrant to search Hannon's kitchen cupboard.

Having overheard the call, Hannon asked Officer Friberg whether "[y]ou tear up houses when you obtain search warrants?" Concerned with avoiding a full-blown search, Hannon offered to allow the officers to search the cupboard if they would forgo a warrant.

Officer Friberg accepted the offer. After verifying Hannon's consent, he then recovered a pillowcase-sized plastic bag of marijuana from the kitchen cupboard. Thereafter, Hannon was arrested for the possession of a controlled substance for the purpose of sale.

Following his arrest, Hannon filed a motion to suppress, challenging the reasonableness of the warrantless entry. At the evidentiary hearing, Officer Friberg admitted that "[he] didn't have evidence" that another occupant may have been inside who needed emergency assistance, he "just had suspicions."

***145** Nevertheless, applying the emergency home entry standard recently announced in ****346** *Brigham City v. Stuart,* 547 U.S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), the district court considered Robinson's distressed appearance, the nature of the 911 call, and Officer Friberg's experience and training in domestic violence situations, and concluded that there was "objective information" to justify the warrantless entry and denied Hannon's motion. As a result, Hannon entered a conditional plea of nolo contendere to simple possession.[1] This appeal followed.[2]

DISCUSSION

In this case, the police entered Hannon's apartment for a single stated purpose—to render emergency aid to any potential third parties inside. Given the entry's one-dimensional nature, this case deals exclusively with the emergency exception to the warrant requirement. While we defer to the factual findings supporting the district court's ruling on Hannon's motion, we review de novo whether the emergency exception justifies the warrantless entry here. *See* *State v. Lisenbee,* 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000).

Emergency exception

Warrantless home entries, the chief evil against which the Fourth Amendment protects, *see* *Payton v. New York,* 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), are presumptively unreasonable unless justified by a well-delineated exception, such as when exigent circumstances exist. *See* *Camacho v. State,* 119 Nev. 395, 400, 75 P.3d 370, 374 (2003). Under established law, *see, e.g.,* *Alward v. State,* 112 Nev. 141, 151, 912 P.2d 243, 250 (1996), *overruled in part on other grounds by* *Rosky v. State,* 121 Nev. 184, 190–91 & n. 10, 111 P.3d 690, 694 & n. 10 (2005), one such exigency is the need to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City,* 547 U.S. at 403, 126 S.Ct. 1943.

Unlike "hot pursuit" situations or the need to preserve evidence, warrantless entries for emergency reasons do not require probable cause. *See* *U.S. v. Snipe,* 515 F.3d 947, 952 (9th Cir.2008). Emergencies, therefore, are analytically distinct from other exigent circumstances. ***146** 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 6.6(a), at 451 (4th ed.2004). Thus, although some taxonomical debate exists regarding its proper classification, whether as a type of exigency or a freestanding exception to the warrant requirement, *id.;* *compare* *U.S. v. Holloway,* 290 F.3d 1331, 1337 (11th Cir.2002) ("[E]mergency situations involving endangerment to life fall squarely within the exigent circumstances exception."), *with* *People v. Hebert,* 46 P.3d 473, 478–79 (Colo.2002) (warrantless emergency entries fall within

the community caretaking exception), emergency entries are "assessed separately and by a distinct test." LaFave, *supra,* § 6.6(a), at 451 n. 6.

Controlling standard—Brigham City v. Stuart

Although Nevada's existing two-pronged test for emergency home entries permits courts to consider law enforcement's subjective motivations, the standard recently announced in *Brigham City* eliminates such a consideration. 547 U.S. at 404, 126 S.Ct. 1943.

Under Nevada's existing test, an emergency home entry is permissible without a warrant if law enforcement officers (1) reasonably believe that emergency assistance is needed, and (2) lack the " ' "accompanying intent to either arrest or search." ' " *See, e.g., Geary v. State,* 91 Nev. 784, 790 n. 3, 544 P.2d 417, 421 n. 3 (1975) (quoting *State v. Hardin,* 90 Nev. 10, 15, 518 P.2d 151, 154 (1974) (quoting E. Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment,* 22 Buff. L.Rev. 419, 426–27 (1973))). This test—the wording of which derives from a law review article—was first adopted in *State v. Hardin,* 90 Nev. at 16, 518 P.2d at 154, ****347** and has since been applied in later cases, though with varying degrees of attention to its second prong. *Compare Alward,* 112 Nev. at 151, 912 P.2d at 250 (not citing or applying the second prong), *Johnson v. State,* 97 Nev. 621, 624, 637 P.2d 1209, 1211 (1981) (citing but not applying second prong), *abrogated in part by Horton v. California,* 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), *Koza v. State,* 100 Nev. 245, 253, 681 P.2d 44, 49 (1984) (same), *and Geary,* 91 Nev. at 790 n. 3, 544 P.2d at 421 n. 3 (same), *with Murray v. State,* 105 Nev. 579, 583, 781 P.2d 288, 290 (1989) (citing and applying second prong), *Banks v. State,* 94 Nev. 90, 97–98, 575 P.2d 592, 597 (1978) (same), *and Hardin,* 90 Nev. at 15–16, 518 P.2d at 154 (same).

To the extent that our caselaw still condones inquiring into law enforcement's subjective motivations in the context of an emergency home entry, as other courts have done, *see, e.g., U.S. v. Snipe,* 515 F.3d 947, 952 (9th Cir.2008); *U.S. v. Najar,* 451 F.3d 710, 718 (10th Cir.2006); *State v. Edwards,* 183 Vt. 584, 945 A.2d 915, 918 (2008), ***147** we abandon our previous test in favor of the standard announced in *Brigham City,* which clarifies "the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation." 547 U.S. at 402, 126 S.Ct. 1943.

Under that standard, a law enforcement officer's "subjective motivation is irrelevant." *Id.* at 404, 126 S.Ct. 1943. Rather, the reasonableness of an emergency home entry depends on whether " 'the circumstances, viewed *objectively,* justify [the] action,' " *id.* (quoting *Scott v. United States,* 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978) (alteration in original)), in other words, whether law enforcement had an objectively reasonable basis to believe that there was an immediate need to protect the lives or safety of themselves or others. *See Snipe,* 515 F.3d at 952; *Najar,* 451 F.3d at 718; *see also U.S. v. Huffman,* 461 F.3d 777, 785 (6th Cir.2006).

Officer Friberg lacked an objectively reasonable belief

Applying the *Brigham City* standard, the district court concluded that there was "objective information" to justify the emergency entry into Hannon's apartment. Even accepting the district court's factual findings as true, *see Lisenbee,* 116 Nev. at 1127, 13 P.3d at 949, we disagree and conclude that this warrantless home entry was not justified on emergency grounds because there was no objectively reasonable basis to believe that a third party was injured inside.

With respect to this issue, both sides analogize and distinguish this case from *Brigham City,* where officers responded at 3 a.m. to complaints about a loud house party and overheard " 'some kind of a [tumultuous] fight' " inside. 547 U.S. at 406, 126 S.Ct. 1943. Through a window, the officers saw a juvenile—who, with fists clenched, was being restrained by four adults—punch an adult in the face, sending the adult to the sink spitting blood. *Id.* In view of those circumstances, the United States Supreme Court determined that the officers had an objectively reasonable basis for believing that the injured adult might need help and that there was an imminent threat of violence. *Id.*

Here, by contrast, Officer Friberg had noticeably less information than the officers in *Brigham City* to support his belief that a third party was endangered inside Hannon's apartment.

First, unlike *Brigham City,* which involved actual violence as well as the clear threat "that the violence ... was just beginning," *id.,* Officer Friberg did not witness, let alone overhear, sounds of an altercation when he arrived. Tellingly, because there was therefore no apparent need for swift action, *see Huffman,* 461 F.3d at 785; *U.S. v. Holloway,* 290 F.3d 1331, 1334 (11th Cir.2002), instead of entering and announcing his presence (as occurred in *Brigham City),* Officer Friberg casually knocked on Hannon's front door.

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***148** Second, unlike in *Brigham City,* in which the officers witnessed the attack and the victim spitting blood, although Robinson was crying, Hannon appeared "angry," and both were flushed and breathing heavily, neither exhibited observable signs of injury. Moreover, when asked by Officer Friberg, both responded that they were unharmed. Thus, even if there was initial reason to believe that ****348** Hannon or Robinson may have been injured, Officer Friberg's concerns should have been allayed after interviewing Hannon and Robinson at the door.

Additionally, in contrast to *Brigham City,* where other partygoers were seen inside and surrounding the house, 547 U.S. at 406, 126 S.Ct. 1943 no similar indicia existed to believe that a third person was inside Hannon's apartment, a point with which Officer Friberg agreed by admitting that while he suspected that another person might have been inside, "[he] didn't have evidence."

Considering the totality of these circumstances, Officer Friberg arrived at a quiet apartment in response to a 911 dispatch call regarding a possible domestic disturbance that—by all accounts—seemed to have already dissipated. Officer Friberg had no reason to believe that Hannon or Robinson had been injured, and had even less reason to believe that Hannon's apartment may have harbored an unidentified third person in need of emergency assistance.

Given the above, we conclude that Officer Friberg lacked an objectively reasonable basis to believe that there was an immediate need to protect the occupants of Hannon's apartment, real or suspected. Because the initial warrantless entry into Hannon's apartment was unlawful, we conclude that the marijuana recovered during the subsequent search was illegally seized. *See Ford v. State,* 122 Nev. 796, 803–04, 138 P.3d 500, 505 (2006); *see generally Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Accordingly, the district court's judgment of conviction is reversed.

CONCLUSION

Based on the totality of the circumstances, we conclude that the warrantless entry into Hannon's apartment was not justified by an objectively reasonable belief that there was an immediate need to protect the occupants of Hannon's apartment. Because no emergency reason existed for forgoing a warrant, we conclude that the district court erred in denying Hannon's motion to suppress. Accordingly, we reverse the district court's judgment of conviction.

We concur: DOUGLAS, and PICKERING, JJ.

All Citations

125 Nev. 142, 207 P.3d 344

Footnotes

1 NRS 174.035(3) (permitting conditional pleas of nolo contendere in exchange for the right to appeal a pretrial ruling).

2 While this case was assigned to District Judge Jerome M. Polaha, who accepted Hannon's change of plea and entered the judgment of conviction in this matter, District Judge Janet Berry heard and decided Hannon's suppression motion.

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40 Cal.App.5th 853
Court of Appeal, Fourth District, Division 1, California.

The PEOPLE, Plaintiff and Appellant,
v.
Brandon Lance LEE,
Defendant and Respondent.

D073740
|
Filed 10/03/2019

Synopsis

Background: Defendant charged with various drug and weapons offenses filed motion to suppress the evidence obtained from warrantless vehicle search. The Superior Court, San Diego County, No. SCD273095, Margie G. Woods, J., granted the motion and the People appealed.

Holdings: The Court of Appeal, Dato, J., held that:

officer lacked probable cause to believe evidence of illegal activity would be found in vehicle, and

search was not justified by a community caretaking function and thus was not a valid inventory search.

Affirmed.

****515** APPEAL from an order of the Superior Court of San Diego County, Margie G. Woods, Judge. Affirmed. (Super. Ct. No. SCD273095)

Attorneys and Law Firms

Summer Stephan, District Attorney, Mark A. Amador, Linh Lam, Christine Bannon and Anne Spitzberg, Deputy District Attorneys, for Plaintiff and Appellant.

Sandra Gillies, under appointment by the Court of Appeal, for Defendant and Respondent.

Opinion

DATO, J.

***856** Following a traffic stop, officers searched Brandon Lance Lee's car without a warrant and discovered 56 grams of cocaine, a firearm, and other items associated with selling narcotics. After Lee was charged with various drug and weapons offenses, he filed a motion to suppress the evidence obtained from the warrantless vehicle search. The trial court granted Lee's motion, rejecting the People's contentions that the search was proper under the automobile exception as supported by probable cause or, alternatively, as an inventory search of a vehicle following an impound. Reviewing that order, we rely on the trial court's express and implied factual findings, provided they are supported by substantial evidence, to independently determine whether the search was constitutional.

In evaluating the People's reliance on the automobile exception to the warrant requirement, we weigh the totality of the circumstances to determine whether officers had probable cause to search Lee's car. Our analysis, like that of the trial court, does not overlook the small, permissible amount of marijuana found in Lee's pocket. But following the legalization of marijuana in 2016, California law now expressly provides that legal cannabis and related products "are not contraband" and their possession and/or use "shall not constitute the basis for detention, search, or arrest." (Health & Saf. Code, § 11362.1, subd. (c).) As a result, the trial court properly concluded that Lee's possession of a small amount of marijuana was of little relevance in assessing probable cause. Because the other factors relied on by the People were also of minimal significance, we conclude that even considering the totality of circumstances known to the officer there did not exist " ' "a fair probability that contraband or evidence of a crime will be found." ' " (*Alabama v. White* (1990) 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (*Alabama*).)

We likewise find no error in the trial court's conclusion that the search was not valid as an inventory search. The search here served no community caretaking function. And based on the manner in which the search was conducted and the statements of the officer to Lee and his passenger, the trial ***857** court reasonably found that the primary purpose of the search was *not* to inventory the contents of Lee's car, but rather to investigate Lee for possible criminal behavior.

We therefore affirm the order granting Lee's motion to suppress the evidence obtained from the unlawful search of his car.

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**516 FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *The Traffic Stop and Subsequent Search*

One evening in August 2017, Officers Carlos Robles and Thomas Cooper of the San Diego Police Department observed a gold-colored Cadillac DeVille with no front license plate and tinted windows in possible violation of Vehicle Code section 26708. They initiated a traffic stop and parked their vehicle near the Cadillac outside an apartment complex. Cooper approached the passenger side to speak with the front seat passenger, Michael H.[2] Robles walked to the driver's window and asked the driver, defendant Lee, for his driver's license. Lee said he did not have his license with him. Robles instructed Lee to step out of the vehicle and performed a patdown search to confirm he did not have any sort of identification.

During this search, Officer Robles discovered a bag containing a small amount of marijuana and a wad of cash in Lee's pocket.[3] Robles asked if he delivered medical marijuana; Lee replied, "Yes sir." Robles started to handcuff Lee when, according to Robles, Lee "tensed up." Lee then leaned back into the car and said something to Michael.[4] Robles then walked Lee to his patrol car and placed him in the backseat. Lee told Robles the Cadillac belonged to him and provided his name and date of birth.[5]

Cooper ran the two individuals' names while Robles spoke with Michael. Robles asked what happened to the money he had previously seen on the ***858** Cadillac's center console. Michael showed it to Robles and flipped through the bills, counting $10 in total. Cooper's searches revealed that Lee's license was suspended and Michael did not have a license. In addition, Michael had been arrested in the past for making criminal threats. Robles instructed Michael to exit the car to be placed in handcuffs. He explained that Michael would be free to leave if nothing was found during the vehicle search.

Officer Robles then spoke with Lee about his suspended license. Lee stated he knew his license had been suspended and explained it was the result of a failure to appear in court. Robles asked Lee if there was anything illegal in the car, and Lee told him there was not. Robles asked again and told him he was going to search the car because it was being impounded due to his suspended license.[6] Lee offered to have ****517** someone come pick up the car for him, but Robles told him, "That's not going to work." Robles asked Lee a third time if there was anything illegal in the car, and Lee again responded no. Lee began to ask if he could grab something from the car, and Robles told Lee he could take whatever he needed after the search confirmed there was nothing illegal in the car.

Robles began to search the Cadillac, starting with the front passenger seat. He examined the space between the seat and the center console, then under the seat. He attempted to access the glovebox, but it was locked. He opened both compartments of the center console and examined several items inside. He activated the screen of a cell phone sitting next to the center console.

Moving to the backseat, Robles pulled the bench seat up and used a flashlight to examine the space underneath. After he returned the seat to a resting position, he pulled down the center backseat armrest and discovered it provided access to the trunk. A black backpack sitting in the trunk became visible once the armrest had been pulled down. Robles took the backpack out of the trunk. He found a firearm in the backpack's main compartment and a large sum of money in its front pocket.

Robles returned to his patrol car and twice asked Lee if there was anything in the Cadillac he needed to discuss with the officers. Lee said no both times. Robles also asked Michael if he knew about anything illegal in the car, and Michael said he did not. Robles continued searching the car, looking under ***859** the driver's side seat and the driver's side floormat. He examined the space between the center console and the driver's side seat. He briefly searched the backseat area once more, including the back pocket of the driver's seat.

Robles again returned to his patrol car and had Lee step out and face the vehicle. He searched Lee's person for the keys to the glovebox and, not finding them, ultimately requested and retrieved them from Michael. Using the key to open the glovebox, he found inside a white envelope with two egg-sized plastic baggies containing a white powdery substance. The substance was later determined to be about 56 grams, or two ounces, of cocaine. He also found more small plastic baggies, a kitchen knife, and a small glass container. A further search of the vehicle revealed several small digital scales.

Robles did not fill out the impound form (ARJIS-11) at the scene when he performed his search as he did not have a copy of the form with him. This form was filled out by another

officer, who conducted his own search of the Cadillac at a later time after it was impounded. Robles did not assist with filling out the form.

The San Diego County District Attorney charged Lee with transportation of cocaine not for personal use while armed with a firearm (Health & Saf. Code, § 11352, subd. (a);[7] Pen. Code, §§ 1210, subd. (a), 12022, subd. (c), count 1); possession for sale of cocaine weighing more than 28.5 grams while armed with a firearm (Health & Saf. Code, § 11351; ****518** Pen. Code, §§ 1203.073, subd. (b)(1), 12022, subd. (c), count 2); having a concealed firearm in a vehicle (Pen. Code, § 25400, subd. (a)(1), count 3); and possession of a large-capacity magazine (Pen. Code, § 32310, subd. (c), count 4).

B. *Lee's Suppression Motion*

After the preliminary hearing, Lee filed a motion to suppress the evidence obtained during the search of his car, claiming it was obtained in violation of the Fourth Amendment. (U.S. Const., 4th Amend.) The People argued the search was permitted as an inventory search, or alternatively that there was probable cause to search the vehicle. At the motion hearing, Officer Robles testified he performed an inventory search as part of his impounding the Cadillac. When pressed why he searched unusual places such as underneath the backseat, he said that in his experience people commonly keep valuables or hide illegal items there. Robles acknowledged that the small bag of marijuana in Lee's pocket contained an amount consistent with personal use and was not illegal on its own. And he agreed that the money in Lee's ***860** pockets combined with the legal amount of marijuana was not evidence of a crime. As Robles further explained, he asked Lee if he was involved in medical marijuana delivery because several illegal delivery services had recently emerged.

The trial court granted Lee's motion to suppress, concluding that although the initial traffic stop was lawful, the subsequent vehicle search was not an inventory search, not one incident to arrest, and not supported by probable cause. The court found that the manner in which Officer Robles searched the vehicle and his repeated questions to Lee about anything illegal inside indicated the primary purpose of the search was to investigate, not to inventory the vehicle's contents or serve a community caretaking function. That Robles did not fill out the required ARJIS-11 form or assist the officer who ultimately did was additional indication that the purpose of the search was not to inventory the contents of the vehicle.

The court further concluded that the $100 to $200 in cash on Lee's person, the small bag of legal marijuana, Lee's acknowledgement of delivering medical marijuana, and his “tensing up” did not provide probable cause to search the vehicle. It questioned Robles's credibility, finding his testimony “less convincing.” In a later proceeding, the People announced they could not move forward, and the court dismissed the case on its own motion.

DISCUSSION

The People appeal the grant of Lee's motion to suppress the evidence obtained during Officer Robles's search of the Cadillac. As they did below, they contend the search was valid because there was probable cause to believe the car contained contraband. In the alternative, they claim the search was a proper inventory search in the course of impounding the vehicle.

A. *Standard of Review*

In reviewing a trial court's decision to grant a motion to suppress evidence, we rely on the trial court's express and implied factual findings, provided they are supported by substantial evidence, to independently determine whether the search was constitutional. (See *People v. Brown* (2015) 61 Cal.4th 968, 975, 190 Cal.Rptr.3d 583, 353 P.3d 305.) “Thus, while we ultimately exercise our independent judgment to determine the constitutional propriety of a search or seizure, we do so within the context of historical facts determined by the trial court.” (*People v. Tully* (2012) 54 Cal.4th 952, 979, 145 Cal.Rptr.3d 146, 282 P.3d 173.) It is the trial court's ****519** role to evaluate witness credibility, resolve conflicts in the testimony, weigh the evidence, and draw factual inferences. (*Ibid.*) We review those factual findings under the ***861** deferential substantial evidence standard, considering the evidence in the light most favorable to the trial court's order. (*Ibid.*)

B. *Automobile Searches and the Fourth Amendment*

A warrantless search is unlawful under the Fourth Amendment “unless it falls within one of the ‘specifically established and well-delineated exceptions.’ ” (*People v. Woods* (1999) 21 Cal.4th 668, 674, 88 Cal.Rptr.2d 88, 981 P.2d 1019; see also *Arizona v. Gant* (2009) 556 U.S. 332,

338, 129 S.Ct. 1710, 173 L.Ed.2d 485.) Automobiles are the subject of special exceptions, and warrantless searches of automobiles "have been upheld in circumstances in which a search of a home or office would not." (*South Dakota v. Opperman* (1976) 428 U.S. 364, 367, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (*Opperman*).) These broader exceptions from the Fourth Amendment's general prohibition against warrantless searches derive from the inherent mobility of automobiles and a diminished expectation of privacy given the public nature of automobile travel. (*Id.* at pp. 367–368, 96 S.Ct. 3092.) The two exceptions relevant here include (1) a search of any area of the automobile where there is probable cause to believe evidence of a crime or contraband may be found, generally referred to as the "automobile exception" (*People v. Evans* (2011) 200 Cal.App.4th 735, 753, 133 Cal.Rptr.3d 323 (*Evans*)), and (2) an inventory search conducted in the course of impounding an automobile (see e.g., *People v. Torres* (2010) 188 Cal.App.4th 775, 786, 116 Cal.Rptr.3d 48 (*Torres*)).

We conclude the vehicle search in this case does not fall within either of these exceptions. As to the first—the automobile exception—the facts known to Officer Robles at the time he removed the occupants were insufficient to establish probable cause to search the Cadillac. The recent legalization of marijuana in California means we can now attach fairly minimal significance to the presence of a legal amount of the drug on Lee's person, and the remaining facts cited by the People do not provide any reasonable basis to believe contraband would be found in the car. As to the second, the inventory search exception does not apply because no community caretaking function was served by impounding the Cadillac, and the trial court reasonably found that Robles's primary motive was to investigate, not inventory, the vehicle's contents. Because the search was neither supported by probable cause nor constituted a proper inventory search, it was constitutionally unreasonable and the trial court properly granted Lee's motion to suppress.

1. *Officer Robles Did Not Have Probable Cause To Search Lee's Vehicle.*

The People argue that the search of Lee's car was proper under the automobile exception to the warrant requirement. Under this exception, ***862** "police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found." (*Evans*, *supra*, 200 Cal.App.4th at p.753, 133 Cal.Rptr.3d 323; see also *United States v. Ross* (1982) 456 U.S. 798, 821, 102 S.Ct. 2157, 72 L.Ed.2d 572.) A probable cause inquiry relies on an objective standard; we do not consider an officer's subjective beliefs. (*Evans*, at p. 753, 133 Cal.Rptr.3d 323.)

Probable cause is a more demanding standard than mere reasonable suspicion. (****520** *People v. Souza* (1994) 9 Cal.4th 224, 230–231, 36 Cal.Rptr.2d 569, 885 P.2d 982.) It exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found ...." (*Ornelas v. United States* (1996) 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911.) In determining whether a reasonable officer would have probable cause to search, we consider the totality of the circumstances. (See *Illinois v. Gates* (1983) 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527.)

The People rely on several factors they contend, taken together, establish probable cause to believe evidence of illegal activity would be found in the vehicle. These include: (1) the marijuana in Lee's pocket; (2) Lee's affirmative response when Officer Robles asked if he delivered medical marijuana; (3) the "wadded-up" $100 to $200 cash in his pocket; (4) the additional $10 in cash in the center console; and (5) the manner in which Lee "tensed" as Robles handcuffed him and led him to the patrol car. They emphasize the marijuana found, arguing that cases like *People v. Mower* (2002) 28 Cal.4th 457, 122 Cal.Rptr.2d 326, 49 P.3d 1067 (*Mower*) and *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 56 Cal.Rptr.3d 306 (*Strasburg*) stand for the proposition that possession of a legal amount of marijuana does not deprive police "of the capacity to entertain a suspicion of criminal conduct."

If by this argument the People mean simply that possession of a small (legal) amount of marijuana does not foreclose the possibility that defendant possesses a larger (illegal) amount, they are obviously correct. But there must be evidence—that is, *additional* evidence beyond the mere possession of a legal amount—that would cause a reasonable person to believe the defendant has more marijuana. And it would be incorrect to say that California's legalization of marijuana is of no relevance in assessing whether there is probable cause to search a vehicle in which police find a small and legal amount of the drug. To understand the significance of California's legalization of marijuana to the suppression motion here, we must construe the relevant cases in their historical context.

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***863** California transitioned to legalized marijuana in stages, from (1) total illegality to (2) permitted medical use to (3) decriminalization to (4) recreational legalization. Prior to 1996, any possession or use of marijuana was illegal. But in November 1996, voters approved a ballot initiative—Proposition 215, the Compassionate Use Act of 1996 (Act)—which added section 11362.5 to the Health and Safety Code. (*Strasburg, supra*, 148 Cal.App.4th at pp. 1052, 1057, 56 Cal.Rptr.3d 306; see § 11362.5.) This Act allowed individuals suffering from an illness to obtain and use marijuana for medical purposes with a physician's recommendation. (*Strasburg*, at p. 1057, 56 Cal.Rptr.3d 306.) These individuals, as well as their primary caregivers, were immune from criminal prosecution or sanction. (*Ibid.*)

Strasburg would become the leading case on how the Act impacted probable cause for vehicle searches where marijuana is found. In *Strasburg*, an officer walked up to the defendant's car and noticed the odor of marijuana. (*Strasburg, supra*, 148 Cal.App.4th at p. 1055, 56 Cal.Rptr.3d 306.) The defendant admitted he had just been smoking marijuana in his car. When asked if he had any marijuana with him, he handed the officer a Ziploc bag containing about three-quarters of an ounce of marijuana. (*Ibid.*) The officer also noticed another small amount of marijuana, about 2.2 grams, in the car. (*Ibid.*) The defendant repeatedly asserted that he had a medical marijuana card, but the officer declined to view it. (****521** *Id.* at pp. 1055–1056, 56 Cal.Rptr.3d 306.) The defendant was detained, the car was searched, and the officer discovered 23 ounces of marijuana and a large scale. (*Id.* at p. 1056, 56 Cal.Rptr.3d 306.)

The appellate court upheld the denial of the defendant's motion to suppress. (*Strasburg, supra*, 148 Cal.App.4th at p. 1060, 56 Cal.Rptr.3d 306.) The odor of marijuana, the defendant's admission he had just been smoking it, and the quantities of marijuana provided to the officer and observed in the vehicle prior to the search constituted probable cause to believe the defendant's vehicle contained additional (illegal) amounts of the substance. (*Id.* at p. 1059, 56 Cal.Rptr.3d 306.) The court rejected the defendant's argument that his medical marijuana prescription negated the existence of probable cause to search his car. (*Id.* at pp. 1059–1060, 56 Cal.Rptr.3d 306.) It relied on *Mower, supra*, 28 Cal.4th 457, 122 Cal.Rptr.2d 326, 49 P.3d 1067, which held that status as a qualified patient under medical marijuana laws provides only limited immunity from prosecution in the form of an affirmative defense, not immunity from arrest. (*Strasburg*, at p. 1058, 56 Cal.Rptr.3d 306.) Accordingly, a defendant's medical marijuana prescription and current medical marijuana laws could provide limited immunity but "not a shield from reasonable investigation" that would affect the officer's probable cause to search the car. (*Id.* at p. 1060, 56 Cal.Rptr.3d 306.)

Three years after *Strasburg*, the governor signed Senate Bill No. 1449 (2009–2010 Reg. Sess.) decriminalizing marijuana possession. (Stats. 2010, ***864** ch. 708, §§ 1−2.) By amending section 11357 of the Health and Safety Code and section 23222 of the Vehicle Code, this legislation converted possession of up to one ounce of marijuana, including while driving, from a misdemeanor to an infraction. (Stats. 2010, ch. 708, §§ 1-2.) *People v. Waxler* (2014) 224 Cal.App.4th 712, 168 Cal.Rptr.3d 822 (*Waxler*) addressed how this decriminalization would affect probable cause determinations for vehicle searches.

As the officer in *Waxler* approached the defendant's truck "he smelled 'the odor of burnt marijuana' and 'saw a marijuana pipe with ... what appeared to be burnt marijuana in the bowl.' " (*Waxler, supra*, 224 Cal.App.4th at p. 716, 168 Cal.Rptr.3d 822.) Searching the truck, the officer found methamphetamine and a methamphetamine pipe. (*Ibid.*) The appellate court affirmed the trial court's denial of the defendant's motion to suppress evidence seized from his truck. (*Ibid.*) It held that the officer had probable cause to search the truck based on the odor of marijuana and his observation of burnt marijuana, noting that under *Strasburg*, "the odor of marijuana justifies the warrantless search of an automobile." (*Id.* at pp. 719, 721, 168 Cal.Rptr.3d 822.) Despite the intervening decriminalization of marijuana after *Strasburg*, the court reasoned that "[o]ther than certain quantities of medical marijuana, possession of *any* amount of marijuana ... is illegal in California and is therefore 'contraband.' " (*Id.* at p. 721, 168 Cal.Rptr.3d 822, italics added.) "Thus, a law enforcement officer may conduct a warrantless search of a vehicle pursuant to the automobile exception when the officer has probable cause to believe the vehicle contains marijuana, which is contraband." (*Ibid.*)

While *Waxler* was the leading case addressing probable cause to search a vehicle following the decriminalization of marijuana, it does little to help resolve similar issues following recreational *legalization.* With the passage of Proposition 64 by voters in 2016, California law now permits adults 21 years of age and older to legally possess up to 28.5 grams, or about one ****522** ounce, of marijuana. (§ 11362.1, subd. (a)(1).) Critically, the statute expressly provides that

"[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, *and no conduct deemed lawful by this section shall constitute the basis for detention*, *search*, *or arrest.*" (§ 11362.1, subd. (c), italics added.) *Waxler* relied heavily on the fact that any amount of nonmedical marijuana remained *contraband* despite the change in the law reducing possession of up to one ounce from a misdemeanor to an infraction. But following legalization, California law now specifically states that up to one ounce of marijuana possessed by an adult age 21 or over is *not* contraband. Accordingly, *Waxler* does not help us determine whether or to what extent legally possessed marijuana now affects whether there is probable cause to search a vehicle.

***865** The 2016 amendments to the Health and Safety Code similarly appear to undercut much of *Strasburg*'s probable cause analysis. The *Strasburg* court held that the odor and sight of less than one ounce of marijuana provided police with probable cause to search the defendant's vehicle. (*Strasburg, supra*, 148 Cal.App.4th at p. 1059, 56 Cal.Rptr.3d 306.) Yet section 11362.1, subdivision (c) now specifically states that lawful conduct involving marijuana—including possession of up to one ounce—shall not form the basis for a search.

Arguing that *Strasburg* and *Waxler* remain good law, the People urge us to follow *People v. Fews* (2018) 27 Cal.App.5th 553, 238 Cal.Rptr.3d 337 (*Fews*), a case we find readily distinguishable. In *Fews*, officers initiated a traffic stop of a car near an area of San Francisco known for drug sales and drug-related violence. (*Id.* at p. 557, 238 Cal.Rptr.3d 337.) The driver quickly got out of the vehicle and reached through the open door to retrieve some items. Defendant, the passenger, remained seated but was seen "making 'furtive movements.' " (*Ibid.*) When officers approached the driver, they noticed the odor of marijuana and saw a half-burnt cigar in the driver's hands that he confirmed contained marijuana. (*Ibid.*) The officers searched both the driver and the defendant, as well as the vehicle, and discovered a firearm in the defendant's pocket. (*Id.* at p. 558, 238 Cal.Rptr.3d 337.)

Affirming the denial of the defendant's suppression motion, the *Fews* court found "no compelling reason to depart from *Strasburg* and *Waxler*" on the facts presented. (*Fews*, *supra*, 27 Cal.App.5th at p. 562, 238 Cal.Rptr.3d 337.) It rejected the defendant's argument that the legalization of marijuana meant it was no longer contraband. (*Id.* at p. 563, 238 Cal.Rptr.3d 337.) As the court explained, Health and Safety Code, section 11362.1, subdivision (c) only applies to conduct deemed *lawful* under that section, which does not include "[d]riving a motor vehicle on public highways under the influence of any drug (see Veh. Code, § 23152, subd. (f)) or while in possession of an open container of marijuana (Veh. Code, § 23222, subd. (b)(1) ...." (*Fews*, at p. 563, 238 Cal.Rptr.3d 337.) Testimony that the officers smelled recently burned marijuana and saw a half-burnt cigar containing marijuana supported a reasonable inference that the driver was illegally operating a vehicle under the influence of marijuana or, at the very least, driving while in possession of an open container of marijuana. Because neither would be *lawful* under section 11362.1, the defendant could not rely on the "not contraband" designation of section 11362.2, subdivision (c) to avoid the holding in *Waxler*. (*Fews*, at p. 563, 238 Cal.Rptr.3d 337.)

***866** Whatever the merits of the *Fews* analysis,[8] the facts here present a very different ****523** scenario. Officer Robles did not smell the odor of burnt marijuana—suggesting the possibility of driving under the influence—and there was no evidence of marijuana in an open container in Lee's car. Indeed, Robles conceded there was nothing illegal about the small amount of marijuana in Lee's pocket. As such, the reasoning used by *Fews* to rely on *Strasburg* and *Waxler* does not apply. In addition, the other factors surrounding the *Fews* search, such as the locale, odd behavior of the driver, and "furtive movements" of the defendant provided a much stronger basis for probable cause than the facts surrounding Officer Robles's search of the Cadillac.

Consistent with the directive of section 11362.1, subdivision (c), Lee's possession of a small and legal amount of marijuana provides scant support for an inference that his car contained contraband. The other evidence relied on by the People adds little to the calculus. Like his possession of a legal amount of marijuana, Lee's admission that he delivers medical marijuana is not particularly significant in the absence of evidence that his delivery business was illegal. The cash found in Lee's pocket and in the center console of the car might be of significance if it suggested illegal drug sales. But we do not know exact amount or the denominations of the bills —only that the total was between $100 and $200 and that the denominations may have included $1, $5, $10, and $20 bills. Finally, Officer Robles's testimony that Lee "tensed up" as he was handcuffed hardly seems an unusual reaction for someone being detained and escorted to the back of a police car. More significantly, the trial judge questioned Robles's credibility, and we are bound to draw all reasonable inferences in support of the court's order granting the suppression motion.[9]

Considering the facts in the light most favorable to the court's order, even the totality of the circumstances falls well short of establishing probable cause to search the Cadillac. Those circumstances simply were not enough to ***867** support the " 'fair probability that contraband or evidence of a crime will be found.' " (*Alabama*, *supra*, 496 U.S. at p. 330, 110 S.Ct. 2412.)

2. *Officer Robles Did Not Conduct a Valid Inventory Search.*

Inventory searches are a well-defined exception to the Fourth Amendment's warrant requirement. (*Colorado v. Bertine* (1987) 479 U.S. 367, 371, 107 S.Ct. 738, 93 L.Ed.2d 739.) When a vehicle is impounded or otherwise in lawful police custody, an officer may conduct a warrantless search aimed at securing or protecting ****524** the vehicle and its contents. (*Opperman*, *supra*, 428 U.S. at p. 373, 96 S.Ct. 3092.) "The policies behind the warrant requirement are not implicated in an inventory search [citation], nor is the related concept of probable cause." (*Colorado v. Bertine*, at p. 371, 107 S.Ct. 738.)

To determine whether a warrantless search is properly characterized as an inventory search, "we focus on the purpose of the impound rather than the purpose of the inventory." (*People v. Aguilar* (1991) 228 Cal.App.3d 1049, 1053, 279 Cal.Rptr. 246 (*Aguilar*).) "The decision to impound the vehicle must be justified by a community caretaking function 'other than suspicion of evidence of criminal activity' [citation] because inventory searches are 'conducted in the absence of probable cause' [citation]." (*Torres*, *supra*, 188 Cal.App.4th at p. 787, 116 Cal.Rptr.3d 48.) For example, impounding serves a community caretaking function when a vehicle is parked illegally, blocks traffic or passage, or stands at risk of theft or vandalism. (*Id.* at p. 790, 116 Cal.Rptr.3d 48; *People v. Williams* (2006) 145 Cal.App.4th 756, 762–763, 52 Cal.Rptr.3d 162 (*Williams*).) Also relevant to the caretaking inquiry is whether someone other than the defendant could remove the car to a safe location. (*Torres*, at p. 790, 116 Cal.Rptr.3d 48.)

The absence of a proper community caretaking function suggests an impound is a pretext to investigate without probable cause, a purpose which is inconsistent with an inventory search. (*Torres*, *supra*, 188 Cal.App.4th at p. 788, 116 Cal.Rptr.3d 48.) Officers may not use an inventory search as "a ruse for a general rummaging in order to discover incriminating evidence." (*Florida v. Wells* (1990) 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1.) Unlike the probable cause determination, which rests solely on an objective standard, the inventory search exception evaluates both the objective reasonableness of the impound decision and the subjective intent of the impounding officer to determine whether the decision to impound was "motivated by an improper investigatory purpose." (*Torres*, at p. 791, 116 Cal.Rptr.3d 48.) Such purpose renders a decision to impound and the subsequent inventory search unlawful under the Fourth Amendment. (*Aguilar*, *supra*, 228 Cal.App.3d at p. 1053, 279 Cal.Rptr. 246.)

Officer Robles's search of the Cadillac is similar to the search in *Torres*. There, a deputy searched the defendant's person following a traffic stop after ***868** he admitted not having a driver's license. (*Torres*, *supra*, 188 Cal.App.4th at p. 780, 116 Cal.Rptr.3d 48.) This search yielded four cell phones and $965. (*Ibid.*) At that point the deputy decided to impound the defendant's truck and soon after performed a search in which he discovered 12 ounces of methamphetamine and evidence of sales. (*Ibid.*) The deputy conceded "he had decided to impound the truck 'in order to facilitate an inventory search' " and that he was not the one who had filled out the required inventory search form. (*Id.* at pp. 781, 782, 116 Cal.Rptr.3d 48.) The appellate court found the impound decision and subsequent inventory search unreasonable and reversed the trial court's denial of the defendant's motion to set aside the information. (*Id.* at pp. 789, 793, 116 Cal.Rptr.3d 48.) This conclusion turned on the apparent investigatory motive of the deputy and the absence of a community caretaking function for impounding the vehicle; "[t]he prosecution failed to show the truck was illegally parked, at an enhanced risk of vandalism, impeding traffic or pedestrians, or could not be driven away by someone other than defendant." (*Id.* at pp. 789–790, 116 Cal.Rptr.3d 48.)

Like the prosecution in *Torres*, the People here failed to show that the ****525** decision to impound Lee's car served any sort of community caretaking function. The car was parked in or alongside an apartment complex. It was not blocking a roadway, the sidewalk, or a driveway.[10] Although both Lee and his passenger were unable to drive the car (as neither had a valid license), Lee offered to have someone else come pick it up so it would not need to be impounded. Robles rejected the offer without explanation, saying simply, "That's not going to work." On these facts, the trial court properly concluded that the impound served no community caretaking function.

In addition, ample evidence supports the trial court's finding that the impound and purported inventory search were a pretext to look for incriminating evidence. Robles repeatedly asked Lee and passenger Michael if there was anything *illegal* in the car, as opposed to whether there were valuables or other items in the car he needed to inventory. Robles told Michael he would be released and free to go if nothing *illegal* was found in the car. And he denied Lee's request to remove some of his personal belongings before the car was searched.

***869** Video from Robles's body-worn camera supports the inference that his motive was to investigate criminal activity, not protect private property. Rather than search areas where someone might normally keep valuables, he examined places where illegal items might be stashed, such as the underside of the backseat. Robles's testimony that in his experience people often keep valuables in such places does not change our view that the typical person does not. More importantly, the trial judge questioned Robles's veracity and Robles admitted that he searched underneath the backseat because it is a common place to hide illegal items. In their totality, these facts provide substantial evidence to support the trial court's finding that the focus of Robles's search was finding incriminating evidence.[11] This motivation is inconsistent with an inventory search. (*Torres*, *supra*, 188 Cal.App.4th at p. 789, 116 Cal.Rptr.3d 48.)

The People point to Vehicle Code provisions (*ante*, fn. 6) and local police procedures as authorizing Robles to impound Lee's vehicle and conduct an inventory search. But the fact that an inventory search is *authorized* is not determinative of the search's constitutionality. Indeed, "[i]nventory search jurisprudence *presumes* some objectively reasonable basis supports the impounding." (*Torres*, *supra*, 188 Cal.App.4th at p. 791, 116 Cal.Rptr.3d 48.) Thus, "statutory authorization does not, in and of itself, determine the constitutional reasonableness of the seizure." (*Williams*, *supra*, 145 Cal.App.4th at p. 762, 52 Cal.Rptr.3d 162; *id.* at pp. 762–763, 52 Cal.Rptr.3d 162 [while officer had statutory authority to impound defendant's vehicle, the impound served no community caretaking function where the car was parked legally by the curb in a residential area and was not blocking traffic or ****526** access; therefore, officer's vehicle search was unconstitutional].) Although Robles had statutory authority to impound Lee's car after apprehending him for driving on a suspended license (see Veh. Code, §§ 14602.6, subd. (a)(1), 22651, subd. (p)), that does not automatically render any impound and subsequent inventory search constitutionally proper. Substantial evidence supports the trial court's finding that Robles's decision to impound Lee's vehicle served no valid community caretaking function. We accordingly conclude that the search of Lee's vehicle cannot be justified by the inventory search exception to the Fourth Amendment's warrant requirement.

***870** DISPOSITION

The order granting Lee's motion to suppress evidence obtained from the unconstitutional search of his car is affirmed.

Benke, Acting P. J., and Aaron, J., concurred.

All Citations

40 Cal.App.5th 853, 253 Cal.Rptr.3d 512, 19 Cal. Daily Op. Serv. 9818, 2019 Daily Journal D.A.R. 9528

Footnotes

1 A substantial part of the factual background is based on video evidence provided by a body camera worn by Officer Robles.

2 Lee and Michael H. were the only individuals in the car. We refer to Lee's passenger by his first name and last initial, intending no disrespect.

3 The amount of cash in Lee's pocket was later determined to be between $100 to $200 in United States bills. The audio from Robles's body worn camera suggests it was in $1 and $5 denominations, but the testimony of investigating officer Detective Steven Skinner at the preliminary hearing states the money found was in $5, $10, and $20 denominations. It is unclear whether Detective Skinner was referring to all the money found during the patdown search and subsequent vehicle search or only to cash later found in the vehicle. The record does not indicate how much money was found in the vehicle.

4 Robles thought he heard something about a "bag." Lee and Michael told Robles later that when Lee leaned into the car, he had asked Michael to grab Lee's phone.

5 It was later determined that the car was not owned by Lee.

6 The Vehicle Code permits an officer to impound a car when a person is found to be driving with a suspended license. (Veh. Code, § 14602.6, subd. (a)(1) [officer may immediately arrest a person found driving with a suspended license and cause the removal and seizure of the vehicle]; Veh. Code, § 22651, subd. (p) [officer may remove a vehicle "[i]f the peace officer issues the driver of [the] vehicle a notice to appear for violation of [Veh. Code] Section 12500" which requires a person to have a valid driver's license to drive upon a highway].) Lee was neither arrested nor issued a citation for driving with a suspended license.

7 Subsequent statutory references are to the Health and Safety Code, unless otherwise noted. We continue to refer to the code by name as appropriate for clarity.

8 There may be an analytic difference between evidence of illegal activity—impaired driving or violation of the open container law—and whether that evidence suggests that contraband will be found in the vehicle, which is the critical issue in establishing probable cause to conduct a search.

9 The People acknowledge that the trial court questioned Robles's "veracity" based on his "inconsistent statements" and being "impeached in certain part of his testimony." But they maintain the court made no "specific" or "material factual findings regarding his testimony." The argument misses the point. Our deference to the trial court's resolution of factual questions extends not merely to specific or express factual findings, but to implied findings as well. (*People v. Woods* (1999) 21 Cal.4th 668, 673, 88 Cal.Rptr.2d 88, 981 P.2d 1019.) It was for that court to listen to Robles's testimony about Lee "tensing up," judge his credibility, and draw whatever reasonable inferences it chose to from the statement. (See *People v. Lawler* (1973) 9 Cal.3d 156, 160, 107 Cal.Rptr. 13, 507 P.2d 621.) We are left to resolve all factual conflicts in a manner most favorable to and supportive of the trial court's decision to grant the motion to suppress. (See *People v. Martin* (1973) 9 Cal.3d 687, 692, 108 Cal.Rptr. 809, 511 P.2d 1161.)

10 In their opening brief the People claimed there was a sign visible in the video footage suggesting that Lee's Cadillac was improperly parked in a private parking lot. In their reply brief, however, they concede no such sign is visible. Moreover, Officer Robles never testified this was a reason he decided to impound the vehicle, and it would in any event not explain Robles's refusal to allow Lee to arrange for someone to pick up the car.

11 We also note that Robles did not fill out or have with him the impound inventory ARJIS-11 form when he conducted the search of Lee's car. Nor did he assist the officer who later performed an inventory search and filled out the required form. These facts further suggest that the motivation behind Robles's search was to investigate, not to inventory. (See *People v. Wallace* (2017) 15 Cal.App.5th 82, 92–93, 222 Cal.Rptr.3d 795.)

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96 S.Ct. 3092
Supreme Court of the United States

SOUTH DAKOTA, Petitioner,
v.
Donald OPPERMAN.

No. 75-76.
|
Argued March 29, 1976.
|
Decided July 6, 1976.

Synopsis

Defendant was convicted before the District County Court, Second Judicial District, Clay County, South Dakota, of possession of less than one ounce of marijuana, and he appealed. The South Dakota Supreme Court, 228 N.W.2d 152, reversed, and certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that routine inventory search of defendant's locked automobile, which had been lawfully impounded for multiple violations of municipal parking ordinances, did not involve an "*unreasonable*" search in violation of the Fourth Amendment, especially since inventory was prompted by presence in plain view of a number of valuables inside the vehicle and there was no suggestion that the procedure utilized, which procedure is standard throughout the country, was a pretext concealing investigatory police motive and that once the officer was lawfully inside the vehicle to secure the personal property in plain view it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the vehicle and in which the subject marijuana was discovered.

Reversed and remanded.

Mr. Justice Powell filed concurring opinion.

Mr. Justice Marshall filed a dissenting opinion in which Mr. Justice Brennan and Mr. Justice Stewart joined.

Mr. Justice White filed dissenting statement.

****3094 *364** *Syllabus*[*]

After respondent's car had been impounded for multiple parking violations the police, following standard procedures, inventoried the contents of the car. In doing so they discovered marihuana in the glove compartment, for the possession of which respondent was subsequently arrested. His motion to suppress the evidence yielded by the warrantless inventory search was denied, and respondent was thereafter convicted. The State Supreme Court reversed, concluding that the evidence had been obtained in violation of the Fourth Amendment as made applicable to the States by the Fourteenth. *Held:* The police procedures followed in this case did not involve an "unreasonable" search in violation of the ****3095** Fourth Amendment. The expectation of privacy in one's automobile is significantly less than that relating to one's home or office, *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325. When vehicles are impounded, police routinely follow caretaking procedures by securing and inventorying the cars' contents. These procedures have been widely sustained as reasonable under the Fourth Amendment. This standard practice was followed here, and there is no suggestion of any investigatory motive on the part of the police. Pp. 3095-3100.

S.D., 228 N.W.2d 152, reversed and remanded.

Attorneys and Law Firms

William J. Janklow, Pierre, S. D., for petitioner.

Robert C. Ulrich, Vermillion, S. D., for respondent, pro hac vice, by special leave of Court.

Opinion

***365** Mr. Chief Justice BURGER delivered the opinion of the Court.

We review the judgment of the Supreme Court of South Dakota, holding that local police violated the Fourth Amendment to the Federal Constitution, as applicable to the States under the Fourteenth Amendment, when they conducted a routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances.

(1)

Local ordinances prohibit parking in certain areas of downtown Vermillion, S. D., between the hours of 2 a. m. and 6 a. m. During the early morning hours of December

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10, 1973, a Vermillion police officer observed respondent's unoccupied vehicle illegally parked in the restricted zone. At approximately 3 a. m., the officer issued an overtime parking ticket and placed it on the car's windshield. The citation warned:

"Vehicles in violation of any parking ordinance may be towed from the area."

At approximately 10 o'clock on the same morning, another ***366** officer issued a second ticket for an overtime parking violation. These circumstances were routinely reported to police headquarters, and after the vehicle was inspected, the car was towed to the city impound lot.

From outside the car at the impound lot, a police officer observed a watch on the dashboard and other items of personal property located on the back seat and back floorboard. At the officer's direction, the car door was then unlocked and, using a standard inventory form pursuant to standard police procedures, the officer inventoried the contents of the car, including the contents of the glove compartment which was unlocked. There he found marihuana contained in a plastic bag. All items, including the contraband, were removed to the police department for safekeeping.[1] During the late afternoon of December 10, respondent appeared at the police department to claim his property. The marihuana was retained by police.

Respondent was subsequently arrested on charges of possession of marihuana. His motion to suppress the evidence yielded by ****3096** the inventory search was denied; he was convicted after a jury trial and sentenced to a fine of $100 and 14 days' incarceration in the county jail. On appeal, the Supreme Court of South Dakota reversed ***367** the conviction. 228 N.W.2d 152. The court concluded that the evidence had been obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. We granted certiorari, 423 U.S. 923, 96 Ct. 264, 46 L.Ed.2d 248 (1975), and we reverse.

(2)

This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are "effects" and thus within the reach of the Fourth Amendment, *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S.Ct. 2523, 2527, 37 L.Ed.2d 706 (1973), warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not. *Cardwell v. Lewis*, 417 U.S. 583, 589, 94 S.Ct. 2464, 2468, 41 L.Ed.2d 325 (1974); *Cady v. Dombrowski*, *supra*, 413 U.S., at 439-440, 93 S.Ct. at 2527; *Chambers v. Maroney*, 399 U.S. 42, 48, 90 S.Ct. 1975, 1979, 26 L.Ed.2d 419 (1970).

The reason for this well-settled distinction is twofold. First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. *Carroll v. United States*, 267 U.S. 132, 153-154, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Coolidge v. New Hampshire*, 403 U.S. 443, 459-460, 91 S.Ct. 2022, 2034, 29 L.Ed.2d 564 (1971). But the Court has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction. *Chambers v. Maroney*, *supra*, 399 U.S., at 51-52, 90 S.Ct. at 1981; *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.[2] In discharging their varied responsibilities ***368** for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. *Cady v. Dombrowski*, *supra*, 413 U.S. at 442, 93 S.Ct. at 2528. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel. Only two Terms ago, the Court noted:

"One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell v. Lewis*, *supra*, 417 U.S., at 590, 94 S.Ct. at 2469.

****3097** In the interests of public safety and as part of what the Court has called "community caretaking functions,"

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Cady v. Dombrowski, *supra*, 413 U.S. at 441, 93 S.Ct. at 2528, automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities.Police ***369** will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic.[3] The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody, *United States v. Mitchell*, 458 F.2d 960, 961 (CA9 1972); the protection of the police against claims or disputes over lost or stolen property, *United States v. Kelehar*, 470 F.2d 176, 178 (CA5 1972); and the protection of the police from potential danger, *Cooper v. California*, *supra*, 386 U.S., at 61-62, 87 S.Ct., at 790. The practice has been viewed as essential to respond to incidents of theft or vandalism. See *Cabbler v. Commonwealth*, 212 Va. 520, 522, 184 S.E.2d 781, 782 (1971), cert. denied, 405 U.S. 1073, 92 S.Ct. 1501, 31 L.Ed.2d 807 (1972); *Warrix v. State*, 50 Wis.2d 368, 376, 184 N.W.2d 189, 194 (1971). In addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned.

These caretaking procedures have almost uniformly been upheld by the state courts, which by virtue of the localized nature of traffic regulation have had considerable occasion to deal with the issue.[4] Applying the ***370** Fourth Amendment standard of "reasonableness,"[5] the state courts have overwhelmingly concluded that, even if an inventory is characterized as a "search,"[6] ****3098** the ***371** intrusion is constitutionally permissible. See, *e. g.*, *City of St. Paul v. Myles*, 298 Minn. 298, 300-301, 218 N.W.2d 697, 699 (1974); *State v. Tully*, 166 Conn. 126, 136, 348 A.2d 603, 609 (1974); *People v. Trusty*, 183 Colo. 291, 292-297, 516 P.2d 423, 425-426 (1973); *People v. Sullivan*, 29 N.Y.2d 69, 73, 323 N.Y.S.2d 945, 948, 272 N.E.2d 464, 466 (1971); *Cabbler v. Commonwealth*, *supra*; *Warrix v. State*, *supra*; *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372, cert. denied, 399 U.S. 912, 90 S.Ct. 2211, 26 L.Ed.2d 568 (1970); *State v. Criscola*, 21 Utah 2d 272, 444 P.2d 517 (1968); *State v. Montague*, 73 Wash.2d 381, 438 P.2d 571 (1968); *People v. Clark*, 32 Ill.App.3d 898, 336 N.E.2d 892 (1975); *State v. Achter*, 512 S.W.2d 894 (Mo.Ct.App.1974); *Bennett v. State*, 507 P.2d 1252 (Okl.Cr.App.1973); *People v. Willis*, 46 Mich.App. 436, 208 N.W.2d 204 (1973); *State v. All*, 17 N.C.App. 284, 193 S.E.2d 770, cert. denied, 414 U.S. 866, 94 S.Ct. 51, 38 L.Ed.2d 85 (1973); *Godbee v. State*, 224 So.2d 441 (Fla.Dist.Ct.App.1969). Even the seminal state decision relied on by the South Dakota Supreme Court in reaching the contrary result, *Mozzetti v. Superior Court*, 4 Cal.3d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971), expressly approved police caretaking activities resulting in the securing of property within the officer's plain view.

The majority of the Federal Courts of Appeals have likewise sustained inventory procedures as reasonable police intrusions. As Judge Wisdom has observed:

"[W]hen the police take custody of any sort of container [such as] an automobile . . . it is reasonable to search the container to itemize the property to be held by the police. [This reflects] the underlying principle that the fourth amendment proscribes only *unreasonable* searches." *United States v. Gravitt*, 484 F.2d 375, 378 (CA5 1973), cert. denied, 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 761 (1974) (emphasis in original).

***372** See also *Cabbler v. Superintendent*, 528 F.2d 1142 (CA4 1975), cert. pending, No. 75-1463; *Barker v. Johnson*, 484 F.2d 941 (CA6 1973); *United States v. Mitchell*, 458 F.2d 960 (CA9 1972); *United States v. Lipscomb*, 435 F.2d 795 (CA5 1970), cert. denied, 401 U.S. 980, 91 S.Ct. 1213, 28 L.Ed.2d 331 (1971); *United States v. Pennington*, 441 F.2d 249 (CA5), cert. denied, 404 U.S. 854, 92 S.Ct. 97, 30 L.Ed.2d 94 (1971); *United States v. Boyd*, 436 F.2d 1203 (CA5 1971); *Cotton v. United States*, 371 F.2d 385 (CA9 1967). Accord, *Lowe v. Hopper*, 400 F.Supp. 970, 976-977 (SD Ga.1975); *United States v. Spitalieri*, 391 F.Supp. 167, 169-170 (ND Ohio 1975); *United States v. Smith*, 340 F.Supp. 1023 (Conn.1972); *United States v. Fuller*, 277 F.Supp. 97 (DC 1967), conviction aff'd, 139 U.S.App.D.C. 375, 433 F.2d 533 (1970). These cases have recognized that standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration, *United States v. Pennington*, *supra*, at 251, as well as a place for the temporary storage of valuables.

(3)

The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures ****3099** are reasonable. In the first such case, Mr. Justice Black made plain the nature of the inquiry before us:

"But the question here is not whether the search was *authorized* by state law. The question is rather whether the search was *reasonable* under the Fourth Amendment." *Cooper v. California*, 386 U.S. at 61, 87 S.Ct., at 790 (emphasis added).

And, in his last writing on the Fourth Amendment, Mr. Justice Black said:

"[T]he Fourth Amendment does not require that every search be made pursuant to a warrant. It ***373** prohibits only '*unreasonable* searches and seizures.' The relevant test *is not the reasonableness of the opportunity to procure a warrant,* but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts." *Coolidge v. New Hampshire*, 403 U.S., at 509-510, 91 S.Ct. 2022, 2059, 29 L.Ed.2d 564 (concurring and dissenting) (emphasis added).

In applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents. In *Cooper* v. California, supra, the Court upheld the inventory of a car impounded under the authority of a state forfeiture statute. Even though the inventory was conducted in a distinctly criminal setting[7] and carried out a week after the car had been impounded, the Court nonetheless found that the car search, including examination of the glove compartment where contraband was found, was reasonable under the circumstances. This conclusion was reached despite the fact that no warrant had issued and probable cause to search for the contraband in the vehicle had not been established. The Court said in language explicitly applicable here:

"It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U.S., at 61-62,[8] 87 S.Ct. at 791.

***374** In the following Term, the Court in *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), upheld the introduction of evidence, seized by an officer who, after conducting an inventory search of a car and while taking means to safeguard it, observed a car registration card lying on the metal stripping of the car door. Rejecting the argument that a warrant was necessary, the Court held that the intrusion was justifiable since it was "taken to protect the car while it was in police custody." *Id.*, at 236, 88 S.Ct. at 993.[9]

Finally, in *Cady v. Dombrowski*, *supra*, The Court upheld a warrantless search of an automobile towed to a private garage even ****3100** though no probable cause existed to believe that the vehicle contained fruits of a crime. The sole justification for the warrantless incursion was that it was incident to the caretaking function of the local police to protect the community's safety. Indeed, the protective search was instituted solely because the local police "were under the impression" that the incapacitated driver, a Chicago police officer, was required to carry his service revolver at all times; the police had reasonable grounds to believe a weapon might be in the car, and thus available to vandals. 413 U.S., at 436, 93 S.Ct. at 2525. The Court carefully noted that the protective search was ***375** carried out in accordance with *standard procedures* in the local police department, *ibid.*, a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function. See *United States v. Spitalieri*, 391 F.Supp., at 169. In reaching this result, the Court in *Cady* distinguished *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), on the grounds that the holding, invalidating a car search conducted after a vagrancy arrest, "stands only for the proposition that the search challenged there could not be justified as one incident to an arrest." 413 U.S., at 444, 93 S.Ct. at 2529. *Preston*therefore did not raise the issue of the constitutionality of a protective inventory of a car lawfully within police custody.

The holdings in *Cooper*, *Harris*, and *Cady* point the way to the correct resolution of this case. None of the three cases, of course, involves the precise situation presented here; but, as in all Fourth Amendment cases, we are obliged to look to all the facts and circumstances of this case in light of the principles set forth in these prior decisions.

"[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case . . . ." *Cooper v. California*, 386 U.S., at 59, 87 S.Ct., at 790.

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The Vermillion police were indisputably engaged in a caretaking search of a lawfully impounded automobile. Cf. *United States v. Lawson*, 487 F.2d 468, 471 (CA8 1973). The inventory was conducted only after the car had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of ***376** valuables inside the car. As in *Cady*,there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.[10]

On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not "unreasonable" under the Fourth Amendment.

The judgment of the South Dakota Supreme Court is therefore reversed, and the ****3101** case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice POWELL, concurring.

While I join the opinion of the Court, I add this opinion to express additional views as to why the search conducted in this case is valid under the Fourth and Fourteenth Amendments. This inquiry involves two distinct questions: (i) whether routine inventory searches are impermissible, and (ii) if not, whether they must be conducted pursuant to a warrant.

***377** I

The central purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. See, *e. g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2573, 45 L.Ed.2d 607 (1975); *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967). None of our prior decisions is dispositive of the issue whether the Amendment permits routine inventory "searches"[1] of automobiles.[2] Resolution of this ***378** question requires a weighing of the governmental and societal interests advanced to justify such intrusions against the constitutionally protected interest of the individual citizen in the privacy of his effects. *United States v. Martinez-Fuerte*, 428 U.S. 543, at 555, 96 S.Ct. 3074, at 3081, 49 L.Ed.2d 1116; *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 878-879, 95 S.Ct. at 2573 (1975); *United States v. Ortiz*, 422 U.S. 891, 892, 95 S.Ct. 2585, 2573, 45 L.Ed.2d 623 (1975); *Cady v. Dombrowski*, 413 U.S. 433, 447-448, 93 S.Ct. 2523, 2531, 37 L.Ed.2d 706 (1973); *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968). Cf. *Camara v. Municipal Court*, *supra*, 387 U.S. at 534-535, 87 S.Ct. at 1734. As noted in the Court's opinion, see *ante* at 3096, three interests generally have been advanced in support of inventory searches: (i) protection of the police from danger; (ii) protection of the police against claims and disputes over lost or stolen property; and (iii) protection of the owner's property while it remains in police custody.

Except in rare cases, there is little danger associated with impounding unsearched automobiles. But the occasional danger that may exist cannot be discounted entirely. ****3102** See *Cooper v. California*, 386 U.S. 58, 61-62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967). The harmful consequences in those rare cases may be great, and there does not appear to be any effective way of identifying in advance those circumstances or classes of automobile impoundments which represent a greater risk. Society also has an important interest in minimizing the number of false claims filed against police since they may diminish the community's respect for law enforcement generally and lower department morale, thereby impairing the effectiveness of the police.[3] It ***379** is not clear, however, that inventories are a completely effective means of discouraging false claims, since there remains the possibility of accompanying such claims with an assertion that an item was stolen prior to the inventory or was intentionally omitted from the police records.

The protection of the owner's property is a significant interest for both the policeman and the citizen. It is argued that an inventory is not necessary since locked doors and rolled-up windows afford the same protection that the contents of a parked automobile normally enjoy.[4] But many owners might leave valuables in their automobile temporarily that they would not leave there unattended for the several days that police custody may last. There is thus a substantial gain in security if automobiles were inventoried and valuable items removed for storage. And, while the same security could be attained by posting a guard at the storage lot, that alternative may be prohibitively expensive, especially for smaller jurisdictions.[5]

Against these interests must be weighed the citizen's interest in the privacy of the contents of his automobile. Although the expectation of privacy in an automobile is significantly less than the traditional expectation of privacy in an automobile is significantly less than the traditional expectation of privacy associated with the home, *United States v. Martinez-Fuerte*, 428 U.S., at 561–562, 96 S.Ct., at 3084; *United States v. Ortiz, supra*, 422 U.S., at 896 n. 2, 95 S.Ct., at 2588; see *Cardwell v. Lewis*, 417 U.S. 583, 590–591, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion), the unrestrained search ***380** of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances. But such a search is not at issue in this case. As the Court's opinion emphasizes, the search here was limited to an inventory of the unoccupied automobile and was conducted strictly in accord with the regulations of the Vermillion Police Department.[6] Upholding searches of this type provides no general license for the police to examine all the contents of such automobiles.[7]

****3103** I agree with the Court that the Constitution permits routine inventory searches, and turn next to the question whether they must be conducted pursuant to a warrant.

***381** II

While the Fourth Amendment speaks broadly in terms of "unreasonable searches and seizures,"[8] the decisions of this Court have recognized that the definition of "reasonableness" turns, at least in part, on the more specific dictates of the Warrant Clause. See *United States v. United States District Court*, 407 U.S. 297, 315, 92 S.Ct. 2125, 2135, 32 L.Ed.2d 752 (1972); *Katz v. United States*, 389 U.S. 347, 356, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *Camara v. Municipal Court*, 387 U.S., at 528, 87 S.Ct. at 1730. As the Court explained in *Katz v. United States*, *supra*, 389 U.S. at 357, 88 S.Ct. at 514, "[s]earches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' *Agnello v. United States*, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . ..' *Wong Sun v. United States*, 371 U.S. 471, 481-482, 83 S.Ct. 407, 414, 9 L.Ed.2d 441." Thus, although "[s]ome have argued that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable,' *United States v. Rabinowitz*, 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed. 653 (1950)," "[t]his view has not been accepted." *United States v. United States District Court*, *supra*, 407 U.S., at 315, and n. 16, 92 S.Ct., at 2136. See *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Except in a few carefully defined classes of cases, a search of private property without valid consent is "unreasonable" unless it has been authorized by a valid search warrant. See, *e. g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 269, 93 S.Ct. 2535, 2537, 37 L.Ed.2d 596 (1973); *Stoner v. California*, 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed.2d 856 (1964); ***382** *Camara v. Municipal Court, supra*, 387 U.S., at 528, 87 S.C at 1730; *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951); *Agnello v. United States*, 269 U.S. 20, 30, 46 S.Ct. 4, 10, 70 L.Ed. 145 (1925).

Although the Court has validated warrantless searches of automobiles in circumstances that would not justify a search of a home or office, *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), these decisions establish no general "automobile exception" to the warrant requirement. See *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964). Rather, they demonstrate that " 'for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars,' " *Cady v. Dombrowski*, *supra*, 413 U.S., at 439, 93 S.Ct. at 2527, quoting *Chambers v. Maroney*, *supra*, 399 U.S. at 52, 90 S.Ct. at 1981, a difference that may in some cases justify a warrantless search.[9]

****3104** The routine inventory search under consideration in this case does not fall within any of the established exceptions to the warrant requirement.[10] But examination of the interests which are protected when searches are ***383** conditioned on warrants issued by a judicial officer reveals that none of these is implicated here. A warrant may issue only upon "probable cause." In the criminal context the requirement of a warrant protects the individual's legitimate expectation of privacy against the overzealous police officer. "Its protection consists in requiring that those inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). See, *e. g.*, *United States v. United States District Court*, *supra*, 407 U.S. at 316-318, 92 S.Ct. at 2136. Inventory searches, however, are not conducted in order to discover evidence of crime. The officer does not make a discretionary determination to search based on a judgment that certain

conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate.

A related purpose of the warrant requirement is to prevent hindsight from affecting the evaluation of the reasonableness of a search. See *United States v. Martinez-Fuerte*, 428 U.S., at 565, 96 S.Ct., at 3086; cf. *United States v. Watson*, 423 U.S. 411, 455 n. 22, 96 S.Ct. 820, 843, 46 L.Ed.2d 598 (1976) (Marshall, J., dissenting). In the case of an inventory search conducted in accordance with standard police department procedures, there is no significant danger of hindsight justification. The absence of a warrant will not impair the effectiveness of post-search review of the reasonableness of a particular inventory search.

Warrants also have been required outside the context of a criminal investigation. In *Camara v. Municipal Court*, the Court held that, absent consent, a warrant was necessary to conduct an areawide building code inspection, ***384** even though the search could be made absent cause to believe that there were violations in the particular buildings being searched. In requiring a warrant the Court emphasized that "[t]he practical effect of [the existing warrantless search procedures had been] to leave the occupant subject to the discretion of the official in the field," since

"when [an] inspector demands entry, the occupant ha[d] no way of knowing whether enforcement of the municipal code involved require[d] inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself [was] acting under proper authorization." 387 U.S., at 532, 87 S.Ct. at 1732.

In the inventory search context these concerns are absent. The owner or prior occupant of the automobile is not present, nor, in many cases, is there any real likelihood that he could be located within a reasonable period of time. More importantly, no significant discretion is placed in the hands of the individual officer: he usually has no ****3105** choice as to the subject of the search or its scope.[11]

In sum, I agree with the Court that the routine inventory search in this case is constitutional.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN and Mr. Justice STEWART join, dissenting.

The Court today holds that the Fourth Amendment permits a routine police inventory search of the closed ***385** glove compartment of a locked automobile impounded for ordinary traffic violations. Under the Court's holding, such a search may be made without attempting to secure the consent of the owner and without any particular reason to believe the impounded automobile contains contraband, evidence, or valuables, or presents any danger to its custodians or the public.[1] Because I believe this holding to be contrary to sound elaboration of established Fourth Amendment principles, I dissent.

As Mr. Justice POWELL recognizes, the requirement of a warrant aside, resolution of the question whether an inventory search of closed compartments inside a locked automobile can ever be justified as a constitutionally "reasonable" search[2] depends upon a reconciliation of the owner's constitutionally protected privacy interests against governmental intrusion, and legitimate governmental interests furthered by securing the car and its contents. *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534-535, 536-537, 87 S.Ct. 1727, 1733, 18 L.Ed.2d 930 (1967). The Court fails clearly to articulate the reasons for its reconciliation of these interests in this case, but it is at least clear to me that the considerations ***386** alluded to by the Court, and further discussed by Mr. Justice POWELL, are insufficient to justify the Court's result in this case.

To begin with, the Court appears to suggest by reference to a "diminished" expectation of privacy, *ante*, at 3096, that a person's constitutional interest in protecting the integrity of closed compartments of his locked automobile may routinely be sacrificed to governmental interests requiring interference with that privacy that are less compelling than would be necessary to justify a search of similar scope of the person's home or office. This has never been the law. The Court correctly observes that some prior cases have drawn distinctions between automobiles and homes or offices in Fourth Amendment cases; but even as the Court's discussion makes clear, the reasons for distinction in those cases are not present here. Thus, *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), and *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), permitted certain probable-cause searches to be carried out without warrants in view of the exigencies created by the mobility of automobiles, but both decisions reaffirmed that the standard of probable cause necessary to authorize such a search was no less ****3106** than the standard applicable to

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search of a home or office. *Chambers*, *supra*, 399 U.S., at 51, 90 S.Ct., at 1981; *Carroll, supra*, 267 U.S., at 155-156, 45 S.Ct., at 286.[3] In other contexts the Court has recognized that automobile travel sacrifices some privacy interests to the publicity of plain view, *e. g.*, *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion); cf. *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). But this recognition, too, is inapposite here, for there is no question of plain view in ***387** this case.[4] Nor does this case concern intrusions of the scope that the Court apparently assumes would ordinarily be permissible in order insure the running safety of a car. While it may be that privacy expectations associated with automobile travel are in some regards less than those associated with a home or office, see *United States v. Martinez-Fuerte*, 428 U.S. 543, at 561-562, 96 S.Ct. 3074, at 3084, 49 L.Ed.2d 1116, it is equally clear that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away . . .," ***388** *Coolidge v. New Hampshire*, 403 U.S. 443, 461, 91 S.Ct. 2022, 2035, 29 L.Ed.2d 564 (1971).[5] Thus, we have recognized that "[a] *search*, even of an automobile, is a substantial invasion of privacy," *United States v. Ortiz*, 422 U.S. 891, 896, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623 (1975) (emphasis added), and accordingly our cases have consistently recognized that the nature and substantiality of interest required to justify a *search* of private areas of an automobile is no less than that necessary to justify an intrusion of similar scope into a home or office. See, *e. g.*, *United States v. Ortiz*, *supra*; *Almeida-Sanchez v. United States*, 413 U.S. 266, 269-270, 93 S.Ct. 2535, 2538, 37 L.Ed.2d 596 (1973); *Coolidge*, *supra*; *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221-222, 88 S.Ct. 1472, 1475, 20 L.Ed.2d 538 (1968); *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964).[6]

***389** The Court's opinion appears to suggest that its result may in any event be justified ****3107** because the inventory search procedure is a "reasonable" response to

"three distinct needs: the protection of the owner's property while it remains in police custody . . .; the protection of the police against claims or disputes over lost or stolen property . . .; and the protection of the police from potential danger." *Ante*, at 3096.[7]

This suggestion is flagrantly misleading, however, because the record of this case explicitly belies any relevance of the last two concerns. In any event it is my view that none of these "needs," separately or together, can suffice to justify the inventory search procedure approved by the Court.

First, this search cannot be justified in any way as a safety measure, for— though the Court ignores it—the sole purpose given by the State for the Vermillion police's inventory procedure was to secure Valuables, Record 75, 98. Nor is there any indication that the officer's search in this case was tailored in any way to safety concerns, or that ordinarily it is so circumscribed. Even aside from the actual basis for the police practice in this case, however, I do not believe that any blanket safety argument could justify a program of routine ***390** searches of the scope permitted here. As Mr. Justice POWELL recognizes, ordinarily "there is little danger associated with impounding unsearched automobiles," *ante,* at 3101.[8] ****3108** Thus, while the safety rationale may not be entirely discounted when it is actually relied upon, it surely cannot justify the search of every car upothe basis of undifferentiated possibility of harm; on the contrary, such an intrusion could ordinarily be justified only in those individual cases where the officer's inspection was prompted by specific circumstances indicating the possibility ***391** of a particular danger. See *Terry v. Ohio*, 392 U.S., at 21, 27, 88 S.Ct. at 1879; cf. *Cady v. Dombrowski*, 413 U.S. 433, 448, 93 S.Ct. 2523, 2531, 37 L.Ed.2d 706 (1973).

Second, the Court suggests that the search for valuables in the closed glove compartment might be justified as a measure to protect the police against lost property claims. Again, this suggestion is belied by the record, since— although the Court declines to discuss it—the South Dakota Supreme Court's interpretation of state law explicitly absolves the police, as "gratuitous depositors," from any obligation beyond inventorying objects in plain view and locking the car. 228 N.W.2d 152, 159 (1975),[9] Moreover, as Mr. Justice POWELL notes, Ante, at 3101, it may well be doubted that an inventory procedure would in any event work significantly to minimize the frustrations of false claims.[10]

Finally, the Court suggests that the public interest in protecting valuables that may be found inside a closed compartment of an impounded car may justify the inventory procedure. I recognize the genuineness of this governmental interest in protecting property from pilferage. But even if I assume that the posting of a guard would be fiscally impossible as an alternative means to ***392** the same protective end,[11] I cannot agree with the Court's conclusion. The Court's result authorizes—indeed it appears to require

—the routine search of nearly every[12] car impounded.[13] In my view, the Constitution does not permit such searches as a matter of routine; absent specific consent, such a search is permissible only in exceptional circumstances of particular necsity.

It is at least clear that any owner might prohibit the police from executing a protective search of his impounded car, since by hypothesis the inventory is conducted for the owner's benefit. Moreover, it is obvious that not everyone whose car is impounded ****3109** would want it to be searched. Respondent himself proves this; but ***393** one need not carry contraband to prefer that the police not examine one's private possessions. Indeed, that preference is the premise of the Fourth Amendment. Nevertheless, according to the Court's result the law may presume that each owner in respondent's position consents to the search. I cannot agree. In my view, the Court's approach is squarely contrary to the law of consent;[14] it ignores the duty, in the absence of consent, to analyze in each individual case whether there is a need to search a particular car for the protection of its owner which is sufficient to outweigh the particular invasion. It is clear to me under established principles that in order to override the absence of explicit consent, such a search must at least be conditioned upon the fulfillment of two requirements.[15] First, there must be specific cause to believe that a search of the scope to be undertaken is necessary in order to preserve the integrity of particular valuable property threatened by the impoundment: “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which . . . reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S., at 21, 88 S.Ct. at 1880.
Such a requirement of “specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence,” *id.*, at 21 n. 18, 88 S.Ct., at 1880, for “[t]he basic purpose of this ***394** Amendment, as recognized in countless decisions of this Court, is safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Camara v. Municipal Court*, 387 U.S., at 528, 87 S.Ct. at 1730. Cf. *United States v. Brignoni-Ponce*, 422 U.S. 873, 883-884, 95 S.Ct. 2574, 2588, 45 L.Ed.2d 607 (1975); *Cady v. Dombrowski*, 413 U.S., at 448, 93 S.Ct. at 2531; *Terry v. Ohio*, *supra*, 392 U.S., at 27, 88 S.Ct. at 1883. Second, even where a search might be appropriate, such an intrusion may only follow the exhaustion and failure of reasonable efforts under the circumstances to identify and reach the owner of the property in order to facilitate alternative means of security or to obtain his consent to the search, for in this context the right to refuse the search remains with the owner. Cf. *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).[16]

Because the record in this case shows that the procedures followed by the Vermillion police in searching respondent's car fall far short of these standards, in my view the search was impermissible and its fruits must be suppressed. First, so far as the record shows, the police in this case had no reason to believe that the glove compartment of the impounded car contained particular property of any substantial value. Moreover, the owner had apparently thought it adequate to protect whatever he left in the car overnight on the street in a business area simply to lock the car, and there is nothing in the record to show that the impoundment ***395** lot would prove a less secure location against pilferage,[17] cf. *Mozzetti* ****3110** *v. Superior Court,* 4 Cal.3d 699, 707, 94 Cal.Rptr. 412, 484 P.2d 84, 89 (1971), particularly when it would seem likely that the owner would claim his car and its contents promptly, at least if it contained valuables worth protecting.[18] Even if the police had cause to believe that the impounded car's glove compartment contained particular valuables, however, they made no effort to secure the owner's consent to the search. Although the Court relies, as it must, upon the fact that respondent was not present to make other arrangements for the re of his belongings, *ante*, at 3099, in my view that is not the end of the inquiry. Here the police readily ascertained the ownership of the vehicle, Record 98-99, yet they searched it immediately without taking any steps to locate respondent and procure his consent to the inventory or advise him to make alternative arrangements to safeguard his property, *id*., at 32, 72, 73, 79. Such a failure is inconsistent with the rationale that the inventory procedure is carried out for the benefit of the owner.

The Court's result in this case elevates the conservation of property interests—indeed mere possibilities of property interests—above the privacy and security interests ***396** protected by the Fourth Amendment. For this reason I dissent. On the remand it should be clear in any event that this Court's holding does not preclude a corary resolution of this case or others involving the same issues under any applicable state law. See *Oregon v. Hass*, 420 U.S. 714, 726, 95 S.Ct. 1215, 1223, 43 L.Ed.2d 570 (1975) (Marshall, J., dissenting).

Statement of Mr. Justice WHITE.

Although I do not subscribe to all of my Brother MARSHALL's dissenting opinion, particularly some aspects

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of his discussion concerning the necessity for obtaining the consent of the car owner, I agree with most of his analysis and conclusions and consequently dissent from the judgment of the Court.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 At respondent's trial, the officer who conducted the inventory testified as follows:

"Q. And why did you inventory this car?

"A. Mainly for safekeeping, because we have had a lot of trouble in the past of people getting into the impound lot and breaking into cars and stealing stuff out of them.

"Q. Do you know whether the vehicles that were broken into . . . were locked or unlocked?

"A. Both of them were locked, they would be locked." Record 74.

In describing the impound lot, the officer stated:

"A. It's the old county highway yard. It has a wooden fence partially around part of it, and kind of a dilapidated wire fence, a makeshift fence." *Id.*, at 73.

2 In *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), and *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967), the Court held that a warrant was required to effect an unconsented administrative entry into and inspection of private dwellings or commercial premises to ascertain health or safety conditions. In contrast, this procedure has never been held applicable to automobile inspections for safety purposes.

3 The New York Court of Appeals has noted that in New York City alone, 108,332 cars were towed away for traffic violations during 1969. *People v. Sullivan*, 29 N.Y.2d 69, 71, 323 N.Y.S.2d 945, 946, 272 N.E.2d 464, 465 (1971).

4 In contrast to state officials engaged in everyday caretaking functions:

"The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle." *Cady v. Dombrowski*, *supra*, 413 U.S. 433, 440, 93 S.Ct. 2523, 2527 (1973).

5 In analyzing the issue of reasonableness *vel non* the courts have not sought to determine whether a protective inventory was justified by "probable cause." The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. See generally Note, Warrantless Searches and Seizures of Automobiles, 87 Harv.L.Rev. 835, 850-851 (1974). The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.

In view of the noncriminal context of inventory searches, and the inapplicability in such a setting of the requirement of probable cause, courts have held—and quite correctly—that search warrants are not required, linked as the warrant requirement textually is to the probable-cause concept. We have frequently observed that the warrant requirement assures that legal inferences and conclusions as to probable cause will be drawn by a neutral magistrate unrelated to the criminal investigative-enforcement process. With respect to noninvestigative police inventories of automobiles lawfully within governmental custody, however, the policies underlying the warrant requirement, to which Mr. Justice POWELL refers, are inapplicable.

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6 Given the benign noncriminal context of the intrusion, see *Wyman v. James*, 400 U.S. 309, 317, 91 S.Ct. 381, 385, 27 L.Ed.2d 408 (1971), some courts have concluded that an inventory does not constitute a search for Fourth Amendment purposes. See *e. g.*, *People v. Sullivan*, *supra*, 29 N.Y.2d, at 77, 323 N.Y.S.2d, at 952, 272 N.E.2d, at 469; *People v. Willis*, 46 Mich.App. 436, 208 N.W.2d 204 (1973); *State v. Wallen*, 185 Neb. 44, 49-50, 173 N.W.2d 372, 376, cert. denied, 399 U.S. 912, 90 S.Ct. 2211, 26 L.Ed.2d 568 (1970). Other courts have expressed doubts as to whether the intrusion is classifiable as a search. *State v. All*, 17 N.C.App. 284, 286, 193 S.E.2d 770, 772, cert. denied, 414 U.S. 866, 94 S.Ct. 51, 38 L.Ed.2d 85 (1973). Petitioner, however, has expressly abandoned the contention that the inventory in this case is exempt from the Fourth Amendment standard of reasonableness. Tr. of Oral Arg. 5.

7 In *Cooper*, the owner had been arrested on narcotics charges, and the car was taken into custody pursuant to the state forfeiture statute. The search was conducted several months before the forfeiture proceedings were actually instituted.

8 There was, of course, no certainty at the time of the search that forfeiture proceedings would ever be held. Accordingly, there was no reason for the police to assume automatically that the the automobile would eventually be forfeited to the State. Indeed, as the California Court of Appeal stated, "[T]he instant record nowhere discloses that forfeiture proceedings were instituted in respect to defendant's car . . . ." *People v. Cooper*, 234 Cal.App.2d 587, 596, 44 Cal.Rptr. 483, 489 (1965). No reason would therefore appear to limit *Cooper* to an impoundment pursuant to a forfeiture statute.

9 The Court expressly noted that the legality of the inventory was not presented, since the evidence was discovered at the point when the officer was taking protective measures to secure the automobile from the elements. But the Court clearly held that the officer acted properly in opening the car for protective reasons.

10 The inventory was not unreasonable in scope. Respondent's motion to suppress in state court challenged the inventory only as to items inside the car not in plain view. But once the policeman was lawfully inside the car to secure the personal property in plain view, it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the car.

The "consent" theory advanced by the dissent rests on the assumption that the inventory is exclusively for the protection of the car owner. It is not. The protection of the municipality and public officers from claims of lost or stolen property and the protection of the public from vandals who might find a firearm, *Cady v. Dombrowski*, or as here, contraband drugs, are also crucial.

1 Routine inventories of automobiles intrude upon an area in which the private citizen has a "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Thus, despite their benign purpose, when conducted by government officials they constitute "searches" for purposes of the Fourth Amendment. See *Terry v. Ohio*, 392 U.S. 1, 18 n. 15, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968); *United States v. Lawson*, 487 F.2d 468 (CA8 1973); *Mozzetti v. Superior Court*, 4 Cal.3d 699, 709-710, 94 Cal.Rptr. 412, 484 P.2d 84, 90-91 (1971) (en banc). Cf. *Cardwell v. Lewis*, 417 U.S. 583, 591, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion).

2 The principal decisions relied on by the State to justify the inventory search in this case, *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); and *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), each relied in part on significant factors not found here. *Harris* only involved an application of the "plain view" doctrine. In *Cooper* the Court validated an automobile search that took place one week after the vehicle was impounded on the theory that the police had a possessory interest in the car based on a state forfeiture statute requiring them to retain it some four months until the forfeiture sale. See 386 U.S., at 61-62, 87 S.Ct. at 791. Finally, in *Cady* the Court held that the search of an automobile trunk "which the officer reasonably believed to contain a gun" was not unreasonable within the meaning of the Fourth and Fourteenth Amendments. 413 U.S., at 448, 93 S.Ct. at 2531. See also *id.*, at 436-437, 93 S.Ct. at 2526. The police in a typical inventory search case, however, will have no reasonable belief as to the particular automobile's contents. And, although the police in this case knew with certainty that there were items of personal property within the exposed interior of the car—*i. e.*, the watch on the dashboard—see *ante*, at 3095, this information alone did not, in the circumstances of this case, provide additional justification for the search of the closed console glove compartment in which the contraband was discovered.

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3 The interest in protecting the police from liability for lost or stolen property is not relvant in this case. Respondent's motion to suppress was limited to items inside the autombile not in plain view. And, the Supreme Court of South Dakota here held that the removal of objects in plain view, and the closing of windows and locking of doors, satisfied any duty the police department owed the automobile's owner to protect property in police possession. S.D., 228 N.W.2d 152, 159 (1975).

4 See *Mozzetti v. Superior Court, supra,* 4 Cal3d, at 709–710, 94 Cal.Rptr. 412, 484 P.2d, at 90–91.

5 See Note, Warrantless Searches and Seizures of Automobiles, 87 Harv.L.Rev. 835, 853 (1974).

6 A complete "inventory report" is required of all vehicles impounded by the Vermillion Police Department. The standard inventory consists of a survey of the vehicle's exterior—windows, fenders, trunk, and hood—apparently for damage, and its interior, to locate "valuables" for storage. As part of each inventory a standard report form is completed. The report in this case listed the items discovered in both the automobile's interior and the unlocked glove compartment. The only notation regarding the trunk was that it was locked. A police officer testified that all impounded vehicles are searched, that the search always includes the glove compartment, and that the trunk had not been searched in this case because it was locked. See Record 33–34, 73–79.

7 As part of their inventory search the police may discover materials such as letters or checkbooks that "touch upon intimate areas of an individual's personal affairs," and "reveal much about a person's activities, associations, and beliefs." *California Bankers Assn. v. Shultz*, 416 U.S. 21, 78–79, 94 S.Ct. 1494, 1525, 39 L.Ed.2d 812 (1974) (Powell, J., concurring). See also *Fisher v. United States*, 425 U.S. 391, 401 n. 7, 96 S.Ct. 1569, 1576, 48 L.Ed.2d 39 (1976). In this case the police found, *inter alia*, "miscellaneous papers," a checkbook, an installment loan book, and a social security status card. Record 77. There is, however, no evidence in the record that in carrying out their established inventory duties the Vermillion police do other than search for and remove for storage such property without examining its contents.

8 The Amendment provides that

"The 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

9 This difference turns primarily on the mobility of the automobile and the impracticability of obtaining a warrant in many circumstances, *e. g.*, *Carroll v. United States*, 267 U.S. 132, 153-154, 45 S.Ct. 280, 294, 69 L.Ed. 543 (1925). The lesser expectation of privacy in an automobile also is important. See *United States v. Ortiz*, 422 U.S. 891, 896 n. 2, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623 (1975); *Cardwell v. Lewis*, 417 U.S., at 590, 94 S.Ct. at 2469; *Almeida-Sanchez v. United States*, 413 U.S. 266, 279, 93 S.Ct. 2535, 2542, 37 L.Ed.2d 596 (1973) (Powell, J., concurring). See *Cady v. Dombrowski*, 413 U.S. at 441-442, 93 S.Ct. at 2528.

10 See, *e. g.*, *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Warden v. Hayden*, 387 U.S. 294, 298-300, 87 S.Ct. 1642, 1645, 18 L.Ed.2d 782 (1967); *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *Brinegar v. United States*, 338 U.S. 160, 174-177, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949); *Carroll v. United States*, *supra*, 267 U.S., at 153, 156, 45 S.Ct. at 283. See also *McDonald v. United States*, 335 U.S. 451, 454-456, 69 S.Ct. 191, 192, 93 L.Ed. 153 (1948); *United States v. Mapp*, 476 F.2d 67, 76 (CA2 1973) (listing then-recognized exceptions to warrant requirement: (i) hot pursuit; (ii) plain-view doctrine; (iii) emergency situation; (iv) automobile search; (v) consent; and (vi) incident to arrest).

11 In this case, for example, the officer who conducted the search testified that the offending automobile was towed to the city impound lot after a second ticket had been issued for a parking violation. The officer further testified that all vehicles taken to the lot are searched in accordance with a "standard inventory sheet" and "all items [discovered in the vehicles] are removed for safekeeping." Record 74. See n. 6, *supra.*

1 The Court does not consider, however, whether the police might open and search the glove compartment if it is locked, or whether the police might search a locked trunk or other compartment.

2 I agree with Mr. Justice POWELL's conclusion, ante, at 3100 n. 1, that, as petitioner conceded, Tr. of Oral Arg. 5, the examination of the closed glove compartment in this case is a "search." See *Camara v. Municipal Court*, 387 U.S. 523,

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530, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 (1967): “It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.” See also *Cooper v. California*, 386 U.S. 58, 61, 87 S.Ct. 788, 790, 17 L.Ed.2d 730 (1967), quoted in n. 5, *infra*. Indeed, the Court recognized in *Harris v. United States*, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968), that the procedure invoked here would constitute a search for Fourth Amendment purposes.

3 This is, of course, “probable cause in the sense of specific knowledge about a particular automobile.” *Almeida-Sanchez v. United States*, 413 U.S. 266, 281, 93 S.Ct. 2535, 2544, 37 L.Ed.2d 596 (1973) (Powell, J., concurring).

4 In its opinion below, the Supreme Court of South Dakota stated that in its view the police were constitutionally justified in entering the car to remove, list, and secure objects in plain view from the outside of the car. 228 N.W.2d 152, 158-159 (1975). This issue is not presented on certiorari here.

Contrary to the Court's assertion, however, *ante*, at 3099-3100, the search of respondent's car was not in any way “prompted by the presence in plain view of a number of valuables inside the car.” In fact, the record plainly states that every vehicle taken to the city impound lot was inventoried, Record 33, 74, 75, and that as a matter of “standard procedure,” “every inventory search” would involve entry into the car's closed glove compartment. *Id.*, at 43, 44. See also Tr. of Oral Arg. 7. In any case, as Mr. Justice POWELL recognizes, *ante*, at 3100 n. 2, entry to remove plain-view articles from the car could not justify a further search into the car's closed areas. Cf. *Chimel v. California*, 395 U.S. 752, 763, 764-768, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969). Despite the Court's confusion on this point—further reflected by its discussion of *Mozzetti v. Superior Court*, 4 Cal.3d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971), *ante* at 3097, and its reliance on state and lower federal-court cases approving nothing more than inventorying of plain-view items, *e. g.*, *Barker v. Johnson*, 484 F.2d 941 (CA6 1973); United States v. Mitchell, 458 F.2d 960 (CA9 1972); *United States v. Fuller*, 277 F.Supp. 97 (DC 1967), conviction aff'd, 139 U.S.App.D.C. 375, 433 F.2d 533 (1970); *State v. Tully*, 166 Conn. 126, 348 A.2d 603 (1974); *State v. Achter*, 512 S.W.2d 894 (Mo.Ct.App.1974); *State v. All*, 17 N.C.App. 284, 193 S.E.2d 770, cert. denied, 414 U.S. 866, 94 S.Ct. 51, 38 L.Ed.2d 85 (1973)—I must conclude that the Court's holding also permits the intrusion into a car and its console even in the absence of articles in plain view.

5 Moreover, as the Court observed in *Cooper v. California*, *supra*, 386 U.S., at 61, 87 S.Ct. at 791: “ ‘[L]awful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it.’ ”

6 It would be wholly unrealistic to say that there is no reasonable and actual expectation in maintaining the privacy of closed compartments of a locked automobile, when it is customary for people in this day to carry their most personal and private papers and effects in their automobiles from time to time. Cf. *Katz v. United States*, 389 U.S. 347, 352, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (opinion of the Court; *id.*, at 361, 88 S.Ct., at 516 (Harlan, J., concurring)). Indeed, this fact is implicit in the very basis of the Court's holding—that such compartments may contain valuables in need of safeguarding.

Mr. Justice POWELL observes, *ante*, at 3101-3102, and n. 7, that the police would not be justified in sifting through papers secured under the procedure employed here. I agree with this, and I note that the Court's opinion does not authorize the inspection of suitcases, boxes, or other containers which might themselves be sealed, removed, and secured without further intrusion. See, *e. g.*, *United States v. Lawson*, 487 F.2d 468 (CA8 1973); *State v. McDougal*, 68 Wis.2d 399, 228 N.W.2d 671 (1975); *Mozzetti v. Superior Court, supra*. But this limitation does not remedy the Fourth Amendment intrusion when the simple inventorying of closed areas discloses tokens, literature, medicines, or other things which on their face may “reveal much about a person's activities, associations, and beliefs,” *California Bankers Assn. v. Shultz*, 416 U.S. 21, 78-79, 94 S.Ct. 1494, 1526, 39 L.Ed.2d 812 (1974) (Powell, J., concurring).

7 The Court also observes that “[i]n addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned.” *Ante*, at 3097. The Court places no reliance on this concern in this case, however, nor could it. There is no suggestion that the police suspected that respondent's car was stolen, or that their search was directed at, or stopped with, a determination of the car's ownership. Indeed, although the police readily identified the car as respondent's Record 98-99, the record does not show that they ever sought to contact him.

8 The very premise of the State's chief argument, that the cars must be searched in order to protect valuables because no guard is posted around the vehicles, itself belies the argument that they must be searched at the city lot in order to

protect the police there. These circumstances alone suffice to distinguish the dicta from *Cooper v. California*, 386 U.S., at 61-62, 87 S.Ct. at 791, recited by the Court, *ante*, at 3098.

The Court suggests a further “crucial” justification for the search in this case: “protection of the Public from vandals who might find a firearm, *Cady v. Dombrowski*, [413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973)], or as here, contraband drugs” (emphasis added). *Ante*, at 3100 n. 10. This rationale, too, is absolutely without support in this record. There is simply no indication the police were looking for dangerous items. Indeed, even though the police found shotgun shells in the interior of the car, they never opened the trunk to determine whether it might contain a shotgun. Cf. *Cady, supra*. Aside from this, the suggestion is simply untenable as a matter of law. If this asserted rationale justifies search of all impounded automobiles, it must logically also justify the search of *all* automobiles, whether impounded or not, located in a similar area, for the argument is not based upon the custodial role of the police. See also *Cooper v. California, supra*, 386 U.S., at 61, 87 S.Ct. at 790, quoted in n. 5, *supra*. But this Court has never permitted the search of any car or home on the mere undifferentiated assumption that it might be vandalized and the vandals might find dangerous weapons or substances. Certainly *Cady v. Dombrowski*, permitting a limited search of a wrecked automobile where, *inter alia*, the police had a reasonable belief that the car contained a specific firearm, 413 U.S., at 448, 93 S.Ct. at 2531, does not so hold.

9 Even were the State to impose a higher standard of custodial responsibility upon the police, however, it is equally clear that such a requirement must be read in light of the Fourth Amendment's pre-eminence to require protective measures other than interior examination of closed areas.

10 Indeed, if such claims can be deterred at all, they might more effectively be deterred by sealing the doors and trunk of the car so that an unbroken seal would certify that the car had not been opened during custody. See *Cabbler v. Superintendent*, 374 F.Supp. 690, 700 (ED Va.1974), rev'd, 528 F.2d 1142 (CA4 1975), cert. pending, No. 75-1463.

11 I do not believe, however, that the Court is entitled to make this assumption, there being no such indication in the record. Cf. *Cady v. Dombrowski, supra*, 413 U.S., at 447, 93 S.Ct., at 2531.

12 The Court makes clear, *ante*, at 3099, that the police may not proceed to search an impounded car if the owner is able to make other arrangements for the safekeeping of his belongings. Additionally, while the Court does not require consent before a search, it does not hold that the police may proceed with such a search in the face of the owner's denial of permission. In my view, if the owner of the vehicle is in police custody or otherwise in communication with the police, his consent to the inventory is prerequisite to an inventory search. See *Cabbler v. Superintendent, supra*, 374 F.Supp., at 700; cf. *State v. McDougal*, 68 Wis.2d, at 413, 228 N.W.2d, at 678; *Mozzetti v. Superior Court*, 4 Cal.3d, at 708, 94 Cal.Rptr. 412, 484 P.2d, at 89.

13 In so requiring, the Court appears to recognize that a search of some, but not all, cars which there is no specific cause to believe contain valuables would itself belie any asserted property-securing purpose.

The Court makes much of the fact that the search here was a routine procedure, and attempts to analogize *Cady v. Dombrowski*. But it is quite clear that the routine in *Cady* was only to search where there was a reasonable belief that the car contained a dangerous weapon, 413 U.S., at 443, 93 S.Ct. at 2529; see *Dombrowski v. Cady*, 319 F.Supp. 530, 532 (ED Wis.1970), not, as here, to search every car in custody without particular cause.

14 Even if it may be true that many persons would ordinarily consent to a protective inventory of their car upon its impoundment, this fact is not dispositive since even a majority lacks authority to consent to the search of *all* cars in order to assure the search of theirs. Cf. *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

15 I need not consider here whether a warrant would be required in such a case.

16 Additionally, although not relevant on this record, since the inventory procedure is premised upon benefit to the owner, it cannot be executed in any case in which there is reason to believe the owner would prefer to forgo it. This principle, which is fully consistent with the Court's result today, requires, for example, that when the police harbor suspicions (amounting to less than probable cause) that evidence or contraband may be found inside the automobile, they may not inventory it, for they must presume that the owner would refuse to permit the search.

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17 While evidence at the suppression hearing suggested that the inventory procedures were prompted by past thefts at the impound lot, the testimony refers to only two such thefts, see *ante*, at 3095 n. 1, over an undisclosed period of time. There is no reason on this record to believe that the likelihood of pilferage at the lot was higher or lower than that on the street where respondent left his car with valuables in plain view inside. Moreover, the failure of the police to secure such frequently stolen items as the car's battery, suggests that the risk of loss from the impoundment was not in fact thought severe.

18 In fact respondent claimed his possessions about five hours after his car was removed from the street. Record 39, 93.

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320 N.J.Super. 325
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
John CRYAN, Defendant–Appellant.

Submitted March 30, 1999.
|
Decided April 16, 1999.

Synopsis
Defendant was convicted in the Superior Court, Law Division, Morris County, of driving while intoxicated (DWI). Defendant appealed. The Superior Court, Appellate Division, Coburn, J.A.D., held that stopping defendant because he failed to proceed for five seconds after a red light turned green was not justified on a community caretaking basis.

Reversed.

Attorneys and Law Firms

****94** ***326** Litvak, Accardi & Trifiolis, for defendant–appellant (Anthony J. Accardi, Livingston, of counsel and Jonathan H. Tepper, Newark, on the brief).

John B. Dangler, Morris County Prosecutor, for plaintiff–respondent (Joseph Connor, Jr., Assistant Prosecutor, on the brief).

Before Judges KEEFE, EICHEN, and COBURN.

Opinion
The opinion of the court was delivered by

COBURN, J.A.D.

Acting under orders to stop every motor vehicle observed moving in the borough, a police officer, after noting that defendant did not react for about five seconds when a red light at which he was stopped turned green, followed the vehicle a short distance and then stopped it by activating his emergency lights. The stop led to a charge of driving while intoxicated (DWI). The primary issue presented by this appeal is whether the police officer's action can be sustained as part of the community caretaking function based on his testimony that he stopped the vehicle for two reasons—the orders and his concern "for why the vehicle was stopped for such a period of time at the green light."

Defendant pled guilty in municipal court to DWI, *N.J.S.A.* 39:4–50.1, preserving his right to test on appeal the validity of the officer's stop of the vehicle. The Law Division, in a de novo trial on the record below of the suppression hearing, agreed with the municipal court and independently determined that the stop was valid community caretaking. We disagree and reverse.

***327** I.

The facts are not in dispute. At approximately 4:24 a.m., on September 5, 1997, a uniformed police officer was traveling eastbound on Columbia Turnpike in a marked police car. At the intersection with James Street, the officer pulled up behind defendant's vehicle, a Toyota Land Cruiser, which was stopped in the left-hand turning lane for the red light. Because the rear windows were tinted, all he could see were the silhouetted figures of two people in the Toyota. Using his mobil data terminal,[1] the officer determined that there was nothing out of the ordinary with respect to the vehicle. When the light turned green, the defendant's vehicle remained stationary for approximately five seconds and then "proceeded to make the left-hand turn very slowly." The officer followed for about 100 feet, then activated his emergency lights and stopped defendant in a parking lot near the corner. There were no other vehicles on the road at this early-morning hour.

The officer explained that there had been an unusually large number of burglaries in the area, and the police force was "running an extra patrol" looking for burglars. The patrol officers were instructed to be particularly observant for vehicles containing more than one person, and they were also told that "there were stolen vehicles possibly being used...." He further explained the general orders in this manner:

> [T]he orders I got from our detective lieutenant were we were to check out—stop any vehicle that basically moved within ... the Borough and we did accordingly. We stopped ... approximately 50 to 100 cars.... [It] ... is not normal for us to stop every car. It was a special detail designed by the Detective Bureau and that also filtered down onto the ... road guys.

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The officer was asked, “So any vehicle you saw from midnight until the end of your detail at 7:00 [a.m.] you pulled over?” The officer answered, “Yes.”

***328** When he was asked why he had stopped defendant's vehicle, the officer conceded that there was no indication that this vehicle had been involved in a burglary and said:

> My purpose in signaling the stop was ... for two reasons. I was concerned for why the vehicle was stopped for such a ****95** period of time at the green light, and I was also inquisitive about the vehicle in relation to the burglaries. We were stopping every car. So I was just performing my duty as far as I was told by our detective lieutenant.

The officer also explained his action by noting that when the vehicle did not move after the light changed, “I was suspicious as to—I wanted to get some information about the vehicle.”

II.

The State contends that this motor vehicle stop may be sustained under the community caretaking function. *Cady v. Dombrowski,* 413 *U.S.* 433, 441, 93 *S.Ct.* 2523, 2528, 37 *L.Ed.*2d 706, 714–15 (1973). The Law Division judge, although noting that the case presented a “very close call,” accepted that theory. An appellate court is required to give considerable deference to a judge's factfinding, *see, e.g., State v. Locurto,* 157 *N.J.* 463, 470–72, 724 *A.*2d 234 (1999), but we are not obliged to give deference to the judge's legal conclusions, *State v. Brown,* 118 *N.J.* 595, 604, 573 *A.*2d 886 (1990); *Manalapan Realty v. Township Committee,* 140 *N.J.* 366, 378, 658 *A.*2d 1230 (1995) (“A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.”) In this case, as we have noted, the facts are undisputed, and we accept the judge's findings in that regard. However, we differ with respect to the legal consequences that flow from those facts.

We first addressed the community caretaking theory in *State v. Goetaski,* 209 *N.J.Super.* 362, 507 *A.*2d 751 (App.Div.), *certif. denied,* 104 *N.J.* 458, 517 *A.*2d 443 (1986). In that case, the officer observed the defendant at about 4 a.m. driving slowly on the shoulder of a rural state highway. *Id.* at 363, 507 *A.*2d 751. The speed limit was fifty miles per hour. *Ibid.* The defendant's left-turn signal was blinking. *Ibid.* The officer stopped the vehicle ***329** after watching it proceed in that manner for a tenth of a mile. *Ibid.* When the officer approached the car and talked with the driver, he made observations that led to a DWI charge. *Ibid.* We defined the issue as whether those circumstances provided a “sufficient reason for the officer to stop defendant and inquire generally if there was any *problem or difficulty.* ” *Id.* at 364, 507 *A.*2d 751 (emphasis added). We sustained the stop, even though no motor vehicle law had been violated, because “the facts were unusual enough for the time and place to warrant the closer scrutiny of a momentary investigative stop and inquiry.” *Id.* at 366, 507 *A.*2d 751. But we also said, “we do not hesitate to add that this stop is about as close to the constitutional line as we can condone.” *Ibid.*

We returned to the community caretaking issue in *State v. Martinez,* 260 *N.J.Super.* 75, 615 *A.*2d 279 (App.Div.1992), also a DWI case. A state trooper observed Martinez driving, at 2 a.m., less than ten miles per hour in a residential twenty-five mile per hour zone. *Id.* at 77, 615 *A.*2d 279. He described the vehicle as proceeding “at a snail's pace,” which he considered abnormally slow. *Ibid.* After following for a time not set out in the opinion, the officer stopped Martinez and made the observations leading to the DWI charge. *Ibid.* We sustained the stop and made these comments:

> We take notice, however, that operation of a motor vehicle in the middle of the night on a residential street at a snail's pace between five and ten m.p.h. is indeed “abnormal,” as the Trooper testified. Such abnormal conduct suggests a number of objectively reasonable concerns: (a) something might be wrong with the car; (b) something might be wrong with its driver; (c) a traffic safety hazard is presented to drivers approaching from the rear when an abnormally slow moving vehicle is operated at night on a roadway without flashers; (d) there is some risk that the residential neighborhood is being “cased” for targets of opportunity. Possibilities (a), (b) and (c) involve the “community caretaking function” expected of alert police officers. *See, Cady v. Dombrowski,* 413 *U.S.* 433, 441, 93 *S.Ct.* 2523, 2528, 37 *L.Ed.*2d 706 (1973); *Goetaski, supra,* 209 *N.J.Super.* at 365, 507 *A.2d* 751; *State v. Marcello,* [157 *Vt.* 657] 599 *A.2d* 357, 358 (Vt.1991); ****96** *State v. Pinkham,* 565 *A.2d* 318, 319 (Me.1989). Possibility (d) implicates the “common-law right to inquire” based upon a founded suspicion that criminal activity might be afoot. *See* LaFave, *Search and Seizure,* Sec. 9.2(h) (2d ed.1987). It is appropriate to consider all of these applicable concerns and balance them against the minimal intrusion involved ***330** in a simple inquiry stop. We are satisfied on this balance

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that the stop was objectively reasonable and fell far short of the line of unconstitutionality we drew in *Goetaski.*

[*Id.* at 78, 615 *A.*2d 279.]

Finally, in *State v. Washington,* 296 *N.J.Super.* 569, 687 *A.*2d 343 (App.Div.1997), we sustained a stop in another DWI case where the defendant had been observed at 12:20 a.m. traveling thirty-six miles per hour in a forty-five mile per hour business zone, weaving within his lane. *Id.* at 571, 687 *A.*2d 343. We had this to say:

Police officers have a community caretaking function. That function has its source in the ubiquity of the automobile and the dynamic, differential situations police officers are confronted with to promote driver safety. *See United State [States] v. Rodriguez–Morales,* 929 *F.*2d 780, 784–86 (1st Cir.1991), *cert. denied,* 502 *U.S.* 1030, 112 *S.Ct.* 868, 116 *L.Ed.*2d 774 (1992). It finds support in the premise that abnormal operation of a motor vehicle establishes a reasonably objective basis to justify a motor vehicle stop. *See State v. Martinez,* 260 *N.J.Super.* 75, 78, 615 *A.2d* 279 (App.Div.1992). What is reasonably objective is measured by the dynamics or totality of the circumstances from the perspective of the officer on duty at the time and not from the esoteric perspective of the courtroom. *See United States v. Cortez,* 449 *U.S.* 411, 418, 101 *S.Ct.* 690, 695, 66 *L.Ed.*2d 621, 629 (1981). Applying the former perspective, we are satisfied the officer had a reasonably objective basis to stop defendant's automobile.

Fundamental logic dictates that an officer has a reasonably objective basis to stop a motor vehicle weaving down a roadway in the manner here. This is true whether or not the driver stays in his or her lane of travel. Even while maintaining one's lane of travel, a driver that weaves a car down a highway, as defendant did, engenders reasonable grounds to conclude that the vehicle is a potential safety hazard to other vehicles and that there is either something wrong with the driver, with the car, or both. *See Martinez, supra,* 260 *N.J.Super.* at 78, 615 *A.*2d 279. If on-duty police officers are to fulfill their responsibility to promote safety for the traveling public, intervention is mandated in such circumstances.

That defendant stayed in his lane of travel did not extinguish a community caretaking function. Driving in a manner that could lead to crossing the center line at an inopportune time, a time when another oncoming vehicle is about to pass, is a controlling consideration. Moreover, when the weaving is combined with the unconventionally slow speed, there is more than a reasonably objective basis to conclude defendant's ability to drive was impaired, justifying the stop.

In sum, we conclude the manner of defendant's driving on the night in question provided the officer with a reasonably objective basis for stopping the car. Consequently, the order under appeal was improvidently entered.

[*Id.* at 572–73, 687 *A.*2d 343.]

***331** In each of the above cited cases the stop was justified on a community caretaking basis because the abnormal operation of the vehicle indicated that the driver might be in some difficulty, thereby presenting a hazard to himself or others. Inferences of that sort cannot be reasonably drawn from a driver's failure to proceed for five seconds after a red light has turned green when the only other vehicle in the area is a marked police car stopped immediately to the driver's rear. Therefore, a stop in these circumstances is not objectively reasonable; it is unconstitutional. *See, e.g., Doheny v. Commissioner of Public Safety,* 368 *N.W.*2d 1, 2 (Minn.Ct.App.1985) (holding the officer's belief that the motorist was lost did not justify the stop); *North Dakota v. Brown,* 509 *N.W.*2d 69, 71–72 (N.D.1993) (holding a stop invalid because the officer failed to provide any clear reason for thinking the driver ****97** needed assistance); *Washington v. DeArman,* 54 *Wash.App.* 621, 774 *P.*2d 1247, 1249–50 (1989) (holding despite the officer's belief that defendant or his motor vehicle was disabled because the vehicle remained motionless at a stop sign for forty-five to sixty seconds, this belief was dispelled when the vehicle moved, and therefore the stop was unjustifiable).

III.

The State contends, in the alternative, that the stop was justified because the officer had an articulable and reasonable suspicion that defendant was violating the law. More specifically, the State argues that in these circumstances there was reason to believe that the driver was intoxicated because of his delay in moving forward and the slowness of his turn; that he was driving carelessly, in violation of *N.J.S.A.* 39:4–97; and that his slow turning speed supported the inference that defendant was "casing the area for burglaries." Putting to one side the fact that none of these thoughts came to the officer, who testified that he stopped this vehicle because he was under orders to stop every moving vehicle

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during his shift, we reject the proposition that the facts objectively viewed would justify the inferences suggested by the State. *See, e.g., Locurto, supra,* 157 *N.J.* at 466, 724 *A.*2d 234 ***332** vehicle speeding); *State v. Smith,* 306 *N.J.Super.* 370, 380, 703 *A.*2d 954 (App.Div.1997) (vehicle weaving in and out of its lane); *State v. Murphy,* 238 *N.J.Super.* 546, 554, 570 *A.*2d 451 (App.Div.1990) (license plate improperly displayed). Furthermore, in deciding this case, the Law Division judge noted, without objection from the State, that he understood the State to be conceding that the officer did not have an articulable and reasonable suspicion that an offense had been committed. In fact, the prosecutor specifically limited her argument in support of the stop to the community caretaking theory and declined to argue any other justification.[2] Questions not raised below "will ordinarily not be considered on appeal." *State v. Bobo,* 222 *N.J.Super.* 30, 33, 535 *A.*2d 983 (App.Div.1987).

The order denying defendant's motion to suppress is reversed. Since there is no evidence of guilt other than that gained from the illegal stop, defendant's conviction is reversed as well.

All Citations

320 N.J.Super. 325, 727 A.2d 93

Footnotes

1 This device is described in detail in *State v. Donis,* 157 *N.J.* 44, 46–48, 723 *A.*2d 35 (1998).

2 At no time has the State argued that the general order involved here, that officers on patrol were to stop all moving vehicles, passes muster under the Fourth Amendment. Certainly, our roadblock cases would suggest otherwise. *See, e.g., State v. Kadelak,* 280 *N.J.Super.* 349, 362–72, 655 *A.*2d 461 (App.Div.1995), *certif. denied,* 141 *N.J.* 98, 660 *A.*2d 1197 (1995); *State v. Kirk,* 202 *N.J.Super.* 28, 36–56, 493 *A.*2d 1271 (App.Div.1985).

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192 N.J. 224
Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Respondent,
v.
Michelle L. ELDERS, Defendant–Appellant.
State of New Jersey, Plaintiff–Respondent,
v.
Ronald Stanley, Defendant–Appellant.
State of New Jersey, Plaintiff–Respondent,
v.
Tasha Jones, Defendant–Appellant.
State of New Jersey, Plaintiff–Respondent,
v.
Christopher M. Leach, Defendant–Appellant.
State of New Jersey, Plaintiff–Respondent,
v.
Anthony Graham, Defendant–Appellant.
State of New Jersey, Plaintiff–Respondent,
v.
Marcellius M. Love, Defendant–Appellant.

Argued Feb. 13, 2007.
|
Decided July 30, 2007.

Synopsis

Background: Six defendants moved to suppress drug-related evidence seized during and after a consent search of a disabled vehicle. The Superior Court, Law Division, Middlesex County, Frederick P. DeVesa, J.S.C., suppressed all evidence seized at the scene. The state appealed with respect to each defendant. The Superior Court, Appellate Division, 386 N.J.Super. 208, 899 A.2d 1037, consolidated the appeals and reversed and remanded. Defendants moved for leave to appeal, which was granted.

Holdings: The Supreme Court, Albin, J., held that:

as a matter of first impression, under the search-and-seizure provision of the state constitution, law enforcement officers cannot request consent to search a disabled vehicle on the shoulder of a roadway unless they have reasonable and articulable suspicion to believe that evidence of criminal wrongdoing will be discovered in the vehicle;

availability of videotape of law enforcement officers' encounter with defendants on a highway did not extinguish deference owed by Appellate Division to trial court's findings with respect to defendants' motion to suppress;

record supported trial court's determination that officers' community-caretaking encounter with defendants quickly escalated into an investigatory detention; and

officers did not have reasonable and articulable suspicion necessary to detain defendants or to ask for consent to search disabled vehicle.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

****1253** Mark H. Friedman, Assistant Deputy Public Defender, argued the cause for appellants (Yvonne Smith Segars, Public Defender, attorney).

Marcia L. Silva, Assistant Prosecutor, argued the cause for respondent (Bruce J. Kaplan, Middlesex County Prosecutor, attorney; Ms. Silva and Simon Louis Rosenbach, Assistant Prosecutor, of counsel and on the briefs).

Leslie Stolbof Simenus argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Ms. Simenus, attorney; Steven G. Sanders, of counsel and on the brief).

Frank Muroski, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Stuart Rabner, Attorney General, attorney).

Opinion

Justice ALBIN delivered the opinion of the Court.

***230** In *State v. Carty,* 170 *N.J.* 632, 635, 790 *A.*2d 903, *modified on other grounds,* 174 *N.J.* 351, 806 *A.*2d 798 (2002), we held ****1254** that a police officer may not ask for consent to search a lawfully stopped vehicle or its occupants unless the officer has "a reasonable and articulable suspicion" that the occupants are engaged in criminal wrongdoing. A

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consent search of a validly stopped car without the requisite suspicion will result in exclusion of the evidence at trial. *Id.* at 647–48, 790 *A.*2d 903. In this appeal, we must decide whether the principles of *Carty* extend to the occupants of a car *disabled* on the shoulder of a highway.

Here, both the trial court and Appellate Division agreed that *Carty* applies to a disabled vehicle on a roadway, but came to different conclusions concerning the constitutionality of the consent search in this case. The trial court determined, among other things, that the state troopers, who requested consent to search a car broken down on the side of the New Jersey Turnpike, did not have reasonable and articulable suspicion to believe that the occupants were engaged in criminal wrongdoing and suppressed drugs and drug-related evidence seized from the car and its occupants. The Appellate Division reversed, maintaining that it owed no deference to the trial court's factual determinations, which were based in part on a videotape of the events on the highway, and found that the officers had the necessary level of suspicion to seek a consent search.

We now hold that the reasonable and articulable suspicion standard governing consent searches of cars validly stopped equally ***231** applies to disabled cars on our roadways. In this case, in reversing the trial court's holding that defendants were subjected to an unconstitutional search, the Appellate Division did not apply the correct standard of review for a suppression hearing. The appellate panel should have determined only whether there was sufficient credible evidence to support the trial court's findings and should not have reviewed the evidence de novo or acted as a factfinder in the first instance. Because the trial court's findings are supported by sufficient credible evidence in the record, we are compelled to reinstate the order suppressing the evidence.

I.

A.

Defendants Michelle L. Elders, Ronald D. Stanley, Tasha Jones, Christopher M. Leach, Anthony Graham, and Marcellius M. Love were charged in a Middlesex County indictment with first-degree conspiracy, *N.J.S.A.* 2C:5–2 (count one); first-degree possession with intent to distribute a controlled dangerous substance (CDS), *N.J.S.A.* 2C:35–5a(1) and *N.J.S.A.* 2C:35–5b(1) (count two); third-degree possession of a CDS, *N.J.S.A.* 2C:35–10a(1) (count three); and fourth-degree possession with intent to distribute a CDS, *N.J.S.A.* 2C:35–5a(1) and *N.J.S.A.* 2C:35–5b(12) (count four). The charges arose from events that occurred on the New Jersey Turnpike. After a stay in New York City, defendants apparently were returning home to North Carolina in a Lincoln Town Car and a Honda Accord when the Lincoln's gas tank came loose, sending both cars to the shoulder of the Turnpike. This set the scene for their encounter with New Jersey State Police troopers, who discovered a sizeable quantity of drugs and a large amount of cash after conducting a "consent" search of the Lincoln and a later search of defendants.

Defendants contested the constitutionality of the search and sought to suppress this evidence. At a motion to suppress hearing, the record consisted solely of the testimony of two New ***232** Jersey State Troopers—Trooper Sean O'Connor and Sergeant Ronald Klem—and a videotape ****1255** of the encounter recorded by a camera mounted on their marked troop car.[1]

In the early morning hours of September 17, 2004, Trooper O'Connor and Sergeant Klem were patrolling the New Jersey Turnpike in the area of Edison Township when they noticed on the shoulder of the road the disabled Lincoln Town Car. At the time, they were pursuing a speeding car and did not stop. A short while later, at approximately 2:50 a.m., the troopers observed that the Lincoln was still on the Turnpike's shoulder. The troopers then turned on their troop car's overhead light, which automatically activated both the car's video camera and audio equipment[2] and pulled directly behind the Lincoln.[3] Twenty-five feet in front of the Lincoln was a Honda Accord.

At the scene, defendants Graham and Love were underneath the Lincoln attempting to reattach the gas tank, defendants Elders and Jones were sitting on the guardrail, and defendants Leach and Stanley were sleeping in the Honda. As the troop car parked, Love came from under the Lincoln and signaled to the troopers that everything was "okay." When the troopers approached the disabled Lincoln, Graham and Love told them that the car's gas tank had fallen off the car. That explanation did not assuage Sergeant Klem, who thought "[s]omething wasn't right" and, at some point, surmised that perhaps drugs were being secreted in a compartment beneath the car. To Trooper O'Connor, ***233** Graham and Love appeared "nervous" and not desirous of help. Neither trooper called for roadside assistance.

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Sergeant Klem then walked towards the Honda, where Leach and Stanley were asleep, while Trooper O'Connor engaged Elders away from her companions. In response to Trooper O'Connor's questions concerning her whereabouts, Elders responded that she was returning to North Carolina after having visited her sister in Brooklyn for two days. She told the trooper that both vehicles belonged to Leach. Trooper O'Connor then instructed her to return to the guardrail for her safety. A registration check of the cars revealed that Leach did not own the vehicles and that neither had been reported stolen.

The two troopers again approached Graham and Love, who were working underneath the Lincoln. Trooper O'Connor then got under the car, claiming to lend assistance. Graham and Love asked for a ratchet; the trooper had none to give and did not offer to call a service station. Trooper O'Connor then ordered the two men to get up from underneath the vehicle and to go to the guardrail for their safety. The trooper did so to maintain control of the scene and to facilitate his questioning of them. Indeed, he wanted to keep "tabs on everybody."

Trooper O'Connor next took Graham aside and questioned him. Graham told the trooper that he had been visiting his family in Manhattan. Graham further stated that defendants were all "cousins," but he knew them only by their street names. With that information, Trooper O'Connor conferred with Sergeant Klem, pointing out that Elders and Graham ****1256** claimed to have visited two different New York City locations.

Trooper O'Connor then made his way to the Honda, where both Leach and Stanley were still asleep, and knocked on the driver's side window. The two troopers were "beginning to develop a reasonable suspicion there was some criminal activity going on," and so Trooper O'Connor directed Leach and Stanley to exit the vehicle for the troopers' safety. The troopers wanted "not only to question them but to get more control over the scene."

***234** Leach told Trooper O'Connor that "he'd been in New York in the Bronx for a couple days where he had been buying clothes." Trooper O'Connor examined Leach about ownership of the Lincoln, and when he sensed that Leach was not cooperating, yelled, "You will answer any questions." After continued interrogation, Leach indicated that he was in charge of both cars. At that point, approximately 3:06 a.m., as revealed by the videotape, Leach told Trooper O'Connor that he wanted an attorney.[4] During their exchange, the trooper told Leach not to give him "attitude." Trooper O'Connor admitted at the hearing that at that time defendants were no longer free to leave the scene because he "felt [he] had a reasonable and articulable suspicion some type of criminal activity was going on," and he intended to continue his investigation. When one of the defendants moved off the guardrail, Trooper O'Connor "put them in their place" in order to "take control of the situation." At approximately 3:08 a.m., two back-up troopers arrived at the scene and kept an eye on defendants.

Based on the conflicting statements and the nervousness of some of the defendants, the absence of the registered owner, and the suspicion aroused by the gas tank falling off the car, Sergeant Klem gave Trooper O'Connor permission to request a consent search of the Lincoln. Trooper O'Connor then asked Leach whether he would consent to a search of the car. Leach initially stated that he would, but after being placed in the passenger's seat of the patrol car, he balked at giving written authorization. With Sergeant Klem positioned in the driver's seat and Trooper O'Connor kneeling outside the passenger's seat, Leach was quickly read his rights from the consent search form, including his right to refuse consent. While Trooper O'Connor was reading the consent form, Leach shook his head left and right, indicating no. When Trooper O'Connor asked him to sign the form, Leach said, "You can search my car but I don't sign." Trooper O'Connor ***235** responded, "That's fine. You don't have to sign. We'll just call for a dog." Leach was told that he would be detained until the dog arrived.[5]

At about 3:36 a.m., after being told again that his consent had to be voluntary, Leach signed the consent form.[6] Trooper O'Connor thoroughly searched the Lincoln. Underneath the hood, in the engine compartment, he found black electrical tape wrapped around a "bundle" that later was identified as concealing one-half of a kilogram of cocaine and over fifty grams of ****1257** marijuana. Based on the suspected contents of the bundle at the time, all six defendants were arrested and searched. On Elders, the troopers discovered a "small white chunky substance" that they believed to be crack cocaine. They also uncovered $8,000 in cash on Stanley and $3,000 in cash on Leach.

Based on the troopers' testimony and the videotape, the Honorable Frederick P. DeVesa, J.S.C., the motion judge, concluded that the drugs and money seized by the troopers were the product of an unconstitutional, warrantless search and therefore suppressed the evidence.

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B.

First, Judge DeVesa found that *Carty* applied to the encounter on the shoulder of the Turnpike, where the troopers stopped at first to assist the disabled vehicle. Accordingly, the troopers were not constitutionally authorized to request a consent search unless they had reasonable and articulable suspicion that defendants were engaged in wrongdoing. Judge DeVesa determined that shortly after the troopers arrived on the scene the encounter with ***236** defendants "was converted into an investigative detention." He reasoned that defendants, who were directed to sit on the guardrail by the troopers and questioned separately on the shoulder of the Turnpike, a limited access highway, were not free to leave.

Ultimately, Judge DeVesa maintained that the troopers did not possess the requisite suspicion to conduct an investigative detention or request a consent search. He found no authority to support the supposition that "mere nervousness and conflicting statements give rise to reasonable suspicion." He then focused on to the key word, articulable. He could not find an "*articulable* suspicion that there were drugs secreted in the [Lincoln] based upon [the] type of information" available to the troopers. (Emphasis added). Moreover, he could not accept the argument that a reasonable suspicion arises that "people are hiding drugs in the motor vehicle" whenever there is a "loose part on a motor vehicle," such as the hanging gas tank in this case. Thus, the troopers' belief that drugs were concealed in the Lincoln was "nothing more than a hunch," which under *Carty* is an insufficient basis for requesting a consent search.

In addition, Judge DeVesa determined that the State did not meet its burden of showing that Leach *knowingly and voluntarily* consented to the search. He noted that Leach was detained for a substantial period of time and not free to leave; that Leach had asked for a lawyer (a request that was either ignored or not heard by the troopers); that he was surrounded by troopers when asked to sign the consent form; and that when he refused to sign the form, Trooper O'Connor threatened to detain him even longer until a dog was called to the scene. He concluded that the State did not sustain its burden of proving that, under the totality of circumstances, Leach had freely given his consent to the search.

Because the investigatory detention and consent search were not premised on reasonable and articulable suspicion and because defendant Leach did not knowingly and voluntarily consent to the search, the recovery of the drugs from the Lincoln was an unconstitutional seizure. The validity of the search of the individual ***237** defendants depended on the legality of the search of the car, therefore, Judge DeVesa suppressed all evidence seized at the scene. The State appealed.

C.

The Appellate Division reversed the motion judge's grant of the motion to suppress. ****1258** [7] *State v. Elders,* 386 *N.J.Super.* 208, 233, 899 *A.*2d 1037 (App.Div.2006). The panel agreed with Judge DeVesa that the principle holding of *Carty*—that a reasonable and articulable suspicion is a prerequisite to a request for a consent search—applies to a police encounter with occupants of a disabled car stranded on the shoulder of a highway. *Id.* at 214, 221–22, 899 *A.*2d 1037. The panel saw no reason to restrict *Carty* to protect only occupants of a car stopped by the police and not occupants of a car "stopped for other reasons" who are importuned by the police to consent to a search of the vehicle. *Id.* at 222, 899 *A.*2d 1037. The panel reasoned that "[t]he potential for unwarranted police intrusion upon private citizens traveling our highways—the evil that *Carty* sought to address—exists in either situation." *Ibid.*

Unlike the trial court, however, the Appellate Division was persuaded that the troopers had the requisite suspicion to conduct an investigative detention and request a consent search and that Leach knowingly and voluntarily gave his consent to the search of the Lincoln. *Id.* at 222–28, 230, 899 *A.*2d 1037. Although the panel recognized that ordinarily it is bound to uphold the motion judge's findings if "they are supported by sufficient credible evidence in the record," it concluded that in this case it owed "no special deference to judicial factfinding[s]" because the "most ***238** telling evidence" was the videotape and because there were no material factual disputes arising from the evidence. *Id.* at 228, 899 *A.*2d 1037.

The panel homed in on the factors that it believed gave rise to an objectively reasonable suspicion of criminal wrongdoing that justified both the investigative detention and the consent search request: the nervous behavior of some of the defendants; the reference by Graham to defendants as "cousins" although he knew the others only by their street names; the different accounts given of their whereabouts in New York City; and the Lincoln's loose gas tank that made an

impression on Sergeant Klem. *Id.* at 225–28, 899 *A.*2d 1037. Based on its own factfindings, the panel concluded that the troopers conducted a proper investigative detention and had "reasonable, articulable suspicion that there was evidence of crime in the vehicle they sought to search." *Id.* at 228, 899 *A.*2d 1037.

The panel also determined that Leach was not coerced into giving his consent to search the car. In that regard, the panel noted that based on the standard of reasonable suspicion, the troopers were legally entitled to call for the use of a drug-sniffing dog and, therefore, their advising Leach that they would do so unless he signed the consent-to-search form "was a fair prediction of events that would follow, not a deceptive threat made to deprive [him] of the ability to make an informed consent." *Id.* at 229–30, 899 *A.*2d 1037 (citation and internal quotation marks omitted) (alteration in original). The panel also rejected the arguments that Leach's request for an attorney in the opening minutes of his encounter with the troopers and that Trooper O'Connor's earlier angry remark vitiated the voluntariness of Leach's later consent to search. *See id.* at 230, 233, 899 *A.*2d 1037. Accordingly, the Appellate Division held that Leach's consent to search the vehicle was voluntarily ****1259** given and that the seizure of the evidence met the appropriate constitutional standards. *Id.* at 232–33, 899 *A.*2d 1037.

We granted defendants' motion for leave to appeal the Appellate Division's ruling. We also granted the motions of the Association ***239** of Criminal Defense Attorneys of New Jersey and the Attorney General to participate as *amici curiae.*

II.

In challenging the Appellate Division's reversal of the motion judge's suppression of the evidence, defendants raise essentially three issues. They claim that the troopers, almost from the inception of their arrival, were not involved in a community caretaking operation to assist stranded motorists but rather conducted an unconstitutional investigatory detention unsupported by reasonable and articulable suspicion. They further claim that the troopers did not have reasonable and articulable suspicion to request a consent search under *Carty.* Last, they contend that as a result of the coercive atmosphere and conduct of the troopers, defendant Leach did not knowingly and voluntarily consent to the search of the Lincoln Town Car. On the basis of those arguments, individually and collectively, defendants seek reinstatement of the suppression order. Underlying those arguments is defendants' assertion that the Appellate Division exceeded its authority by substituting its own factual findings for those of the motion judge.

On the other hand, the State contends that the Appellate Division erred by extending the protections of *Carty* to the occupants of a car not stopped but disabled on the side of the road. The State argues that *Carty* should be confined to its narrow circumstances—police stops—and not to cases involving officers who go to render assistance to stranded vehicles on the shoulder of a roadway. Assuming that *Carty* is applicable, the State basically presents the same facts and reasons relied on by the Appellate Division to uphold the search of the car and defendants. The State argues that the troopers had reasonable and articulable suspicion to detain defendants and to request a consent search and that Leach freely gave his consent to search the Lincoln.

***240** We first turn to the issue of first impression before us —whether *Carty's* protections apply not only to the occupants of motor vehicle stops but also to those whose cars have been disabled on a roadway.

III.

In *Carty, supra,* we "grapple[d] with the problems caused by standardless requests for consent searches of motor vehicles lawfully stopped for minor traffic offenses." 170 *N.J.* at 640, 790 *A.*2d 903. We addressed those problems, not in a vacuum, but in the context of "the widespread abuse of our existing law" by law enforcement officers who obtained consent searches for routine motor vehicle stops. *Id.* at 646, 790 *A.*2d 903. We understood that an individual who "is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle" might feel compelled to consent. *Id.* at 644, 790 *A.*2d 903. We also recognized that not having an "objective standard or rule to govern the exercise of discretion, would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Id.* at 641, 790 *A.*2d 903 (citation and internal quotation marks omitted).

Even before Carty, New Jersey, along with a small minority of jurisdictions, was at the nation's forefront, subjecting consent searches to "a higher level of scrutiny" than available under the Federal Constitution. ****1260** *Id.* at 639, 790 *A.*2d 903; *State v. Domicz,* 188 *N.J.* 285, 307, 907 *A.*2d 395 (2006).

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In *State v. Johnson,* 68 *N.J.* 349, 354, 346 *A.*2d 66 (1975), we held that Article I, Paragraph 7 of the New Jersey Constitution, which protects people within this State from "unreasonable searches,"[8] requires the State to prove, as a prerequisite to a lawful consent search, that a ***241** person have knowledge of his right to refuse to give consent. *See also Domicz, supra,* 188 *N.J.* at 307, 907 *A.*2d 395.

Nevertheless, we later determined that the heightened procedural protections that generally apply to consent searches were inadequate in dealing with the "indiscriminate abuse of consent searches of cars whose operators had been stopped for minor traffic infractions." *Id.* at 305–06, 907 *A.*2d 395. Accordingly, in *Carty, supra,* we held that law enforcement officers are required to have a reasonable and articulable suspicion of criminal activity before requesting consent to search a car stopped for a motor vehicle infraction. 170 *N.J.* at 635, 790 *A.*2d 903. We imposed the reasonable suspicion standard for "the prophylactic purpose of preventing the police from turning routine traffic stops into a fishing expedition for criminal activity unrelated to the lawful stop." *Ibid.* We based our decision on Article I, Paragraph 7 of our State Constitution. *Id.* at 635, 647, 654, 790 *A.*2d 903.

The State urges us to limit *Carty* to its narrow facts and to distinguish between a police stop for a motor vehicle violation and police assistance to a disabled vehicle as part of a community caretaking duty. The State argues that the focus of *Carty's* concern was on the prolonged detention of the driver stopped for a minor motor vehicle violation who is subjected to a police officer "capriciously" wanting to search his car. In the State's view, the stranded driver of a disabled car is not quite as vulnerable in a police encounter as the driver of a car stopped for a motor vehicle violation.

We will not parse *Carty* as finely as the State would have us do. The underlying constitutional concerns that animated our decision in *Carty* apply as well to occupants of disabled cars stranded on the side of a roadway. Clearly, in the case of a disabled vehicle, if the police are fulfilling a community caretaking function, the consent search of a car for evidence of criminality is hardly in keeping with that mission. The driver of a disabled car facing police officers whose offer of assistance quickly turns into a "fishing expedition" based on a "hunch" that criminal activity is ***242** afoot is subject to no less compulsion to accede to a consent search than the driver subject to a typical motor vehicle stop. The driver of a disabled car is, for the most part, in the same inherently coercive predicament as the driver stopped on the highway—consent to the search and prolong the period of detention or refuse consent and perhaps suffer ramifications.

A police officer investigating rather than rendering assistance to a disabled car's occupants, and intent on searching the car, may be less likely to expedite roadside help. Thus, that driver who is importuned to give his consent to search is as isolated and perhaps as vulnerable as the driver hailed to the side of the road for a routine motor vehicle stop. The protections provided in *Carty* would appear to be of no less importance to motorists stranded on the shoulder of a roadway than those subjected to an automobile stop.

****1261** We are in agreement with both the trial court and the Appellate Division that the underlying rationale and salutary purpose of *Carty* extends to cars disabled on the side of a road. Therefore, the drivers and occupants of disabled cars are entitled to the same level of protection afforded to the drivers and occupants of cars involved in a motor vehicle stop. In both cases, a police officer who wishes to conduct a consent search must have reasonable and articulable suspicion to believe that evidence of criminal wrongdoing will be found in the vehicle before seeking consent for the search.

Here, the motion judge and Appellate Division applied the *Carty* standard to the vehicular consent search. The Appellate Division, however, did not defer to the motion judge's factfindings. Therefore, the question now before us is whether the Appellate Division improperly substituted its own factfindings for those of the motion judge.

IV.

The motion judge concluded that the troopers did not have reasonable and articulable suspicion either to conduct an investigatory ***243** detention of defendants or to request defendant Leach's consent to search the Lincoln Town Car. On both grounds, the motion judge suppressed the evidence seized from the car and later from the individual defendants.

Based on its own review of the record, the Appellate Division reversed the motion judge, finding that the troopers possessed a reasonable and articulable suspicion for an investigative detention and a consent search. Although the panel acknowledged that it must defer to findings of facts supported by sufficient credible evidence, it declared that "[n]o material factual dispute or contradiction arose from

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[the] evidence, and [therefore] no special deference to judicial factfinding [was] warranted." *Elders, supra,* 386 *N.J.Super.* at 228, 899 *A.*2d 1037. The panel considered the videotape to be "[t]he most telling evidence at the hearing" and reasoned that "the observations upon which the motion judge explicitly made his findings and drew his conclusions came from the videotaped encounter, and that videotape is equally available to us." *Id.* at 228, 232, 899 *A.*2d 1037. Relying on its own observations of the videotape and drawing its own conclusions from the "essentially undisputed" testimony of the two troopers, the panel was "satisfied that the troopers had a reasonable, articulable suspicion that there was evidence of crime in the vehicle they sought to search." *Id.* at 228, 899 *A.*2d 1037.

A.

Our analysis must begin with an understanding of the standard of appellate review that applies to a motion judge's findings in a suppression hearing. As the Appellate Division in this case clearly recognized, an appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are "supported by sufficient credible evidence in the record." *Ibid.* (citing *State v. Locurto,* 157 *N.J.* 463, 474, 724 *A.*2d 234 (1999)); *see also State v. Slockbower,* 79 *N.J.* 1, 13, 397 *A.*2d 1050 (1979) (concluding that "there was substantial credible evidence to support the findings of ***244** the motion judge that the ... investigatory search [was] not based on probable cause"); *State v. Alvarez,* 238 *N.J.Super.* 560, 562–64, 570 *A.*2d 459 (App.Div.1990) (stating that standard of review on appeal from motion to suppress is whether "the findings made by the judge could reasonably have been reached on sufficient credible evidence present in ****1262** the record" (citing *State v. Johnson,* 42 *N.J.* 146, 164, 199 *A.*2d 809 (1964))).

An appellate court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." *Johnson, supra,* 42 *N.J.* at 161, 199 *A.*2d 809. An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. *Id.* at 162, 199 *A.*2d 809. A trial court's findings should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." *Ibid.* In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." *Ibid.*

We cannot agree with the Appellate Division that the availability of a videotape of the troopers' encounter with defendants, particularly in the context of a hearing where witnesses testified, extinguishes the deference owed to a trial court's findings. *See, e.g., United States v. Santos,* 403 *F.*3d 1120, 1128 (10th Cir.2005) (noting "increasing availability of videotapes of traffic stops due to cameras mounted on patrol cars does not deprive district courts of their expertise as finders of fact, or alter our precedent to the effect that appellate courts owe deference to the factual findings of district courts"); *United States v. Welerford,* 356 *F.*3d 932, 935–36 (8th Cir.2004) (recognizing that an appellate court must defer to district court's findings denying defendant's motion to suppress even when videotape of defendant's encounter with State Trooper is available); *United States v. Navarro–Camacho,* 186 *F.*3d 701, 706–07 (6th Cir.1999) ***245** noting that in case involving videotape of vehicle stop, circuit court reviews district court's findings of fact for "clear error," given that "magistrate judge was able not only to view the videotape, but also to hear from an array of witnesses who testified about either (1) the videotape itself or (2) the events depicted on it"). In *State v. Chapman,* 332 *N.J.Super.* 452, 459–60, 753 *A.*2d 1179 (App.Div.2000), the Appellate Division properly followed the deferential standard set forth in *Johnson* in a vehicular consent search case involving a videotape. In concluding that the voluntariness of the consent was supported by substantial, credible evidence on the record, the panel noted that the trial court had the benefit not only of viewing the videotape, but also of observing the testimony of witnesses. *Id.* at 459–60, 467, 753 *A.*2d 1179.

The Appellate Division in this case did not apply the deferential standard of review to the motion judge's findings. Those factual findings were based on both the troopers' testimony and the videotape. The video camera for the most part was in a fixed position and therefore could not record all of the events, and the audio to the tape could not clearly capture all of the conversations because of the heavy Turnpike traffic. The motion judge was entitled to draw inferences from the evidence and make factual findings based on his "feel of the case," and those findings were entitled to deference unless they were "clearly mistaken" or "so wide of the mark" that the interests of justice required appellate intervention. *See, e.g., N.J. Div. of Youth & Family Servs. v. M.M.,* 189 *N.J.* 261, 279, 914 *A.*2d 1265 (2007). A disagreement with how

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the motion judge weighed the evidence in a close case is not a sufficient basis for an appellate court to substitute its own factual findings to decide the matter.

****1263** We therefore conclude that the Appellate Division did not apply the proper deferential standard of review to the motion judge's factual findings. We now must determine whether those findings are supported by sufficient credible evidence in the record.

***246** B.

Before we decide whether Judge DeVesa was "clearly mistaken" in concluding that the troopers conducted an unconstitutional investigative detention and consent search, we must survey the principles of law that are applicable to the facts of this case. We start by noting that under both the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of our State Constitution, searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid. *State v. Pineiro,* 181 *N.J.* 13, 19, 853 *A.*2d 887 (2004). Because our constitutional jurisprudence evinces a strong preference for judicially issued warrants, the State bears the burden of proving by a preponderance of the evidence that a warrantless search or seizure "falls within one of the few well-delineated exceptions to the warrant requirement." *Id.* at 19–20, 853 *A.*2d 887 (citations and internal quotation marks omitted); *see also State v. Wilson,* 178 *N.J.* 7, 12–13, 833 *A.*2d 1087 (2003). The two exceptions to the warrant requirement at play in this case are the investigative detention and the consent search.

Not all interactions between law enforcement and citizens constitute seizures, and not all seizures are unconstitutional. *State v. Maryland,* 167 *N.J.* 471, 483, 486–87, 771 *A.*2d 1220 (2001). For example, a police officer who approaches an individual in a public place for the purpose of questioning him has not "seized" the person in the constitutional sense so long as the person has not been denied the right to walk away. *State v. Rodriguez,* 172 *N.J.* 117, 126, 796 *A.*2d 857 (2002). Such "field inquiries" are permitted even if they are not based on a well-grounded suspicion of criminal activity. *Ibid.* However, encounters with the police in which a person's freedom of movement is restricted, such as an arrest or an investigatory stop or detention, must satisfy acceptable constitutional standards. See *State v. Nishina,* 175 *N.J.* 502, 510–11, 816 *A.*2d 153 (2003); *Rodriguez, supra,* 172 *N.J.* at 126–27, 796 *A.*2d 857. Here, we are dealing with an investigatory stop, which is a citizen encounter with the ***247** police that results in a relatively brief detention restricting a person's right to walk away. *Maryland, supra,* 167 *N.J.* at 486–87, 771 *A.*2d 1220.

An investigatory stop or detention is constitutional only "if it is based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." *Rodriguez, supra,* 172 *N.J.* at 126, 796 *A.*2d 857 (quoting *Terry v. Ohio,* 392 *U.S.* 1, 21, 88 *S.Ct.* 1868, 1880, 20 *L.Ed.*2d 889, 906 (1968)). An investigative detention that is premised on less than reasonable and articulable suspicion is an "unlawful seizure," and evidence discovered during the course of an unconstitutional detention is subject to the exclusionary rule. *Id.* at 132–33, 796 *A.*2d 857 (concluding that investigative detention without requisite level of suspicion nullifies defendant's subsequent consent to search, and therefore evidence seized as result of search must be suppressed). To determine whether the State has shown a valid investigative detention requires a consideration of the totality of the circumstances. We have recognized that

> [n]o mathematical formula exists for deciding whether the totality of the circumstances ****1264** provided the officer with articulable or particularized suspicion that the individual in question was involved in criminal activity. Such a determination can be made only through a sensitive appraisal of the circumstances in each case. In each case, the reasons for such particularized suspicion will be given careful scrutiny by the Court. A seizure cannot—we emphasize cannot—be justified merely by a police officer's subjective hunch.
>
> [*Pineiro, supra,* 181 *N.J.* at 27, 853 *A.*2d 887 (quoting *State v. Davis,* 104 *N.J.* 490, 505, 517 *A.*2d 859 (1986)).]

The reasonable and articulable standard for investigatory detentions set forth here applies as well to consent searches of automobiles under *Carty.* With those legal principles in mind, we next examine the motion judge's factual findings to see whether they are supported by sufficient credible evidence in the record.

C.

The motion judge maintained that the state troopers' encounter with defendants on the shoulder of the Turnpike quickly ***248** escalated from community caretaking—

responding to a disabled vehicle to provide assistance—to an investigative detention.[9] The trial court stated:

> While it may be true that these defendants were already stopped on the Turnpike when the State Police confronted them, it is also clear from the testimony of both officers that *almost immediately after making these observations and stopping the police vehicles the nature of the encounter was converted into an investigative detention.* The officers began to question the defendants about who they were and where they were coming from, separated them, asked them to sit on the guardrail while this questioning was taking place and most importantly it hasn't been mentioned here with any great degree of specificity but we're dealing here with a limited access highway. People are not free to walk away. People confronted by the police on the New Jersey Turnpike they're pretty much restricted in their movement by virtue of the nature of the highway itself.
>
> [(Emphasis added).]

Those findings are amply supported by the record. The motion judge considered that the troopers never called for roadside assistance even though from the moment of their arrival they became aware of a serious mechanical problem with the Lincoln. After about two minutes on the scene, Trooper O'Connor pulled defendant Elders to the side, away from the other defendants, and began questioning her about her whereabouts. The trooper did not inquire into the disabled car's condition or suggest that she leave in the functioning Honda for safety reasons. Arguably, the encounter turned into a detention before the troopers heard any seemingly inconsistent accounts of the locations defendants had been visiting in New York.

Within six minutes of the stop, Trooper O'Connor forcefully ordered, not asked, ****1265** defendants Graham and Love to get up from ***249** underneath the Lincoln Town Car and to stand by the guardrail. Once up, Graham was questioned, not about the car's condition, but about the places he had visited during his trip to New York. Shortly afterwards, defendants Leach and Stanley also were told to stand by the guardrail. When Trooper O'Connor sensed that Leach was not cooperating with him, he yelled, "You will answer any questions." Leach's request for an attorney was followed by Trooper O'Connor stating that he had a bad attitude.

The motion judge addressed all of the evidence that the State argued supported a finding of reasonable and articulable suspicion: defendants' nervous behavior, their conflicting statements, and the fallen-off gas tank. In the motion judge's view, there were "many reasons" that could explain the "nervousness" of some of the defendants and the "conflicting statements" at 3 a.m. on the shoulder of the Turnpike. Indeed, it is a sad fact that not all persons feel comfortable in the presence of the police. *State v. Tucker,* 136 *N.J.* 158, 169, 642 *A.*2d 401 (1994) (recognizing "[t]hat some city residents may not feel entirely comfortable in the presence of some, if not all, police is regrettable but true"); *State v. Kuhn,* 213 *N.J.Super.* 275, 282, 517 *A.*2d 162 (App.Div.1986) ("[N]ot wish[ing] to be in the proximity of police, [is] not a commendable, but also not an unlawful attitude."); *see also Carty,* 170 *N.J.* at 648, 790 *A.*2d 903 ("[A]ppearance of nervousness is not sufficient grounds for the reasonable and articulable suspicion necessary to extend the scope of a detention beyond the reason for the original stop.").

With regard to defendants' different accounts of where they were visiting in New York City (one said Brooklyn, another Manhattan, and yet another the Bronx), it was anything but clear that six defendants visiting over two days in two separate cars did not go their own ways, and even if they did not, that out-of-towners from North Carolina would have had a familiarity with the five boroughs. See *State ex rel. J.G.,* 320 *N.J.Super.* 21, 33, 726 *A.*2d 948 (App.Div.1999) (finding that conflicting answers to whereabouts—first "Brooklyn," then the "Village"—did not, along ***250** with other nominal factors, amount to reasonable and articulable suspicion of drug activity). To be sure, nervousness and conflicting statements, along with indicia of wrongdoing, can be cumulative factors in a totality of the circumstances analysis that leads to a finding of reasonable and articulable suspicion of ongoing criminality. *See State v. Stovall,* 170 *N.J.* 346, 367, 788 *A.*2d 746 (2002) (noting that even though nervousness may be normal, it does not detract from fact that "a suspect's nervousness plays a role in determining whether reasonable suspicion exists").

According to the motion judge, the State fell short in showing that there was an "articulable" suspicion. From his viewpoint, the information available to the troopers gave rise to nothing more than a "hunch" that "something was wrong." With respect to Sergeant Klem's testimony that the hanging gas tank caused him to be suspicious, Judge DeVesa rejected the notion that "any time there's a loose part on a motor vehicle that somehow that should give rise to believe that people are hiding drugs in the motor vehicle." He apparently acknowledged that although an officer's experience and knowledge must be afforded due

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weight to " 'specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his [or her] experience,' " generalizations could not form the basis for reasonable and articulable suspicion. *See id.* at 361, 788 *A.*2d 746 (quoting ****1266** *Terry, supra,* 392 *U.S.* at 27, 88 *S.Ct.* at 1883, 20 *L.Ed.*2d at 909) (alterations in original).

The motion judge could not conclude that in the circumstances of this case, "simple nervousness" and "conflicting statements" gave "rise to a reasonable suspicion that drugs [were] being secreted in this vehicle." In the end, he held that the troopers did not possess the requisite suspicion either to conduct the investigatory stop or request consent to search the Lincoln.

The motion judge's findings concerning the timing of the investigatory detention and whether the troopers possessed the necessary suspicion were close calls. We cannot conclude, however, based on our review of the record, that those findings are so clearly mistaken that an appellate court should substitute its own ***251** judgment. Accordingly, we are compelled to reverse the Appellate Division and reinstate the motion judge's order suppressing the evidence.

Because the unconstitutional investigatory detention and request for consent to search standing alone support suppression of the evidence, we need not reach the question of whether defendant Leach's consent was knowingly and voluntarily given to the troopers.

V.

In summary, we hold that under our State Constitution, law enforcement officers cannot request consent to search a disabled vehicle on the shoulder of a roadway unless they have reasonable and articulable suspicion to believe that evidence of criminal wrongdoing will be discovered in the vehicle. Under our deferential standard of appellate review, we conclude that there was sufficient credible evidence in the record to support the motion judge's findings that the troopers engaged in an unconstitutional investigatory detention and search of the Lincoln Town Car and individual defendants. We, therefore, affirm in part and reverse in part, reinstate the motion judge's suppression order, and remand to the trial court for proceedings consistent with this opinion.

Justice RIVERA–SOTO, dissenting.

I respectfully dissent from the majority's determination of this cause substantially for the reasons persuasively explained by Judge Wecker in *State v. Elders,* 386 *N.J.Super.* 208, 899 *A.*2d 1037 (App.Div.2006). I add only the following.

The majority takes issue with what it characterizes as the Appellate Division's failure to "apply the correct standard of review for a suppression hearing." *Ante,* 192 *N.J.* at 231, 927 *A.*2d at 1254 (2007). According to the majority, the panel engaged in "its own factfindings," *ante,* at 238, 927 *A.*2d at 1258, "did not defer to the motion judge's factfindings," *ante,* at 242, 927 *A.*2d at 1261, ***252** and thus "improperly substituted its own factfindings for those of the motion judge[,]" *ibid.* In the end, the majority concludes that "[t]he Appellate Division in this case did not apply the deferential standard of review to the motion judge's findings." *Ante,* at 245, 927 *A.*2d at 1262. For the reasons that follow, I disagree.

Instead of parsing out the panel's words on the subject, it is more instructive to read, as an integrated whole, how the panel viewed its task in this appeal:

> When the outcome of a suppression hearing is dependent upon the judge's findings of fact, including witness credibility, we defer to those findings as long as they are supported by sufficient credible evidence in the record. See *State v. Locurto,* 157 *N.J.* 463, 474, 724 *A.*2d 234 (1999). Here, however, the outcome is ****1267** based upon the judge's application of the law to facts that are essentially undisputed. The most telling evidence at the hearing was the videotape of the highway incident, and the only witnesses at the hearing were the two troopers most closely involved in the incident. No material factual dispute or contradiction arose from that evidence, and no special deference to judicial factfinding is warranted. We are satisfied that the troopers had a reasonable, articulable suspicion that there was evidence of crime in the vehicle they sought to search.
>
> [*Elders, supra,* 386 *N.J.Super.* at 228, 899 *A.*2d 1037.]

There is nothing in the Appellate Division's decision that supports the conclusion that it willy-nilly jettisoned the motion judge's *factual* findings in favor of its own. Indeed, the panel explains—and no one contests—that there were no material factual disputes here. Thus, all that remained was the application of law to those undisputed facts. And, in that context, we have repeatedly and uniformly held that "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any

special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378, 658 *A.*2d 1230 (1995). *See Raspa v. Office of the Sheriff,* 191 *N.J.* 323, 334–35, 924 *A.*2d 435 (2007) (same, quoting *Manalapan Realty, supra*); *State v. Drury,* 190 *N.J.* 197, 209, 919 *A.*2d 813 (2007) ("We therefore owe no deference to the interpretation of the trial court or the appellate panel, and apply instead a de novo standard of review" (citation omitted)); *State v. Harris,* 181 *N.J.* 391, 419, 859 *A.*2d 364 (2004) (same, quoting *Manalapan Realty, supra*); *Pheasant Bridge Corp. v. Twp. of Warren,* 169 *N.J.* 282, 293, 777 ***253** *A.*2d 334 (2001) (same, citing *Manalapan Realty, supra*); *In re Return of Weapons to J.W.D.,* 149 *N.J.* 108, 117, 693 A.2d 92 (1997) ("If, however, an appellate court is reviewing a trial court's legal conclusions, the same level of deference is not required" (citing *Manalapan Realty, supra*)). Applying the law to the facts, the panel concluded, in respect of the actual search of the car, that "the troopers had a reasonable, articulable suspicion that there was evidence of crime in the vehicle they sought to search." *Elders, supra,* 386 *N.J.Super.* at 228, 899 *A.*2d 1037. That is a conclusion of law derived from the application of law to a given set of facts. It is only that legal conclusion that is at odds with the motion judge's legal conclusion; there is no substantive difference between factual findings relied on by the motion judge and those the panel referenced in support of its conclusion.

The Appellate Division did reject the motion judge's factual findings in a limited respect: "whether [defendant Christopher] Leach's apparent request for an attorney earlier in the confrontation was a sufficient basis for the judge to conclude that Leach's subsequent consent was not voluntary." *Id.* at 230, 899 *A.*2d 1037. The panel recited at length the factual findings made by the motion judge concerning that matter, and it "recognize[d its] obligation to give deference to the [factual] findings of the Law Division judge, as long as those findings are based upon sufficient credible evidence in the record." *Id.* at 231, 899 *A.*2d 1037 (citing *Locurto, supra,* 157 *N.J.* at 474, 724 *A.*2d 234). The Appellate Division explained, however, that "the rationale for according the trial judge's finding such deference is that those findings 'are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.' " *Id.* at 232, 724 *A.*2d 234 (quoting *State v. Locurto, supra,* 157 *N.J.* at 474, 724 *A.*2d 234).

****1268** The panel explained that, because "the observations upon which the motion judge explicitly made his findings and drew his conclusions came from the videotaped encounter, and [because] that videotape is equally available to us[,]" it readily was able to gauge ***254** whether those findings were supported by sufficient credible evidence in the record. *Ibid.* It determined that they were not. As the Appellate Division noted, its "own observations [of the videotape] do not support the findings cited by the judge to conclude that Leach did not voluntarily consent to the search." *Ibid.* The panel then listed five separate reasons for rejecting the motion judge's findings in respect of Leach's consent to the search of his car. *Id.* at 232–33, 724 *A.*2d 234. Having given due deference to the motion judge, the Appellate Division nonetheless concluded that his findings were not supported by sufficient credible evidence in the record. It was for that reason—and not from the application of an incorrect standard of review—that the panel reversed the motion judge's ruling.

Because the majority reverses the judgment of the Appellate Division based on its view that the panel applied an incorrect standard of review, because I disagree with that conclusion, and because I would affirm the panel's legal conclusion that both the search and Leach's consent to search were proper, I respectfully dissent.

For affirmance in part/reversal in part/remandment—Chief Justice ZAZZALI and Justices LONG, LaVECCHIA, ALBIN, WALLACE and HOENS—6.

For affirmance—Justice RIVERA–SOTO—1.

All Citations

192 N.J. 224, 927 A.2d 1250

Footnotes

1 Our review of the videotape has assisted us in describing the sequence of events.

2 Trooper O'Connor carried in his pocket a transmitter box, which "act [ed] as a microphone for the [video] camera."

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3 As the troopers pulled over to the shoulder, they informed the dispatcher that two black men were underneath the disabled car. Moreover, they informed the dispatcher that the disabled car had a North Carolina license plate and provided the dispatcher with the plate number.

4 At the hearing, Trooper O'Connor claimed that he did not hear Leach's request for an attorney due to the heavy traffic on the Turnpike, although he conceded that the request could be clearly heard on the videotape.

5 At the hearing, Trooper O'Connor testified that it might have taken as long as an hour for the on-duty canine officer and the dog to arrive. Both Trooper O'Connor and Sergeant Klem insisted that they had reasonable and articulable suspicion that some form of criminal activity was afoot and therefore a drug-sniffing dog was the next logical step.

6 The videotape indicates that the consent form was signed at 3:28 a.m.

7 It should be noted that before the Appellate Division, the State "filed separate Notices of Appeal respecting each defendant." *State v. Elders,* 386 *N.J.Super.* 208, 213 n. 1, 899 *A.*2d 1037 (App.Div.2006). The State's briefs were identical, as were each of the defendant's briefs. *Ibid.* Given that the issues raised were the same, the Appellate Division consolidated the six appeals in its opinion. *Ibid.*

8 Article I, Paragraph 7, which is almost identical in wording to the Fourth Amendment, provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

9 The community caretaker doctrine reflects the realization that police officers are often called on not to investigate crimes, but instead " 'to ensure the safety and welfare of the citizenry at large.' " *State v. Diloreto,* 180 *N.J.* 264, 276, 850 *A.*2d 1226 (2004) (quoting John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions,* 89 *J.Crim. L. & Criminology* 433, 445 (1999)). Police officers serve as community caretakers when their actions 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, 93 *S.Ct.* 2523, 2528, 37 *L.Ed.*2d 706, 715 (1973).

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260 N.J.Super. 75
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Jose MARTINEZ, Defendant–Appellant.

Submitted Oct. 1, 1992.
|
Decided Oct. 30, 1992.

Synopsis

Defendant was convicted in the Superior Court, Law Division, Cumberland County, of driving under the influence of alcohol, and he appealed. The Superior Court, Appellate Division, Landau, J.A.D., held that police officer's stop of defendant's automobile was objectively reasonable.

Affirmed.

Attorneys and Law Firms

****280** ***76** Capizola, Fineman, Kutner & Pagliughi, Vineland, for defendant-appellant (Kenneth A. Pagliughi and Barbara R. Lapham, on the brief).

Michael Brooke Fisher, Cumberland County Prosecutor, for plaintiff-respondent (Jon M. Reilly, Asst. Prosecutor, on the letter brief).

Before Judges KING, LANDAU and THOMAS.

Opinion

The opinion of the court was delivered by

LANDAU, J.A.D.

Defendant Jose Martinez here contests his Law Division conviction following appeal from the municipal judgment below, on a charge of driving under the influence of alcohol in violation of *N.J.S.A.* 39:4–50. Sentence has been stayed pending this appeal.

***77** Martinez was stopped by a State Trooper patrolling Deerfield Township shortly after 2 a.m. on October 8, 1990 when the Trooper observed him driving his vehicle "at a snail's pace," although otherwise presenting no occasion for inquiry. At the time of the stop, Martinez and the police vehicle were the only cars on the street.

Martinez contends that the charges should have been dismissed below on his motion for want of justification for the stop. More particularly, he urges that his conviction "steps beyond the constitutional line" which we set in *State v. Goetaski,* 209 *N.J.Super.* 362, 507 *A.*2d 751 (App.Div.1986), *certif. den.,* 104 *N.J.* 458, 517 *A.*2d 443 (1986).

Goetaski had been stopped by a State Trooper when observed driving slowly on the shoulder of a state highway at 4:00 a.m., in a rural fifty m.p.h. zone, with his turn indicator flashing. We held that the stop was constitutional after weighing competing concerns for freedom from arbitrary police invasion of privacy expectations against the gravity of the applicable public concern which, in *Goetaski,* was a legitimate apprehension about the driver's welfare. We agreed with the State's argument that the patrolling trooper had reason to believe that "either there's something wrong with the driver, he's having a problem or there is something out of the ordinary," and that people do not drive slowly on a rural road shoulder in the middle of the night if there's not something wrong. We observed, however, that the stop was very close to the constitutional line. (*See Goetaski, supra,* 209 *N.J.Super.* at 365–366, 507 *A.*2d 751, and authorities there cited).

Martinez was not in the shoulder of a rural road, nor were his turn indicators or signal flashers activated. He was observed while proceeding on the roadway in a residential twenty-five m.p.h. zone. However, the Trooper testified that Martinez was "travelling at a snail's pace ... less than 10 [m.p.h.]", the operation was "abnormal" in the sense of being excessively slow, and that he followed Martinez in his own car at less than ***78** ten m.p.h. *N.J.S.A.* 39:4–97.1 expressly prohibits driving at "such a slow speed as to impede or block the normal and reasonable movement of traffic ...". There was, of course, no ****281** prospect that Martinez would create a traffic jam on the residential street at two o'clock in the morning.

We take notice, however, that operation of a motor vehicle in the middle of the night on a residential street at a snail's pace between five and ten m.p.h. is indeed "abnormal," as the Trooper testified. Such abnormal conduct suggests a number of objectively reasonable concerns: (a) something might be wrong with the car; (b) something might be wrong with its driver; (c) a traffic safety hazard is presented to drivers approaching from the rear when an abnormally slow moving

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vehicle is operated at night on a roadway without flashers; (d) there is some risk that the residential neighborhood is being "cased" for targets of opportunity. Possibilities (a), (b) and (c) involve the "community caretaking function" expected of alert police officers. *See, Cady v. Dombrowski,* 413 *U.S.* 433, 441, 93 *S.Ct.* 2523, 2528, 37 *L.Ed.*2d 706 (1973); *Goetaski, supra,* 209 *N.J.Super.* at 365, 507 *A.*2d 751; *State v. Marcello,* 599 *A.2d* 357, 358 (Vt.1991); *State v. Pinkham,* 565 *A.2d* 318, 319 (Me.1989). Possibility (d) implicates the "common-law right to inquire" based upon a founded suspicion that criminal activity might be afoot. *See* LaFave, *Search and Seizure,* Sec. 9.2(h) (2d ed. 1987). It is appropriate to consider all of these applicable concerns and balance them against the minimal intrusion involved in a simple inquiry stop. We are satisfied on this balance that the stop was objectively reasonable and fell far short of the line of unconstitutionality we drew in *Goetaski.*

Affirmed.

All Citations

260 N.J.Super. 75, 615 A.2d 279

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222 N.J. 154
Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Respondent and Cross–Appellant,
v.
Evan REECE, Defendant–Appellant and Cross–Respondent.

A-79 September Term 201, A-80 September Term 2013, O73284
|
Argued April 14, 2015.
|
Decided July 20, 2015.

Synopsis
Background: Defendant was convicted after a bench trial in the Municipal Court of simple assault, resisting arrest, and obstruction. On de novo review, the Superior Court, Law Division, Burlington County, affirmed defendant's convictions for resisting arrest and obstruction, but reversed the assault conviction. Defendant appealed. The Superior Court, Appellate Division, 2013 WL 4525600, affirmed in part and reversed in part. defendant appealed, and state petitioned for certification.

Holdings: The Supreme Court, Solomon, J., held that:

officers' warrantless entry into defendant's home was justified under emergency aid doctrine;

defendant could be convicted for obstruction;

defendant used physical force creating substantial risk of injury, as element of resisting; and

officers did not use excessive force.

Affirmed in part and reversed in part.

Attorneys and Law Firms

****1237** Justin T. Loughry, Moorestown, argued the cause for appellant and cross-respondent (Loughry and Lindsay, attorneys).

Daniel I. Bornstein, Deputy Attorney General, argued the cause for respondent and cross-appellant (John J. Hoffman, Acting Attorney General of New Jersey, attorney).

Opinion

Justice SOLOMON delivered the opinion of the Court.

***157** Officers responded to defendant's home to investigate a dropped 9–1–1 call. When the officers announced their intention to enter ***158** defendant's home without a warrant, defendant attempted to block their entry and a struggle ensued. After being subdued, defendant was arrested and charged with two counts of simple assault, *N.J.S.A.* 2C:12–1(a)(1); one count of resisting arrest, *N.J.S.A.* 2C:29–2(a); and one count of obstruction, *N.J.S.A.* 2C:29–1(a).

Following trial, the municipal court judge found defendant guilty of one count each of simple assault, resisting arrest, and obstruction. Defendant appealed de novo to the Superior Court, Law Division. The Law Division found defendant guilty of resisting arrest and obstruction, but not guilty of simple assault. A divided Appellate Division panel affirmed defendant's conviction for resisting arrest, and reversed defendant's conviction for obstruction.

In this appeal, we are called upon to resolve two issues: first, whether the officers' warrantless entry into defendant's home was justified under the emergency-aid doctrine; and second, whether the elements of obstruction were established by the evidence presented. We conclude that the emergency-aid doctrine justified the officers' warrantless entry into defendant's home. Furthermore, because the credibility and factual findings of the municipal court and Law Division were supported by substantial evidence, we affirm defendant's conviction for resisting arrest and reinstate defendant's obstruction conviction.

I.

The State presented the following proofs at trial. At dusk on January 7, 2009, Pemberton Police Department Sergeant Peter Delagarza responded to a dropped 9–1–

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1 call originating from defendant's home.[1] Upon arrival, Delagarza, who was in uniform, walked around the property and observed three vehicles in the driveway. Moments later, Delagarza knocked on the front door. ***159** Defendant opened the door, and Delagarza asked if defendant made a 9–1–1 call. Defendant denied making any such call and, when asked, insisted that that he was alone in the home.

In an effort to show that no call had been made, defendant asked if he could retrieve his cordless home phone to show Delagarza. Delagarza assented, and defendant walked back into the residence, leaving the front door ajar. Delagarza peered into the home through the open door but saw nothing unusual or suspicious. Nevertheless, Delagarza radioed for backup.

When defendant returned with the phone, he displayed the phone's screen to Delagarza and scrolled through the caller identification. Finding no 9–1–1 call in the phone's memory, defendant handed ****1238** the phone to Delagarza, who then radioed dispatch to confirm that the 9–1–1 call originated from defendant's residence. Defendant stood next to Delagarza as the dispatcher repeated the originating number of the call, which defendant confirmed was his home phone number.

During this exchange, Delagarza noticed that defendant had a small abrasion on his right hand. At trial, Delagarza testified on direct examination that the abrasion was "somewhere around the knuckle area of the hand," and similar to "an abrasion that you would receive from punching something." After noticing the abrasion, Delagarza asked defendant whether he was married. According to Delagarza, defendant responded, "I don't see what business it is of yours anyway, but I'm married." Delagarza testified that after he asked this question defendant's demeanor began to change, and "it seemed like he was starting to get frustrated with the fact that I was there and that I was starting to ask these questions."

Delagarza then asked if he could enter the house and look around, but defendant refused consent. Delagarza called for assistance. Officers Hall and Gant, who had responded to Delagarza's call for backup and were seated in marked cars parked in front of the house, joined Delagarza at the doorway. Delagarza told defendant that he and the officers needed to check the house, ***160** at which point defendant slammed the door closed. While defendant attempted to lock the door, the officers pushed the door open. Delagarza announced that defendant was under arrest, and the officers entered defendant's residence.

Delagarza testified that, when he moved to place the defendant under arrest, defendant "immediately started to physically resist" by pulling his hand away. At this point, Officers Hall and Gant also "grabbed" defendant and all four men "immediately ... fell to the ground on the floor." During the struggle on the floor, Delagarza was pinned beneath defendant, causing Officers Hall and Gant to fear for Delagarza's safety. Hall and Gant each reacted by striking defendant once in the face with a closed fist. After securing defendant, Delagarza and Gant checked the interior of the house and found nothing amiss.

Defendant disputes the State's factual assertions in four significant respects. First, he said the officers did not announce their intention to arrest him.[2] Second, he claims he did not resist arrest by pulling his hands away from the officers. Rather, after the officers grabbed him he executed a "controlled fall" similar to a maneuver learned in parachute training[3] by simply "let[ting] [his] legs go" because he feared "get [ting] hurt otherwise," and as a result of this controlled fall, he and the three officers tumbled to the floor. Third, defendant stated that Delagarza mischaracterized the abrasion on his hand. Finally, defendant asserted the officers did not limit themselves to one blow each, rather they struck defendant "in volleys of two to three, probably three to four total times."

After the incident, defendant was charged with resisting arrest, *N.J.S.A.* 2C:29–2(a); obstructing the administration of law, ***161** *N.J.S.A.* 2C:29–1(a); and simple assault upon Delagarza and Hall, *N.J.S.A.* 2C:12–1(a)(1). Trial occurred in Pemberton municipal court on four separate dates between June 14, 2010, and March 14, 2011.[4]

****1239** At the conclusion of the trial, the municipal court judge made specific credibility findings. The judge found defendant "less than credible" because the judge "found [defendant] to be a bit too glib, to have too many ready explanations for obvious[ly] inappropriate behavior." The judge supported that conclusion by noting several instances where defendant's credibility was undermined by attempts to craft an explanation for his conduct.

For example, defendant asserted that when the incident first began, he questioned whether Delagarza was indeed a police officer, despite Delagarza's conspicuous uniform

and badge. Defendant testified that he suspected Delagarza was not an officer because defendant was alone in the home and had not placed the 9–1–1 call. However, during direct examination, defendant suggested that the dropped 9–1–1 call may have occurred as the result of a phone malfunction caused by the inclement weather. Finally, the judge characterized defendant's purported "controlled fall" as a "convenient explanation."

The municipal court judge found that defendant further undermined his credibility by giving a lengthy and detailed explanation of what he was wearing during the incident, and why he had chosen to wear each article of clothing. In the judge's opinion, this testimony was an attempt to explain away inappropriate conduct—defendant contended that the wool socks he was wearing caused him to slide and lose his footing on the freshly polished hardwood floors.

By contrast, while acknowledging minor discrepancies in the officers' testimony, the judge found the officers credible. The judge reasoned that, although the officers were sequestered during ***162** trial and were thus incapable of hearing each other's testimony, the officers' accounts were "very similar." He characterized the testimony of Delagarza and Hall as "good, open, honest, and credible," because both officers limited their testimony to "that which they had seen and recalled from the incident." The judge specifically credited Delagarza's explanation that he did not report that Hall and Gant struck defendant because Delagarza was underneath defendant and did not see it happen. The judge also credited Hall's statement that he punched defendant once out of concern for Delagarza's safety, and Gant's testimony that he struck defendant in the face to end the encounter quickly after sensing Delagarza was on the floor underneath defendant.

Ultimately, the municipal court made the following findings: (1) the officers announced their intention to arrest, (2) defendant was aware that the officers were in fact police officers, and (3) Officers Hall and Gant each punched the defendant once in the face because they perceived a threat to Delagarza. The judge then found defendant guilty of simple assault upon Officer Hall, resisting arrest, and obstruction, but acquitted defendant of simple assault upon Delagarza.

In finding defendant guilty of resisting arrest, the judge stated:

> I think it is clear that the testimony presented indicated that [defendant] was advised that he was under arrest on more than one occasion.... [I]t is abundantly clear to anyone and certainly to [defendant] that if you're being told to stop resisting, that you should in fact stop resisting and allow yourself to be placed under arrest.

The judge also held that the officers were entitled to enter the home based upon the emergency-aid doctrine, as described in *State v. Frankel,* 179 *N.J.* 586, 847 *A.*2d 561, *cert. denied.,* 543 *U.S.* 876, 125 *S.Ct.* 108, 160 *L.Ed.*2d 128 (2004). The judge reasoned that, because the officers "had the right to enter the home," defendant's ****1240** attempt to deny them entry constituted obstruction of justice.

On de novo review, the Law Division affirmed defendant's convictions for resisting arrest and obstruction. The Law Division held that, "upon these facts, [Delagarza] and his colleagues were ***163** justified in doing what was needed to insure that no one in that house was in need of emergent aid. They had the duty to enter to confirm or dispel an emergency situation." The Law Division added that defendant's testimony did not appear credible.

> [I]f [defendant] had "gone limp" or "did nothing" as he suggests, the whole matter would have been completed within a very short period as opposed to a several minute physical struggle on the floor with defendant's face being struck and bruised. The testimony of the defendant is simply not worthy of belief.

Additionally, the Law Division determined that "defendant, by all the circumstances presented to him, knew that Delagarza and his officers were police and why they were there at his door."

The Appellate Division, in a split decision, affirmed defendant's resisting arrest conviction but reversed defendant's conviction for obstruction. Judge Alvarez, writing for the majority, found that the emergency-aid doctrine did not apply because Delagarza "simply lacked sufficient information from which to conclude someone in the home was at risk of immediate danger." Judge Alvarez explained

> [i]n the absence of facts triggering the emergency aid doctrine, which would make police entry lawful, defendant's refusal to allow Delagarza to enter his home was not an act of obstructing. He was entitled to refuse to cooperate. We do not suggest, however, that Delagarza's concern was unwarranted, only that the circumstances did not justify a forced entry. If the entry was unlawful, defendant's conduct in refusing to admit the officers is not an act of "obstructing."

Regarding the resisting arrest conviction, the majority, quoting *N.J.S.A.* 2C:29–2(a), held that because the arrest was made under "color of ... official authority" and was

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announced, defendant was not entitled to resist arrest, even if the arrest was unjustified.

In a concurring opinion, Judge Waugh concluded that, "although the police officers had lawful reason to enter [defendant]'s residence without a warrant or consent, [defendant]'s refusal of their request that he consent to a warrantless search was not a violation of [the obstruction statute]."

Judge Fisher, dissenting in part, disagreed with the majority's affirmance of defendant's conviction for resisting arrest. In Judge Fisher's view, his colleagues' conclusion "oversimplifie[d] the troubling issues raised by th[e] case, namely, the clear disregard of ***164** defendant's Fourth Amendment rights." The dissent added that "[i]t is the fact that this event occurred in the home and not elsewhere that prompts my dissent," asserting that defendant was not guilty of resisting arrest because the unlawful intrusion into defendant's home and the officers' use of excessive force permitted defendant to protect himself.

The dissent disagreed with the Law Division's factual findings, asserting that those findings should have been rejected because the Law Division failed to consider the discrepancy between Delagarza's testimony that he saw an abrasion on defendant's knuckle and the photographs admitted into evidence which showed an abrasion at the base of his thumb. The dissent also rejected the factual findings of the municipal court and the Law Division because they did not consider that Delagarza's police report made no mention of the other officers striking defendant in the ****1241** face. Thus, the dissent posited, the Law Division's findings were "so plainly unwarranted that the interests of justice demand intervention and correction."

Defendant appealed his conviction as of right. *R.* 2:2–1(a). Subsequently, this Court granted the State's petition for certification regarding the dismissal of the obstruction charge. *State v. Reece,* 217 *N.J.* 296, 88 *A.*3d 192 (2014).

II.

Defendant argues that, to obtain a conviction for resisting arrest, the State must show that the arresting officers announced their intention to arrest prior to any resistance, the officers were acting under color of their authority, and the "police [did] not use unlawful force in effecting the unlawful arrest." *N.J.S.A.* 2C:29–2(a); *N.J.S.A.* 2C:3–4(b)(1)(a); *State v. Mulvihill,* 57 *N.J.* 151, 157–58, 270 *A.*2d 277 (1970). Defendant contends that the officers failed to announce their intentions to arrest prior to defendant's resistance and used excessive force in restraining him. Thus, defendant argues, the majority erred in affirming his resisting arrest conviction.

***165** Defendant maintains that, in this case, the police used unlawful force by "physically set[ting] upon [defendant] with overpowering force when he never so much as attempted a punch, kick or push." Defendant argues that the Appellate Division majority, when considering the resisting-arrest charge, ignored the officers' unlawful force. Defendant also maintains that, given the reversal of his obstruction conviction, the Appellate Division impliedly concluded that "the police entered forcibly and illegally, without any justification," and the officers' "very presence inside the house and the measures by which they accomplished that presence were unlawful and constituted in and of themselves unlawful force."

Defendant emphasizes that, contrary to *State v. Williams,* 192 *N.J.* 1, 926 *A.*2d 340 (2007), and *State v. Crawley,* 187 *N.J.* 440, 901 *A.*2d 924, *cert. denied,* 549 *U.S.* 1078, 127 *S.Ct.* 740, 166 *L.Ed.*2d 563 (2006), both of which dealt with police-citizen encounters on the street, the police in this case unconstitutionally invaded his home. He urges this Court to consider the resisting arrest charge "in the context of this sacrosanct constitutional right of privacy and security and right to be left alone in the home, free of official intrusion."

Defendant asserts that the majority failed to reverse the resisting arrest conviction based on plainly unwarranted, unsupported factual findings and credibility determinations. Specifically, defendant maintains as follows: Delagarza's testimony that he saw an abrasion on defendant's knuckle was "conclusively refuted" by photographs; Delagarza lacked candor because his report made no mention that defendant was punched in the face; and Hall testified he did not hear Delagarza say defendant was under arrest, which supports defendant's claim that the officers did not announce defendant was under arrest. Finally, defendant asserts that "[t]he record does not permit a rational conclusion of guilt beyond a reasonable doubt for 'resistance' to an unlawful arrest."

The State argues that the officers' entry into the home was justified by the emergency-aid doctrine because a dropped 9–1–1 call had been made from defendant's residence, defendant denied ***166** making the 9–1–1 call but claimed

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no one else was home, Delagarza observed a fresh abrasion on defendant's hand, and defendant became suspiciously defensive and hostile when asked if he was married. The State asserts that the facts here are "materially indistinguishable" from *Frankel,* and therefore the result should be the same. ****1242** Additionally, the State argues that, under *Crawley,* regardless of the constitutionality of the officers' decision to enter defendant's residence under the emergency-aid doctrine, defendant "still had no right to physically resist their efforts to enter the house, and when he did so, he was guilty of obstruction."

III.

We begin our review with the well-settled proposition that appellate courts should give deference to the factual findings of the trial court. *State v. Locurto,* 157 *N.J.* 463, 470–71, 724 *A.*2d 234 (1999). Those findings must be upheld, provided they " 'could reasonably have been reached on sufficient credible evidence present in the record.' " *Id.* at 471, 724 *A.*2d 234 (quoting *State v. Johnson,* 42 *N.J.* 146, 162, 199 *A.*2d 809 (1964)). Deference is warranted because the " 'findings of the trial judge ... are substantially influenced by his opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.' " *Ibid.* (quoting *Johnson, supra,* 42 *N.J.* at 161, 199 *A.*2d 809).

In *Locurto,* the defendant appealed a municipal court conviction to the Law Division. *Id.* at 467, 724 *A.*2d 234. As with the instant case, the Law Division's factual findings in *Locurto* were predicated upon the credibility findings of the municipal court, and we noted that

> the rule of deference is more compelling where ... two lower courts have entered concurrent judgments on purely factual issues. Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error.
>
> [*Id.* at 474, 724 *A.*2d 234.]

***167** Therefore, appellate review of the factual and credibility findings of the municipal court and the Law Division "is exceedingly narrow." *Id.* at 470, 724 *A.*2d 234.

However, to the extent the Law Division or municipal court makes a legal determination, that determination is reviewed de novo. *See State v. Handy,* 206 *N.J.* 39, 45, 18 *A.*3d 179 (2011) (stating "appellate review of legal determinations is plenary"). Thus, we must defer to the factual findings of the municipal court and the Law Division so long as they are supported by sufficient credible evidence, but we review the legal conclusion that the emergency-aid doctrine applies here de novo.

IV.

A.

With those standards in mind, we must first consider whether warrantless entry of defendant's home was justified by the emergency-aid doctrine.

Article I, Section 7 of the New Jersey Constitution assures "[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 warrant shall issue except upon probable cause...." Thus, as a general matter, "police officers must obtain a warrant from a neutral judicial officer before searching a person's property." *State v. DeLuca,* 168 *N.J.* 626, 631, 775 *A.*2d 1284 (2001).

In recognition of our strong policy against warrantless searches and seizures, the burden falls upon the State to prove a warrantless search was justified by one of the " 'specifically established and well-delineated exceptions' " to the warrant requirement. *Frankel, supra,* 179 *N.J.* at 598, 847 *A.*2d 561 (quoting *Mincey* ****1243** *v. Arizona,* 437 *U.S.* 385, 390, 98 *S.Ct.* 2408, 2412, 57 *L.Ed.* 290, 298–99 (1978)). Therefore, police officers are entitled to conduct a warrantless search when the search is supported by "a ***168** known exception to the warrant requirement." *State v. Eckel,* 185 *N.J.* 523, 539, 888 *A.*2d 1266 (2006).

The exception to the warrant requirement at issue here is the emergency aid doctrine, an exception "derived from the commonsense understanding that exigent circumstances may require public safety officials, such as the police, firefighters, or paramedics, to enter a dwelling without a warrant for the purpose of protecting or preserving life, or preventing serious injury." *Frankel, supra,* 179 *N.J.* at 598, 847 *A.*2d 561. Under those circumstances, our constitution does not "demand that public safety officials stand by in the face of an imminent danger and delay potential lifesaving measures while critical

and precious time is expended obtaining a warrant." *Id.* at 599, 847 *A.*2d 561.

In determining whether the emergency-aid doctrine justifies a warrantless search, we follow federal jurisprudence and apply "the objective reasonableness test." Kevin G. Byrnes, *Current N.J. Arrest, Search & Seizure,* § 11:2, at 226 (2014–15). In *Frankel, supra,* we adopted a "three-prong test to determine whether a warrantless search by a public safety official is justified." 179 *N.J.* at 600, 847 *A.*2d 561. Under *Frankel,*

> the public safety officer must have an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or prevent serious injury; his primary motivation for entry into the home must be to render assistance, not to find and seize evidence; and there must be a reasonable nexus between the emergency and the area or places to be searched.
>
> [*Ibid.*]

In *State v. Edmonds,* 211 *N.J.* 117, 132, 47 *A.*3d 737 (2012), we revisited the test articulated in *Frankel* and concluded that the subjective motivations of a public safety official were "no longer consonant with Fourth Amendment jurisprudence." *Id.* at 131–32, 47 *A.*3d 737. Consequently, *Edmonds* framed a two-part test to be applied in determining whether the emergency-aid doctrine justifies a warrantless search:

> 1) the officer had 'an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or to prevent serious injury' and
>
> ***169** 2) there was a 'reasonable nexus between the emergency and the area or places to be searched.'
>
> [*Ibid.* (quoting *Frankel, supra,* 179 *N.J.* at 600, 847 *A.*2d 561).]

In this case, the nexus between the perceived emergency and the scope of the officers' search is not challenged. Therefore, the issue here concerns only the first prong of the analysis.

In *Frankel, supra,* we explained that the first prong asks "whether [the officer] was 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[s]' his entry into defendant's home under the emergency aid doctrine." 179 *N.J.* at 610, 847 *A.*2d 561 (quoting *Terry v. Ohio,* 392 *U.S.* 1, 21, 88 *S.Ct.* 1868, 1880, 20 *L.Ed.*2d 889, 906 (1968)). Applying that principle, we held that a dropped 9–1–1 call from a residence creates "a presumptive emergency, requiring an immediate response," because such a call suggests "a person whose life is endangered but [is] unable to speak" made the call. *Id.* at 604, 847 *A.*2d 561.

****1244** However, the presumption that an emergency exists when there is a dropped 9–1–1 call "may be dispelled by any number of simple explanations given by the homeowner to the responding officer." *Ibid.* For instance, a parent "may explain that her child, who appears at the door with her, impishly dialed the number"; or "[a] resident, who otherwise raises no suspicions, may state that he intended to call 4–1–1 but pushed the wrong digit." *Id.* at 604–05, 847 *A.*2d 561. Courts applying this presumptive emergency "must weigh the competing values at stake, the privacy interests of the home versus the interest in acting promptly to render potentially life-saving assistance to a person who may be incapacitated." *Id.* at 605, 847 *A.*2d 561. This is a fact-sensitive inquiry. *Id.* at 606, 847 *A.*2d 561.

The facts in *Frankel* inform our inquiry here. In *Frankel,* a police officer responded to a dropped 9–1–1 call originating from the home of the defendant. *Id.* at 593, 847 *A.*2d 561. The officer knocked on the front door, and the defendant answered, but the officer could not see into the home because his view was obscured ***170** by a white sheet hanging behind the front door. *Ibid.* The defendant denied placing a 9–1–1 call and claimed that he was alone in the home. *Id.* at 593–94, 847 *A.*2d 561. The officer, noting the defendant's increasing nervousness, began to fear for his safety and asked the defendant to come out from behind the sheet. *Id.* at 594, 847 *A.*2d 561. Once the defendant complied, the officer frisked him for weapons. *Ibid.* The officer then asked for permission to enter the home. *Ibid.* However, because the officer did not have a warrant, the defendant refused entry. *Ibid.* The officer then called for backup. *Ibid.*

The officer and the defendant continued their conversation on the porch. *Ibid.* The officer confirmed with the police dispatcher that the 9–1–1 call originated from the defendant's phone, and a follow-up call to that number elicited a busy signal. *Id.* at 594–95, 847 *A.*2d 561. While the defendant retrieved his cordless phone, the officer entered the foyer with the defendant's consent and noticed a lawn chair propped against a sliding glass door which he believed may have been intended to impede entry. *Id.* at 594–95, 847 *A.*2d 561. When backup arrived, the officer entered the home and conducted a search limited to places where a body could

be concealed. *Ibid.* No one else was found, but the search revealed marijuana plants, ultraviolet lights and an elaborate watering system. *Id.* at 596, 847 *A.*2d 561. The defendant was charged with fourth-degree possession of marijuana, *N.J.S.A.* 2C:35–10a (3), and first-degree operation of a marijuana manufacturing facility, *N.J.S.A.* 2C:35–4. *Id.* at 596, 847 *A.*2d 561.

On those facts, we held that the totality of the circumstances justified the officer's warrantless search under the emergency-aid doctrine because the dropped 9–1–1 call created "a duty to presume there was an emergency." *Id.* at 609, 847 *A.*2d 561. Moreover, the defendant's nervous demeanor and the dispatcher's confirmation that the 9–1–1 call came from the defendant's phone reinforced the officer's suspicion that there was an incapacitated person in the home. *Ibid.*

***171** Similarly, the dropped 9–1–1 call in this case permitted Delagarza to presume that there was an emergency. In light of that presumption, and based upon his observations—defendant denied making the 9–1–1 call while also claiming no one else was home, there were three cars in the driveway, there was an abrasion on defendant's hand, and defendant became agitated when asked if he was married—Delagarza had "an objectively reasonable basis to believe that an emergency require[d] that he provide immediate assistance to ****1245** protect or preserve life, or to prevent serious injury." *Frankel, supra,* 179 *N.J.* at 600, 847 *A.*2d 561.

The facts presented here are strikingly similar to those present in *Frankel.* Accordingly, we conclude that the emergency-aid exception to the warrant requirement justified the police officers' intrusion into defendant's home. Having determined that the officers' warrantless entry was justified under the emergency-aid doctrine, we now turn to the specific charges against defendant.

B.

1.

A person is guilty of obstructing the administration of law or other governmental function when he or she

> purposely obstructs, impairs or perverts the administration of law or other governmental function or *prevents or attempts to prevent a public servant from lawfully performing an official function* by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.
>
> [*N.J.S.A.* 2C:29–1(a) (emphasis added).]

We have "construe[d] 'lawfully performing an official function' to mean a police officer acting in objective good faith, under color of law in the execution of his duties." *Crawley, supra,* 187 *N.J.* at 460–61, 901 *A.*2d 924. In *Crawley,* we stated

> A police officer who *reasonably* relies on information from headquarters in responding to an emergency or public safety threat may be said to be acting in good faith under the statute. However, a police officer who without any basis arbitrarily detains a person on the street would not be acting in good faith.
>
> [*Id.* at 461 n. 8, 901 *A.*2d 924.]

***172** A suspect is required to cooperate with the investigating officer even when the legal underpinning of the police-citizen encounter is questionable. *See Williams, supra,* 192 *N.J.* at 10, 926 *A.*2d 340 ("[D]efendant was obliged to submit to the investigatory stop, regardless of its constitutionality."); *Crawley, supra,* 187 *N.J.* at 459–60, 901 *A.*2d 924 (holding defendant committed obstruction by impeding stop, despite officer's lack of reasonable suspicion).

When Delagarza announced his intention to enter the house, he was doing so in order to lawfully perform an official function under the emergency-aid doctrine. Defendant's attempt to close the door on the officers constituted an attempt to prevent the officers from performing their official function. Defendant's interference is not excused by his suspicions about the officers' intentions. *Crawley, supra,* 187 *N.J.* at 459–60, 901 *A.*2d 924, and *Williams, supra,* 192 *N.J.* at 10, 926 *A.*2d 340, establish that once an officer makes his investigatory intentions clear, and he is acting under the color of law, the validity of the underlying police action is inconsequential. We hereby confirm that, whether on the street or at a residence, a person who "prevents or attempts to prevent a public servant from lawfully performing an official function by means of ... physical interference or obstacle" is guilty of obstruction. *N.J.S.A.* 2C:29–1(a). Because the emergency-aid doctrine justified the officers' warrantless intrusion into defendant's home, and because defendant hampered their entry by slamming the door, defendant's obstruction conviction should have been upheld.

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2.

A person is guilty of third-degree resisting arrest when he or she:

(a) Uses or threatens to use physical force or violence against the law enforcement officer or another; or

**1246 (b) Uses any other means to create a substantial risk of causing physical injury to the public servant or another.

[*N.J.S.A.* 2C:29–2(a)(3).]

*173 "It is not a defense to a prosecution [for resisting arrest] that the law enforcement officer was acting unlawfully in making the arrest, provided he was acting under color of his official authority and provided the law enforcement officer announces his intention to arrest prior to the resistance." *N.J.S.A.* 2C:29–2(a); *see also* *Mulvihill, supra,* 57 *N.J.* at 155–56, 270 *A.*2d 277 ("[I]n our State when an officer makes an arrest, legal or illegal, it is the duty of the citizen to submit and, in the event the seizure is illegal, to seek recourse in the courts for the invasion of his right of freedom."). "By the express terms of the [resisting arrest] statute, a person has no right to resist arrest by flight or any other means, even if the arrest constitutes an unreasonable seizure under the constitution." *Crawley, supra,* 187 *N.J.* at 453, 901 *A.*2d 924; *see also* *State v. Herrerra,* 211 *N.J.* 308, 334–35, 48 *A.*3d 1009 (2012) ("It is well-settled that defendants have 'no right' to resist arrest, elude or obstruct the police, or escape 'in response to an unconstitutional stop or detention.' " (quoting *Crawley, supra,* 187 *N.J.* at 455, 901 *A.*2d 924)). Because defendant pulled his hands away from the officers after Delagarza announced defendant was under arrest, and in doing so dragged the officers to the floor, the Appellate Division was correct to affirm defendant's resisting arrest conviction.

3.

Defendant contends that his obstruction and resisting arrest convictions should not stand because his actions were justified by the officers' use of excessive force. We acknowledge that a person's use of force against a law enforcement officer may be justified when the officer "employs unlawful force to effect [an] arrest." *N.J.S.A.* 2C:3–4(b)(1)(a). However, a private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized police officer engaged in the performance of his duties. *Mulvihill, supra,* 57 *N.J.* at 155–56, 270 *A.*2d 277.

As we said previously, the record below supports the findings of the municipal court and Law Division, that the officers announced *174 their intention to arrest, defendant was aware that the officers were in fact police officers, and Officers Hall and Gant each punched the defendant once in the face because they perceived a threat to Delagarza. Under these circumstances, defendant had a duty to yield to the commands of the officers who were engaged in the performance of their duties. *Ibid.* Therefore, defendant's failure to yield to the officers' legitimate authority resulted in an altercation during which the officers were entitled to use the force the municipal court and Law Division found necessary to subdue defendant.

V.

The judgment of the Appellate Division is affirmed in part and reversed in part. Defendant's conviction for resisting arrest is affirmed, and defendant's obstruction conviction is reinstated.

For affirmance in part; reversal in part—Chief Justice RABNER and Justices LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ–VINA, SOLOMON and Judge CUFF (temporarily assigned)—7.

Opposed—None.

All Citations

222 N.J. 154, 117 A.3d 1235

Footnotes

1 A dropped 9–1–1 call is an emergency call received by the communication center of a law enforcement agency from an identified location where the caller disconnects before information can be received.

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2 The trial transcript reveals that, upon entering the home, Hall and Gant heard the announcement that defendant was under arrest. Delagarza testified that he made the statement, and Gant identified Delagarza as the one who did so. However, Hall could not recall which officer made the announcement.

3 Defendant was a Captain in the United States Air Force.

4 The procedures used by the municipal court are not challenged in this appeal.

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968 F.3d 123
United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee,
v.
Rafael Antonio DEL ROSARIO-Acosta, Defendant, Appellant.

No. 17-1736
|
August 3, 2020

Synopsis

Background: Following denial of motion to suppress, defendant was convicted in the United States District Court for the District of Puerto Rico, Jay A. Garcia-Gregory, Senior District Judge, of possession of marijuana and unlawful possession of firearm by prohibited person. Defendant appealed.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

community-caretaking exception to warrant requirement did not apply to warrantless seizure of defendant's vehicle;

police officers did not have probable cause to seize vehicle pursuant to Puerto Rico Uniform Forfeiture Act; and

inevitable discovery doctrine did not apply.

Reversed in part, vacated in part, and remanded.

***124** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO [Hon. Jay A. García-Gregory, U.S. District Judge]

Attorneys and Law Firms

Eleonora C. Marranzini, Assistant Federal Public Defender, with whom Eric A. Vos, Federal Public Defender, Vivianne M. Marrero-Torres, Assistant Federal Public Defender, Supervisor, Appeals Section, and Franco L. Pérez-Redondo, Research & Writing Specialist, were on brief, for appellant.

Joshua K. Handell, with whom Rosa Emilia Rodríguez-Vélez, United States Attorney, Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, and Thomas F. Klumper, Assistant United States Attorney, Senior Appellate Counsel, were on brief, for appellee.

Before Howard, Chief Judge, Torruella and Kayatta, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

Rafael Antonio Del Rosario-Acosta was convicted of possession of marijuana and unlawful possession of a firearm by a prohibited person. Because we find that the district court erred by not suppressing evidence obtained through an unlawful search and seizure of his vehicle, we reverse the district court's denial of his motion to suppress, vacate his conviction, and remand for further proceedings.

***125 I.**

Responding to a call from a gas station cashier reporting an armed person on the premises, three Puerto Rico Police Department officers found a sizable crowd at a gas station on July 5, 2014. After the officers ordered the crowd to disperse, Officer Luis Osorio-Acosta ("Osorio") observed Del Rosario walk to a red Toyota Corolla parked nearby. As he departed, Del Rosario momentarily stopped his car and appeared to drop something onto the ground. Del Rosario then drove onto nearby Street No. 7, where he parked and then walked back toward the gas station and the officers. When the officers asked him questions, he turned and ran back down Street No. 7, with the officers in pursuit on foot and by car.

As Del Rosario ran, the officers saw him: remove, tear open, and discard a plastic bag containing what appeared to be marijuana; stop by his car and place a key in the lock; and begin running again, discarding a pill bottle. At that point, the officers caught up with Del Rosario and arrested him.

After the officers retrieved the plastic bag and the pill box (which contained eight Xanax pills and three Percocet pills), Officer Osorio took Del Rosario's car key and confirmed that it operated the lock on the car door. The affidavit in support of the criminal complaint, executed by Alcohol, Tobacco, Firearms & Explosive (ATF) Special Agent Charles

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Fernández, who was not at the scene, but who interviewed the officers afterwards, states that the officers then opened and searched the car with Del Rosario's consent. At the suppression hearing, the officers denied opening the car. The government attributed the contrary account in Agent Fernández's affidavit to translation error, notwithstanding the fact that he seemingly spoke both Spanish and English. The magistrate judge believed the officers, prompting an apparently incredulous district judge to hold a de novo hearing. After that hearing, the district judge also found himself persuaded by the translation error explanation.

Having been so persuaded, the district court then found as fact that the officers first opened the car after they had it towed back to headquarters. Upon inventory examination, the car was found to contain a revolver in the front cabin and ten small bags of marijuana under the carpet of the trunk. In due course, after unsuccessfully moving to suppress the evidence found in his car, Del Rosario was tried, convicted, and sentenced to ten months' imprisonment. He now appeals, pressing two arguments: The district court clearly erred as factfinder in deciding that the officers did not open and search his car at the scene of the arrest; and in any event, the officers had no right to seize and tow his car, thereby setting it up for an inventory search. As we will explain, we need only consider the latter argument, which puts at issue the possible application of the community-caretaking exception to the warrant requirement. Ultimately siding with Del Rosario,[1] we reverse his sentence and conviction, and remand for a new trial.

II.

A.

"Generally, a law enforcement officer may only seize property pursuant to a warrant based on probable cause describing the place to be searched and the property ***126** to be seized." United States v. Coccia, 446 F.3d 233, 237-38 (1st Cir. 2006) (citing Horton v. California, 496 U.S. 128, 133 n.4, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)). The officers having obtained no warrant in this instance, the government relies primarily on the community-caretaking exception to the warrant requirement. See Cady v. Dombrowski, 413 U.S. 433, 441-43, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). This exception is based on the fact "that the police perform a multitude of community functions apart from investigating crime," Coccia, 446 F.3d at 238, and traditionally have been "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety," id. (quoting United States v. Rodriguez-Morales, 929 F.2d 780, 784–85 (1st Cir. 1991)); see also id. (describing the community-caretaking function as "encompass[ing] law enforcement's authority to remove vehicles that impede traffic or threaten public safety and convenience" (citing South Dakota v. Opperman, 428 U.S. 364, 368-69, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976))).

As applied to the seizure of an automobile, the community-caretaking function turns in great part on the police officer's reasons for seizing the vehicle. The officer must have "solid, noninvestigatory reasons for impounding a car." Rodriguez-Morales, 929 F.2d at 787; see also Colorado v. Bertine, 479 U.S. 367, 375, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987) (holding that the decision to seize need be "on the basis of something other than suspicion of evidence of criminal activity"). Impoundment may not be a "mere subterfuge for investigation." Rodriguez-Morales, 929 F.2d at 787. Of course, if the officer has a proper noninvestigatory reason, she may act on it even if she also has (as will often be the case) a belief that impoundment and inventorying will find evidence of a crime. Id.; see also Coccia, 446 F.3d at 240-41.

Some circuits require that the noninvestigatory reasons for seizing property be manifest in a police department policy, protocol, or criteria guiding when a car is seized and when it is not. See, e.g., United States v. Petty, 367 F.3d 1009, 1012 (8th Cir. 2004) (holding that "[s]ome degree of 'standardized criteria' or 'established routine' must regulate these police actions ... to ensure that impoundments and inventory searches are not merely 'a ruse for general rummaging in order to discover incriminating evidence' " (quoting Florida v. Wells, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990)), but also not "requir[ing] that ... a decision to impound or inventory must be made in a totally mechanical fashion"); United States v. Duguay, 93 F.3d 346, 351 (7th Cir. 1996) (requiring standardization of the "circumstances in which a car may be impounded"). But see United States v. Lyle, 919 F.3d 716, 731 (2d Cir. 2019) (looking to the "totality of the circumstances" to conclude that the impoundment was "reasonable under the Fourth Amendment even absent standardized procedures"); United States v. McKinnon, 681 F.3d 203, 208 (5th Cir. 2012) (per curiam) (evaluating the "reasonableness" of the community-caretaking impoundment "in the context of the facts and circumstances encountered

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by the officer" without reference to any standard criteria); United States v. Smith, 522 F.3d 305, 314 (3d Cir. 2008) (assessing the "reasonableness of the vehicle impoundment for a community caretaking purpose" and declining to require standardized police procedures).

In Coccia, we held that the presence of a department protocol spelling out when there existed noninvestigatory reasons to impound a vehicle would be a significant factor cutting in favor of blessing a seizure ***127** done pursuant to such an objective protocol. See 446 F.3d at 238 (explaining that "an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment"). We also held, nevertheless, that the absence of such a protocol did not necessarily preclude reliance on the community-caretaking exception. Id. at 238-39. Rather, we held out the possibility that an examination of other factors in a given case might justify application of the exception even with no explicit, standardized protocol for noninvestigatory seizures. Id. Possible factors supporting the reasonableness of a seizure include: (1) a rental company owned the car, Petty, 367 F.3d at 1012-13 ; (2) the car could not legally be driven, United States v. Zapata, 18 F.3d 971, 978 (1st Cir. 1994); (3) the potential presence of dangerous materials in the vehicle, Coccia, 446 F.3d at 240; (4) the car was on the property of another, id.; (5) the defendant would be indisposed for a long time, id.; (6) the car was packed full of personal property that might be stolen, id.; (7) the car was in an area known for criminal activity, United States v. Ramos-Morales, 981 F.2d 625, 626-27 (1st Cir. 1992); (8) there was no one else immediately available to take the vehicle, Coccia, 446 F.3d at 240; and (9) the car was parked illegally or dangerously and might be best not left behind, Rodriguez-Morales, 929 F.2d at 785-86.

The record in this case contains no copy of any written protocol pertinent to the seizure of Del Rosario's car. When asked why they had the car towed, Officer Osorio testified that they did so "for an investigation." Asked why they needed the car to do an investigation, Osorio replied, "[b]ecause [Del Rosario] was in that vehicle and it was said that he had a weapon and it wasn't found on him." Officer Osorio did mention an unwritten protocol, apparently triggered by notifying a supervisor: "Once a supervisor is notified, then the whole protocol has to be followed" by taking the arrestee and the vehicle to the station. When asked, "Why was the vehicle going to be transported to the division?" Officer Osorio replied: "Because that was for investigation." This apparent "protocol" is not the type of formal and verifiable protocol that might provide comfort that the officers are not seizing the vehicle simply to search it. To the contrary, the apparently unwritten protocol as described by Officer Osorio seems to be nothing more than a practice designed to facilitate investigation of the crime by putting in motion an inventory search of the vehicle whether or not there is any need to protect the vehicle or the public.

So, we turn our attention to the other factors we identified in Coccia. No rental company or other third party owned the car. The car was parked legally on a quiet residential street one street over from where Del Rosario lived with his family.[2] It created no more danger than did any other car lawfully parked on that street. No evidence suggests personal property was visible inside the car, and the officers do not claim that the car faced any greater threat than that faced by any other car lawfully parked in the neighborhood. There is no claim that the car was unregistered or uninsured, or in an unsafe condition. Nor is there any suggestion that the driver would be held for long on the minor drug possession offense for which he was arrested.

***128** Officer Osorio's claim that Del Rosario was reported by someone to have had a weapon that was no longer on his person, if true, certainly may have supported either a search or at least a seizure. See Coccia, 446 F.3d at 240 ("Pursuant to the community caretaking function, police may conduct warrantless searches and seizures to take possession of dangerous material that is not within anyone's control." (citing Cady, 413 U.S. at 447-48, 93 S.Ct. 2523)). There is, though, no evidence at all that anyone said or even hinted that Del Rosario had a weapon at the time of the seizure.[3] The fact that an officer would use such an unsubstantiated claim to invoke the community-caretaking exception at a subsequent suppression hearing heightens our concern that the exception is advanced here as an after-the-fact justification for a warrantless investigatory search. The district court made no finding to the contrary, concluding instead that the officer's subjective intentions were not relevant.

The only Coccia factor favoring the government is that ostensibly there was no one else to move the car. But the relevance of that factor only arises when there is a need to move the car. In other words, when the other factors reasonably call for the vehicle to be moved, impoundment might still be unnecessary if there is another person able and willing to move and care for the car (e.g., a relative or friend of the arrestee). See, e.g., United States v. Infante-Ruiz, 13 F.3d 498, 503-04 (1st Cir. 1994) (finding impoundment of rental

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car not justified where another driver was available); Duguay, 93 F.3d at 353-54 (holding impoundment unconstitutional when another occupant of the vehicle was present at the arrest and could "provide for the speedy and efficient removal of the car from public thoroughfares or parking lots"). Nor is this a case in which a car was located in a random spot at the side of the road only because its driver was pulled over by the police. Rather, Del Rosario parked his car entirely of his own accord exactly where he wanted it parked. As best the officers knew, the car would have remained right where it was had they not decided to question or approach Del Rosario. We are not persuaded either by the government's passing suggestion that perhaps the officers were justified in seizing the vehicle because Del Rosario had left his keys in the door. Surely the officers could have secured the keys (just as they would have at the station had the keys been on Del Rosario's person).

All in all, it seems inescapable that the officers seized Del Rosario's car so that they could search it for evidence of a crime, and that they later sought to justify the search by invoking the community-caretaking exception. And while that exception might well apply even if there were also other motives for seizing the car, here the exception fits so poorly that it does not suffice to lift our eyes from the obvious conclusion that the seizure served no purpose other than facilitating a warrantless investigatory search under the guise of an impoundment inventory.

To be clear, we are not saying that an improper subjective motive renders the community-caretaking exception inapplicable. United States v. Hadfield, 918 F.2d 987, 993 (1st Cir. 1990) (explaining that "an officer's state of mind or subjective intent ***129** in conducting a search is inapposite as long as the circumstances, viewed objectively, justify the action taken"). Rather, we hold that, with no objective criteria supplied by a department protocol policy that furthers a noninvestigatory purpose, and with the factors listed in Coccia and our other case law weighing against any noninvestigatory need to move the car, the officers' testimony provides no basis for gaining comfort that invoking the exception serves as anything other than a subterfuge. See Rodriguez-Morales, 929 F.2d at 787. Such a search actually exceeds the invasiveness of a search at the scene of the arrest, as it both intrudes on the arrestee's limited privacy interests and in some cases may saddle the arrestee with a substantial and unwarranted towing and storage bill, in effect fining the person for being arrested.

B.

The government argues that, even if the community-caretaking exception cannot apply, the impoundment was permissible because the seizure and impoundment of the car was authorized under the Puerto Rico Uniform Forfeiture Act of 2011. P.R. Laws Ann. tit. 34, § 1724f.[4] To rely on section 1724f to justify the warrantless seizure of the vehicle, the officers must have had "probable cause to believe that all the conditions imposing forfeiture had been met" at the time when they made the decision to impound. United States v. One 1975 Pontiac Lemans, Vehicle I.D. No. 2F37M56101227, 621 F.2d 444, 449 (1st Cir. 1980); see also Florida v. White, 526 U.S. 559, 564-65 & n.3, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999); United States v. Gaskin, 364 F.3d 438, 458 (2d Cir. 2004) ("[L]aw enforcement officers who have probable cause to believe an automobile is subject to forfeiture may both seize the vehicle from a public place and search it without a warrant."); United States v. Brookins, 345 F.3d 231, 235 (4th Cir. 2003) ("[T]he police may seize an automobile without first obtaining a warrant when they have probable cause to believe that it is forfeitable contraband.").

Section 1724f authorizes the forfeiture of property "constituting or derived from any proceeds of, or used to commit, a felony and misdemeanor for which the law authorizes forfeiture, when said felonies and misdemeanors are classified by ... controlled substances laws." P.R. Laws Ann. tit. 34, § 1724f. The officers made no claim that the impounded vehicle constituted the proceeds of any crime, or that the vehicle was obtained with any such proceeds. Nor did the government ever try to substantiate below a claim that the car was "used" to commit the crime of merely possessing illegal drugs. See United States v. Jones, 565 U.S. 400, 413, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (declining to consider an alternative justification for the search under the Fourth Amendment where the government did not raise that argument below); cf. Gaskin, 364 F.3d at 458 (finding forfeiture where the vehicle had been used to meet with a drug couriers and transport a load of marijuana); White, 526 U.S. at 561, 119 S.Ct. 1555 (noting that officers had observed the defendant using the vehicle to deliver cocaine on three separate occasions prior to its seizure by police). However, there is no claim here that Del Rosario was using the car to, for example, sell drugs or make deliveries. The government claimed in the district court only that Del Rosario was "in possession of the vehicle ***130** while he was being arrested" for possessing controlled substances. Possessing

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one thing while also possessing another thing does not mean that one uses the former to possess the latter. Nor has the government developed any argument or presented any precedent suggesting that driving a car while carrying drugs in one's pocket constitutes a "use" of the car to commit the offense of drug possession. Common sense suggests otherwise, just as one would not say that he used a bus to commit the offense had he taken a ride on public transit with the drugs in his pocket.[5] Without more, the government has not convinced us that it had probable cause to seize the vehicle pursuant to this forfeiture statute.

C.

The government also relies on the doctrine of inevitable discovery. The argument seems to be (although it is not entirely clear) that the officers would have lawfully searched the car at the scene had they not opted to seize and impound the car. But, the doctrine of inevitable discovery means what it says; it requires reference to "demonstrated historical facts," shown by a preponderance of the evidence, to show that the evidence would have come to light through lawful means. Nix v. Williams, 467 U.S. 431, 444–45 & n.5, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); see also Zapata, 18 F.3d at 978 ("Evidence which comes to light by unlawful means nonetheless can be used at trial if it ineluctably would have been revealed in some other (lawful) way ...."). At trial, the officers fervently disavowed any intent to search the car at the scene. And the government does not develop from the record any reason to think that the officers inevitably could have lawfully conducted such a search.

With no further argument advanced to justify the warrantless seizure of Del Rosario's vehicle or the decision not to suppress the results of that seizure, the failure to grant Del Rosario's motion to suppress the evidence found in the inventory search was error.[6]

III.

For the reasons stated above, we **reverse** the denial of the motion to suppress, **vacate** Del Rosario's conviction, and **remand** for further proceedings.

All Citations

968 F.3d 123

Footnotes

1 At oral argument, the government agreed that Del Rosario raised and preserved this argument in the district court.

2 In its brief, the government contends that the car was parked unlawfully, on a yellow line in front of a fire hydrant. But there was no testimony to this effect and the district court made no finding that the car was illegally parked.

3 The cashier who made the call to police stated that there was an armed man on the premises of the gas station. However, there is no evidence suggesting that Del Rosario was the putative armed person. The cashier neither provided a description of the armed man nor supplied other identifying details, such as the person's name, age, or the type of firearm he possessed. The district court's conclusion that no such description was given was not clearly erroneous, nor does the government challenge it as such.

4 The government relies on "Puerto Rico Law 119," entitled the "Puerto Rico Uniform Impoundment Law," in its briefing. We understand P.R. Laws Ann., tit. 34, § 1724f to be the codification of this law. The parties have not provided us with reason to believe there is a material difference between these sources relevant to this case.

5 In filling out the inventory forms at the station, the officers did not claim that the vehicle was seized due to involvement with a crime.

6 Having found that suppression was required for this reason, we need not address Del Rosario's alternative argument that the officers in fact searched the car unlawfully at the scene before impounding it.

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776 F.3d 765
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Andre GILMORE, Defendant–Appellant.

No. 14–1088
|
Jan. 16, 2015.

Synopsis

Background: Defendant was charged with possession of a firearm by a prohibited person. The United States District Court for the District of Colorado, William J. Martnez, J., 945 F.Supp.2d 1211, denied defendant's motion to suppress. Defendant appealed.

The Court of Appeals, Matheson, Circuit Judge, held that officers had probable cause to believe defendant was sufficiently intoxicated so as to pose a danger to himself.

Affirmed.

Attorneys and Law Firms

***766** Madeline S. Cohen, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the briefs), Office of the Federal Public Defender for the District of Colorado, appearing for Appellant.

Catherine M. Gleeson, Assistant United States Attorney (John F. Walsh, United States Attorney, and Robert Mark Russel, Assistant United States Attorney, on the brief), Office of the United States Attorney for the District of Colorado, Denver, CO, appearing for Appellee.

Before HARTZ, MATHESON, and MORITZ, Circuit Judges.

Opinion

MATHESON, Circuit Judge.

On January 13, 2013, police officers responded to a report of a disoriented person in an exhibitor parking lot at the National Western Stock Show in Denver. Upon arriving at the lot, the officers located Andre Gilmore, briefly questioned him, and conducted a pat-down search as part of taking him into protective custody. The search revealed a firearm in Mr. Gilmore's waistband. He was subsequently charged as a felon in possession in violation of 18 U.S.C. § 922(g)(1).

Mr. Gilmore moved to suppress evidence of the firearm, arguing the search violated the Fourth Amendment because the officers lacked probable cause to believe he was a danger to himself or others. After holding an evidentiary suppression hearing, the district court denied the motion. Mr. Gilmore appeals that determination. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual Background*

On the morning of January 13, 2013, Mr. Gilmore used an exit driveway to walk into Parking Lot C at the National Western Stock Show in Denver, Colorado. As Mr. Gilmore entered, a lot attendant, Jason Morris, greeted him and asked how he was doing. Mr. Gilmore did not respond. Mr. Gilmore was staggering and appeared intoxicated to Mr. Morris. A second attendant, Richard Gomez, observed Mr. Gilmore to be staggering or swerving, mumbling to himself, and apparently intoxicated. Mr. Gomez also noted that unlike exhibitors in Lot C—a fenced-in lot adjacent to a cattle tie-out area[1]—Mr. Gilmore was not wearing a badge and was not dressed in rancher-style clothing. After following Mr. Gilmore as he walked into the tie-out area, Mr. Gomez contacted Vincent Garcia, a security guard in Lot C, who reported Mr. Gilmore's presence to his supervisor. Shortly thereafter, a police dispatcher broadcast a brief description and location of Mr. Gilmore, describing him as a suspicious party who was disoriented.[2]

Lieutenant Vincent Gavito and Sergeant Dino Gavito were working at the Stock Show and went to Lot C.[3] The officers spoke to Mr. Garcia, who had seen Mr. Gilmore in the lot and told the officers Mr. Gilmore appeared "very disoriented" and ***767** "obviously out of it." ROA, Vol. 3 at 72, 98. By this time, Mr. Gilmore had walked to the north end of the tie-out area, which was closed off by a fence. The officers drove through the parking lot entrance and parked their unmarked

police car facing Mr. Gilmore, who began walking toward the tie-out area entrance where they were waiting.

When the officers encountered Mr. Gilmore, he was wearing a dark red overcoat over another dark coat,[4] dark jeans, and tennis shoes, carrying a cloth briefcase over his shoulder, and holding a small plastic bag and a large white jawbreaker in his hands. He was staring blankly into the air; having difficulty focusing; walking in a meandering, unsteady fashion; and did not appear to recognize the officers' presence. Lt. Gavito's first impression upon seeing Mr. Gilmore was that he was a candidate for protective custody due to his apparent level of intoxication.

The officers, who were both wearing uniforms, exited their car and approached Mr. Gilmore. Lt. Gavito asked Mr. Gilmore if he was all right and what he was doing in the lot. Mr. Gilmore turned and looked at Lt. Gavito, apparently registering his presence for the first time, but did not respond. Lt. Gavito told Mr. Gilmore to put down the items in his hand, and Mr. Gilmore complied. Lt. Gavito identified himself as a police officer and repeated his question to Mr. Gilmore, asking what he was doing in the lot. Mr. Gilmore mumbled an incoherent answer.

Lt. Gavito then asked Mr. Gilmore if he had any weapons. When Mr. Gilmore did not answer, Lt. Gavito conducted a pat-down search of his outer clothing. Lt. Gavito felt what he believed to be the butt of a handgun under Mr. Gilmore's coat. He lifted the coat, saw a pistol, and seized it from Mr. Gilmore's waistband. The officers arrested him for possessing a firearm while intoxicated in violation of Colorado Statute § 18–12–106(d). The officers handcuffed Mr. Gilmore, placed him in their car, and drove him to the Stock Show security office. On the way to the office, Lt. Gavito asked Mr. Gilmore his name, which Mr. Gilmore provided.

At the security office, the officers asked Mr. Gilmore for his birthday and used the information to access his criminal history records. They discovered he had a prior felony conviction that prohibited him from possessing a firearm. Because Mr. Gilmore was incoherent and was in and out of consciousness, the officers did not try to interview him at this time. He was instead transported to the Denver Detention Center and interviewed the following day.

B. ***Procedural Background***

A federal grand jury charged Mr. Gilmore with one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Before trial, Mr. Gilmore filed a motion to suppress the gun seized during the pat-down search, arguing the officers lacked reasonable suspicion to believe he was armed and dangerous. The district court held an evidentiary hearing on the motion. At that hearing, the Governmentpresented six witnesses: Mr. Morris, Mr. Gomez, Mr. Garcia, Lt. Gavito, Sgt. Gavito, and David Gallegos.[5] Mr. Gilmore did not call any witnesses.

Based on the testimony presented at the hearing, the district court denied Mr. Gilmore's motion to suppress. The court determined ***768** the evidence did not support a reasonable, particularized suspicion that Mr. Gilmore was armed and dangerous and the pat-down search was not justified on those grounds. The court also determined, however, that Lt. Gavito had probable cause to take Mr. Gilmore into protective custody for detoxification under Colorado's Emergency Commitment statute, and therefore acted reasonably in frisking Mr. Gilmore for weapons before taking him into custody. Colo.Rev.Stat. § 27–81–111(1)(a).[6]

After the district court denied his motion, Mr. Gilmore signed a plea agreement and statement of facts relevant to sentencing. He entered a conditional guilty plea, reserving his right to appeal the denial of his motion to suppress. The district court sentenced him to 28 months in prison. He timely appealed.

II. **DISCUSSION**

On appeal, Mr. Gilmore challenges the denial of his motion to suppress. He argues the district court erred by concluding the officers had probable cause to believe he was a danger to himself based on factual findings regarding (1) his degree of intoxication, (2) the dangerousness of the surrounding area, and (3) the danger posed by the cold weather. Mr. Gilmore concedes that if the officers had probable cause to believe he was a danger to himself, they were permitted to conduct a pat-down search before taking him into protective custody.

The Government contends the officers could reasonably believe Mr. Gilmore was a danger to himself. It argues in the alternative the pat-down search was justified because the officers had probable cause to arrest Mr. Gilmore for third-degree criminal trespass.

Based on the facts established at the suppression hearing, we conclude the officers had probable cause to believe Mr. Gilmore was a danger to himself. Accordingly, we need not reach the Government's argument that the officers also had probable cause to arrest Mr. Gilmore for third-degree criminal trespass.

A. ***Standard of Review***

In reviewing a district court's denial of a motion to suppress, we view the evidence in the light most favorable to the Government and accept the district court's factual findings unless clearly erroneous. *See United States v. Hunter,* 663 F.3d 1136, 1141 (10th Cir.2011). We review de novo the ultimate determination of the reasonableness of a search or seizure under the Fourth Amendment. *United States v. Karam,* 496 F.3d 1157, 1161 (10th Cir.2007).

B. ***Legal Background***

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable ***769** under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). One such exception is for "community caretaking functions," which are police actions "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, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). Under this exception, "a police officer may have occasion to seize a person, as the Supreme Court has defined the term for Fourth Amendment purposes, in order to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity." *United States v. King,* 990 F.2d 1552, 1560 (10th Cir.1993).

We have recognized the community caretaking function allows police officers to perform investigatory seizures of intoxicated persons. *See United States v. Garner,* 416 F.3d 1208, 1213–15 (10th Cir.2005) (observing the community caretaking function allows officers to detain intoxicated individuals who pose a hazard to themselves or others); *Gallegos v. City of Colo. Springs,* 114 F.3d 1024, 1029 n. 4 (10th Cir.1997) (determining the community caretaking function permitted officers to detain an apparently intoxicated citizen). To ensure community caretaking comports with the Fourth Amendment, we have emphasized officers must first have probable cause to take an individual into protective custody. "[T]o justify seizure for intoxication by alcohol, an officer must have probable cause to believe an intoxicated person is a danger to himself or others." *Anaya v. Crossroads Managed Care Sys., Inc.,* 195 F.3d 584, 591 (10th Cir.1999). The determination of probable cause "is based on the totality of the circumstances, and requires reasonably trustworthy information that would lead a reasonable officer to believe," in this context, that the individual posed a danger to himself or others. *Cortez v. McCauley,* 478 F.3d 1108, 1116 (10th Cir.2007).

C. ***Analysis***

When assessing whether an intoxicated person is a threat to himself or others, a totality of the circumstances analysis must consider the person's degree of impairment as well as potential threats in the surrounding environment. Considering these factors together, and construing the uncontroverted facts in the light most favorable to the Government, we agree with the district court that the officers had probable cause to believe Mr. Gilmore was a danger to himself.

1. **Mr. Gilmore's Intoxication**

On appeal, Mr. Gilmore asserts there is no evidence about his level of intoxication other than witness testimony that he appeared intoxicated, was walking in a meandering manner, and was staring into space. He also asserts there is no evidence suggesting his reaction time and powers of observation were significantly impaired because he reacted when Lt. Gavito first spoke to him and complied with Lt. Gavito's request to put down his briefcase and candy.

In determining whether Mr. Gilmore was sufficiently intoxicated so as to constitute a threat to himself, however, an officer may consider a variety of factors. "Probable cause only requires a probability of ... activity, not a prima facie showing of such activity." *Wilder v. Turner,* 490 F.3d 810, 813 (10th Cir.2007) (articulating the probable cause standard in a Fourth Amendment case concerning an officer's assessment of an individual's degree of intoxication). Although the officers here did not use a breathalyzer or blood ***770** draw test to establish intoxication, other facts available to officers may

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suffice for them to determine an individual is intoxicated. *See* *United States v. Chavez,* 660 F.3d 1215, 1224 (10th Cir.2011). In light of the uncontroverted witness testimony and facts established at the suppression hearing, we conclude the officers had probable cause to believe Mr. Gilmore was sufficiently intoxicated so as to pose a danger to himself.

First, the officers could reasonably believe Mr. Gilmore was intoxicated based on his behavior. The dispatcher informed the officers before they arrived that Mr. Gilmore was a suspicious party who appeared disoriented. When the officers arrived at the lot, Mr. Garcia told the officers Mr. Gilmore appeared "very disoriented" and "obviously out of it." ROA, Vol. 3 at 72, 98. The officers' own observations during their interactions with Mr. Gilmore confirmed this assessment. Lt. Gavito testified Mr. Gilmore "was having a difficult time focusing," "[h]e was kind of staring off into the air," "he wasn't walking with purpose, in a straight line," "he was kind of meandering," and "his balance was not very steady." ROA, Vol. 3 at 77. When the officers tried to engage Mr. Gilmore, he was unable to respond coherently to basic questions regarding whether he was all right, what he was doing in the area, and whether he had a weapon.

These conditions led Lt. Gavito to conclude Mr. Gilmore "was definitely under the influence of alcohol or drugs, or something."[7] ROA, Vol. 3 at 78. Mr. Gilmore questions the degree of his impairment, but the district court's factual findings that Mr. Gilmore was gazing into space, staggering, unsteady, and unable to respond to simple questions were enough to establish a reasonable belief Mr. Gilmore was sufficiently intoxicated for protective custody. *See* *Qian v. Kautz,* 168 F.3d 949, 954 (7th Cir.1999) (concluding an officers' observations of general indicators of intoxication "(*e.g.,* slurred speech, unsteadiness, etc.)" may be sufficient for officer to reasonably determine a person is intoxicated even though specific indicators "(*e.g.,* smell of alcohol, bloodshot eyes, failed sobriety tests, etc.)" are lacking); *United States v. Luginbyhl,* No. 06–CR–0206–CVE, 2007 WL 2579622, at *2 (N.D.Okla. Aug. 8, 2007) (determining an officer was permissibly exercising the community caretaking function by stopping a person who appeared to be under the influence of drugs or had a mental illness but who "did not display any physical signs of intoxication [and] did not stumble or slur his speech.").[8]

***771** *Second,* it was reasonable for the officers to determine Mr. Gilmore's perception and reaction time were impaired. When the officers, who were both wearing police uniforms, exited their vehicle and initially encountered Mr. Gilmore, he did not appear to notice their presence. Then, when Lt. Gavito approached him, Mr. Gilmore still did not appear to register his presence until Lt. Gavito greeted him and asked if he was all right. This evidence could lead a reasonable officer to believe Mr. Gilmore's perception was limited. *See* *Edwards v. Bray,* 688 F.2d 91, 92 (10th Cir.1982) ("Intoxication increases reaction time and reduces speed of motor responses, including those of auditory discrimination and judgment.") (citing 4 Gray, Attorney's Textbook of Medicine, P 133.51 (3d ed.1981)).

The officers' determination that Mr. Gilmore was intoxicated and had impaired perception informed their assessment that Mr. Gilmore was at risk. *Meehan v. Thompson,* 763 F.3d 936, 944 (8th Cir.2014) ("Police officers are often constitutionally obligated to care for [intoxicated] individuals, and because alcohol can have disparate effects on different people, police officers must be given some latitude in evaluating whether an intoxicated individual can properly care for herself.").

2. **Environmental Factors**

Mr. Gilmore additionally argues the Government offered no witness testimony that the surrounding environment placed him in danger. He contends the Stock Show area was not dangerous. He notes the district court observed the two coats he was wearing were "not inappropriate for the weather." ROA, Vol. 1 at 53.

We do not look at the surrounding environment in a vacuum; in the totality of the circumstances analysis, we consider the threat it might pose to somebody in Mr. Gilmore's position. Conditions that may not pose a danger to a sober individual may be treacherous to someone who is disoriented, intoxicated, or otherwise impaired. *See* *Meehan,* 763 F.3d at 942 ("[A] person's intoxication may exacerbate the other potential hazards of her environment, such as the late hour and her location on a public roadway, and may impair her ability to recognize these hazards."); *People v. Dandrea,* 736 P.2d 1211, 1212–13 (Colo.1987) (observing a stop and frisk of an intoxicated person prior to protective custody was conducted because "the day was extremely cold" and the person was stopped "on an isolated mountain road"). Here, the record supports the officers' reasonable belief that Mr. Gilmore was at risk in the Stock Show's environs.

First, although there was no witness testimony that the neighborhood surrounding the Stock Show placed Mr. Gilmore in immediate danger, there was testimony that

the surrounding neighborhood was dangerous. Lt. Gavito testified the neighborhood surrounding the Stock Show was "very predominant with gang members" and "a lot of gang activity," and he testified that in his years working at the Stock Show he had numerous encounters with unauthorized weapon possession.[9] ROA, Vol. 3 at 81–82. Witnesses also testified car thefts had occurred in the adjoining lots. A reasonable officer could believe Mr. Gilmore could be harmed if he wandered disoriented into one of the surrounding neighborhoods or areas carrying a briefcase.

Second, Mr. Gilmore argues nothing in the record established the presence of cattle in the tie outs or heavy or high-speed traffic in Lot C or its vicinity that would place him in danger. We agree with Mr. ***772** Gilmore that there was no evidence of cattle in the tie outs or high-speed traffic in Lot C at the time he was arrested. But the officers could have reasonably believed if Mr. Gilmore wandered into another area of the Stock Show or an area outside of the Stock Show with high-speed traffic, he could have been struck by a car given his impaired state. *See Dandrea,* 736 P.2d at 1212.

Finally, although the court determined Mr. Gilmore's dress was seasonally appropriate, the officers could have reasonably believed if Mr. Gilmore were to become unconscious in a remote area or fail to find shelter when the temperature dropped that evening,[10] he could suffer serious injury or death. Weather that would not be dangerous to a properly dressed and sober individual can become dangerous when that person is intoxicated. *See Gladden v. Richbourg,* 759 F.3d 960, 966 (8th Cir.2014) ("Circumstances that are harmless to a sober person may be dangerous to one who is severely intoxicated or otherwise incompetent. Bitterly cold weather is one such circumstance: while most people can be expected to navigate cold weather to find an indoor shelter, an intoxicated person may lack this capacity."); *Dandrea,* 736 P.2d at 1212–13. The district court observed Mr. Gilmore's two coats were "not inappropriate for the weather," ROA, Vol. 1 at 53, but this does not mean Mr. Gilmore was fully protected from the elements. Clothing that might be sufficient for a mid-day walk does not necessarily provide sufficient protection over extended periods of exposure in severe cold.

* * *

We conclude the totality of the circumstances could lead a reasonable officer to conclude Mr. Gilmore was a danger to himself because he appeared to be severely intoxicated to the point of impairment and he was in an environment that posed significant risks to an impaired individual. We stress that our holding is narrow and highly fact-dependent. Officers must have probable cause to take an individual into protective custody, and Mr. Gilmore only contests whether the facts support the officers' determination that he was a danger to himself. Based on uncontroverted testimony indicating Mr. Gilmore was highly unresponsive in an unforgiving environment with considerable risks to his safety, we conclude it was within the scope of the officers' community caretaking function to ensure he was safe from harm.

III. **CONCLUSION**

For the foregoing reasons, we affirm the district court.

All Citations

776 F.3d 765

Footnotes

1 The cattle tie-out area is "a fenced off area where [exhibitors] put the overflow cattle to bed them down at night." ROA, Vol. 3 at 72.

2 Several thefts from vehicles had occurred in Stock Show parking lots in the days prior, although none had occurred in Lot C.

3 Lt. Gavito and Sgt. Gavito are brothers.

4 The district court determined Mr. Gilmore's two coats "were not inappropriate for the weather," which was approximately six degrees Fahrenheit. ROA, Vol. 1 at 53.

5 Mr. Gallegos is a police officer who interviewed Mr. Gilmore the day after Lt. Gavito arrested him.

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6 Colorado's Emergency Commitment statute states in pertinent part:

> When a person is intoxicated or incapacitated by alcohol and clearly dangerous to the health and safety of himself, herself, or others, he or she shall be taken into protective custody by law enforcement authorities or an emergency service patrol, acting with probable cause, and placed in an approved treatment facility. If no such facilities are available, he or she may be detained in an emergency medical facility or jail, but only for so long as may be necessary to prevent injury to himself, herself, or others or to prevent a breach of the peace.

Colo.Rev.Stat. § 27–81–111(1)(a).

7 We do not understand Mr. Gilmore to be arguing he was sober at the time of his interaction with the officers. On appeal, Mr. Gilmore argues only that the officers did not have probable cause to believe he was sufficiently intoxicated so as to pose a danger to himself. *See* Oral Arg. at 2:45 (suggesting we do not know whether Mr. Gilmore was intoxicated); Oral Arg. at 7:20 (recounting the officers' testimony and concluding "[t]hese facts suggest that he may have been intoxicated or experiencing some other problem of perception, but they did not justify immediately proceeding to, 'we're taking you to detox' ").

8 The Colorado Supreme Court has recognized officers' discretion under the Emergency Commitment statute:

> Under section 25–1–310(1), it is the *officer* who must determine whether the intoxicated person is clearly dangerous. The General Assembly plainly did not intend for the police to take into protective custody every intoxicated person they meet. Instead, the General Assembly designated a specific class of intoxicated persons who are subject to emergency commitment and left the determination of whether a particular individual is clearly dangerous to the police.

Leake v. Cain, 720 P.2d 152, 164 (Colo.1986).

9 Lt. Gavito had been employed at the Stock Show since 1998.

10 The Government's exhibits showed that on the day Mr. Gilmore was arrested, the temperature ultimately dropped to negative ten degrees Fahrenheit. [Aplee. Ex. D at 1.]

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734 F.2d 503
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee, v. Bobby Chris JOHNSON, Defendant-Appellant.

No. 83–2242.
|
May 15, 1984.

Synopsis
Defendant was convicted in the United States District Court for the Northern District of Oklahoma, H. Dale Cook, Chief Judge, of possession of controlled substance with intent to distribute, and he appealed. The Court of Appeals held that: (1) inventory search of defendant's automobile was proper; (2) admission of evidence regarding defendant's past involvement in drug transactions was not abuse of discretion; and (3) refusal to give instruction on lesser included offense of mere possession was proper.

Affirmed.

Attorneys and Law Firms

***504** Kenn Bradley, Tulsa, Okl., for defendant-appellant.

Layn R. Phillips, U.S. Atty., Keith Ward, Asst. U.S. Atty., Tulsa, Okl., for plaintiff-appellee.

Before SETH, Chief Judge, and BREITENSTEIN and McWILLIAMS, Circuit Judges.

Opinion

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Cir.R. 10(e). The cause is therefore ordered submitted without oral argument.

Appellant Bobby Chris Johnson was arrested by the Tulsa police in response to a call at 2:30 a.m. concerning a "man with a gun" in a yellow Cadillac in the parking area of Brandy's Club Lounge. The police found appellant sitting in his car, highly intoxicated, with a .357 caliber magnum revolver in plain view on the passenger seat. The revolver was later found not to be loaded. Appellant was arrested for actual physical control of an automobile while intoxicated. Following his arrest, appellant was handcuffed, searched and placed on the ground where he subsequently passed out. He was found to have 26.63 grams of 82 percent pure cocaine in his pocket.

The police conducted an inventory search of the car and had it towed. They discovered a box of .45 caliber ammunition in the passenger compartment and scales, a sifter, a cocaine analysis kit, a plastic bag of white powder and other items in two brown cases in the trunk.

Appellant was booked by the Tulsa police for actual physical control of an automobile while intoxicated and was charged in federal court with possession of a controlled substance with intent to distribute. At trial, testimony was adduced that the cocaine was worth approximately $13,315.00 and that the drug paraphernalia found in the trunk was of the kind used by drug dealers. A government witness' testimony regarding numerous drug transactions with appellant was given to establish intent to distribute. The jury returned a verdict of guilty.

Appellant asserts that the inventory search of the car was unconstitutional, that admission of evidence of past illegal activity was an abuse of discretion, that the evidence was otherwise insufficient to support a guilty verdict, and that failure to instruct on the lesser included offense of mere possession was an abuse of discretion.

The search was made following the arrest of appellant, and, with respect to the search of the passenger compartment, was lawful as incident to his arrest. *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768; ***505** *United States v. Martin,* 566 F.2d 1143 (10th Cir.). In *Martin,* we upheld an inventory search of an automobile legally parked in a residential neighborhood after its owner was arrested for public drunkenness at 2:30 in the morning in his car. The present case is quite similar factually and we reach the same result here. In each instance, the police decided to have the car towed because the owner was clearly unable to drive and they were concerned about vandalism. This is an appropriate exercise of the "community caretaking functions" which the police have a responsibility to discharge. *South*

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Dakota v. Opperman, 428 U.S. 364, 368–69, 96 S.Ct. 3092, 3096–97, 49 L.Ed.2d 1000; *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706. To this end the police followed their routine procedure for securing and inventorying the automobile's contents.

In the present case a search was further justified because of the presence of the revolver. A warrantless search of an automobile, including entering a locked trunk, was found to be reasonable in *Cady v. Dombrowski* in order to retrieve a revolver that would possibly "fall into untrained or perhaps malicious hands." *Id.,* at 443, 93 S.Ct. at 2529. Appellant's revolver in plain view clearly justified a search of the rest of the automobile for other weapons. Also, the presence of nonmatching bullets in the passenger compartment would justify a suspicion that matching bullets may be found elsewhere in the automobile or another weapon. Because the inventory search was valid the incriminating items discovered in the trunk were properly admitted as evidence.

There was no abuse of discretion in the admission of evidence regarding appellant's past involvement in drug transactions. Fed.R.Evid. 404(b), which prohibits admission of evidence of other crimes, wrongs or acts in order to prove the character of the accused, allows this evidence in for other purposes, such as proof of intent or motive. In addition, the evidence must have real probative value, not just possible worth, be close in time to the crime charged and be so related to the crime charged that it serves to establish intent. *United States v. Nolan,* 551 F.2d 266, 271 (10th Cir.); *United States v. Parker,* 469 F.2d 884, 890 (10th Cir.).

The government's witness testified to numerous sales to and purchases from appellant, conversations regarding the conduct of their respective drug businesses and stated that for a time they were "associates". Tr., 110–18. The testimony related to activities occurring up to seven months prior to the crime charged. Testimony as to the frequency of the transactions and the quantities of cocaine involved was closely related to establishing intent to distribute and was highly probative. The activities were also close in time to the charged crime. *See, United States v. Nolan,* at 272, in which two incidents occurring two years apart were sufficiently "close in time." We find no abuse of discretion in the admission of the testimony of the government's witness.

Because the contents of the automobile and the testimony of the government's witness were properly admitted it is not necessary to consider whether the remaining evidence alone would have been sufficient to support a guilty verdict.

Our decision on whether the defendant was entitled to an instruction on the lesser included offense of mere possession is controlled by *Keeble v. United States,* 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844, *Sansone v. United States,* 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882, *Berra v. United States,* 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013, *United States v. Chapman,* 615 F.2d 1294 (10th Cir.), and *United States v. Pino,* 606 F.2d 908 (10th Cir.). In *Fitzgerald v. United States,* 719 F.2d 1069 (10th Cir.), we enumerated requirements for instructing on a lesser included offense as did *United States v. Chapman.* Included is the requirement that the element differentiating the two offenses is a matter in dispute, and also from *Keeble* —only if the evidence would permit a jury to rationally convict the defendant of the lesser offense and acquit of the greater offense. The ***506** trial court has discretion in the determination as to whether the evidence is sufficient to require the instruction.

In the present case the quantity of the drugs involved, the presence of drug paraphernalia used by dealers and the testimony of the government's witness all clearly support the charge of possession with intent to distribute. It would be irrational under these facts for the jury to acquit appellant of a charge of intent to distribute while convicting him of mere possession, because that would mean that no inference could be drawn from the evidence to rationally support the distribution aspect of the charge. Instructing only on possession with intent to distribute was proper.

AFFIRMED.

All Citations

734 F.2d 503, 15 Fed. R. Evid. Serv. 1576

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978 F.2d 631
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
David M. LUGO, Defendant–Appellant.

No. 91–8067.
|
Nov. 2, 1992.
|
Rehearing Denied Dec. 15, 1992.

Synopsis

Defendant was convicted in the United States District Court for the District of Wyoming, Alan B. Johnson, Chief Judge, of possession of cocaine with intent to distribute and use of firearm in relation to drug trafficking crime. Defendant appealed. The Court of Appeals, Stephen H. Anderson, Circuit Judge, held that warrantless search of defendant's truck was not justifiable.

Reversed.

***632** Submitted on the Briefs:[*]

Attorneys and Law Firms

Richard A. Stacy, U.S. Atty., Matthew H. Mead, Asst. U.S. Atty., and Maynard D. Grant, Sp. Asst. U.S. Atty., Cheyenne, Wyo., for plaintiff-appellee.

Michael G. Katz, Federal Public Defender, and Jenine Jensen, Asst. Federal Public Defender, Denver, Colo., for defendant-appellant.

Before McKAY, ANDERSON, and BRORBY, Circuit Judges.

Opinion

STEPHEN H. ANDERSON, Circuit Judge.

Defendant–Appellant David M. Lugo was found guilty by a jury and convicted on one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a) and (b), and on one count of use of a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). On appeal, Lugo challenges the district court's denial of his motion to suppress evidence of a firearm, ammunition and cocaine found in his truck. In denying Lugo's motion to suppress, the district court found that the search of Lugo's truck was justified as a search incident to arrest and under the "community caretaking function" exception to the warrant requirement. For the reasons stated below, we disagree and reverse.[1]

***633** I. BACKGROUND

In January 1991, David Lugo was involved in a two-car collision on a snowpacked Wyoming highway near Rock Springs, Wyoming. Lugo was driving a truck which bore Arizona license plates; the other vehicle was a rental car driven by FBI Agent David Boyer. Both parties stopped and exchanged insurance and registration information and, at Boyer's request, Mr. Lugo agreed to follow Boyer to a service station in Rock Springs in order to report the accident to the Wyoming Highway Patrol.

Thirty to forty-five minutes later, Wyoming Highway Patrolman Carl McDonald arrived at the service station and interviewed Agent Boyer in his patrol car while Lugo waited inside the service station. McDonald then interviewed Lugo and, upon learning that his Arizona driver's license had been suspended for failure to show proof of insurance, McDonald advised Lugo that he would be cited with driving under suspension and improper lane usage. Because Lugo was unable to post the required $340 cash bond, McDonald advised him he would be taken into custody until his court appearance. At this point, Lugo was no longer free to leave and, according to McDonald's testimony at the suppression hearing, was "probably" under arrest.

After taking Lugo into custody, McDonald requested that a second officer be sent to the scene to assist him. He also requested a wrecker pursuant to standard Wyoming Highway Patrol policy which requires that a vehicle be impounded whenever a driver is separated from the vehicle and no other licensed driver is available to take custody of the vehicle. Hoping to save towing fees, Lugo arranged with the service station employees and McDonald to have his truck left at the service station until he returned for it.

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Lugo drove his truck to the side of the service station, followed by McDonald and Patrolman Edward Sabourin, who by then had arrived to assist. After parking his truck, Lugo retrieved a gas can from the truck bed and placed it in the passenger compartment of his truck. Lugo repeatedly attempted to lock the door of the truck, but McDonald told him not to do so because the officers "would inventory the contents of the vehicle." In response to McDonald's questioning, Lugo said that he had no luggage or valuables in the truck. McDonald then asked him if he had any firearms, and Lugo volunteered that there was a gun inside the truck behind the driver's seat. When Lugo attempted to reach into the vehicle to retrieve the weapon, the officers told him to leave the weapon alone, stating that they would recover it during the inventory. At the suppression hearing, McDonald explained why there was no need to remove the gun at the time he and Sabourin learned of its existence: "I was in control of Mr. Lugo. The gun wasn't an immediate threat to me. As long as we kept him away from the truck, there were two of us there, there wasn't any urgent need to secure the weapon." R.Vol. II at 80.

Lugo was then handcuffed. McDonald gave Sabourin a "highway patrol inventory sheet" and asked Sabourin to inventory the contents of the truck while McDonald transported Lugo to the Green River Jail. Immediately thereafter McDonald placed Lugo in the back seat of McDonald's patrol car and drove away. Sabourin then commenced his inventory.

During his inventory search, Sabourin first retrieved the gun from the cab organizer behind the seat. He also found ammunition for the gun in the pocket next to the gun and on the floorboard. He recorded these items on the inventory sheet.

After finding the gun and ammunition, Sabourin opened the passenger door and stepped out of the truck. As he was exiting the truck, he "noticed that the door panel had been ajar, pulled away from the door, and there was a crease on the bottom rear corner of the door panel." Sabourin described the door panel as being "about a half an inch open." He also noticed a vent or opening, approximately 3 x 5 inches in size, in the lower part of the door panel. The opening corresponded with where a speaker would be, but upon closer investigation he determined there was no speaker. ***634** The vent or opening had a cover over it, and there were holes in the cover. Sabourin decided to investigate further by bending down the edge of the cover over the speaker opening in the door panel and looking inside with his flashlight. He observed a "flimsy rubber covering inside of the vent ... that had been bent up by a brown paper bag inside it." R.Vol. II at 99. Sabourin then bent back the door panel along the existing crease, at the point where the door panel was not attached to the door, reached inside the door panel, and removed the paper bag. He opened the bag and found two white bricks, later determined to be cocaine.

Although Sabourin explained that an inventory search of stereo speakers was common procedure for the Wyoming Highway Patrol, he testified that removing a speaker cover to look inside a door panel would not be part of a routine inventory search. Later during his testimony at the suppression hearing, Sabourin testified that he was conducting a search incident to arrest when he looked and reached inside the door panel.

Upon receiving a message from Sabourin regarding the results of his search, McDonald directed Sabourin to have Lugo's truck impounded at the State garage. McDonald then advised Lugo of his *Miranda* rights and told him that Sabourin had found cocaine in his truck. Lugo stated that he was transporting two baggies and that these baggies were on the floor of the truck between the bucket seats. Based on Lugo's statement, McDonald instructed Sabourin to search between the bucket seats of the truck for two baggies containing two "balls" of cocaine. Sabourin returned to the truck and found two baggies.

Lugo was charged with one count of possession of cocaine with intent to distribute, and one count of possession of a firearm in relation to a drug trafficking crime. He filed a motion to suppress the gun, ammunition and cocaine seized from his truck.

After hearing the testimony described above, the district court denied Lugo's motion to suppress, finding that the search was valid (1) as being incident to Lugo's arrest under *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); and (2) "for the purpose of safeguarding the general public from a weapon which was in the vehicle" under the "community caretaking function" described in *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). R.Vol. I, doc. 31. The district court declined to resolve the case on the basis of the government's third argument, that the search was a valid inventory search.

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II. DISCUSSION

Our analysis of the district court's factual findings on the motion to suppress is subject to the clearly erroneous standard of review. *United States v. Ibarra,* 955 F.2d 1405, 1408 (10th Cir.1992). The reasonableness of the search and seizure, however, is a question of law which we review *de novo. Id.* at 1409.

A. *Search Incident to Arrest*

Lugo first challenges the district court's finding that the search of his truck and the resulting seizure of the firearm and cocaine was a valid search incident to his arrest. Such a search is controlled by *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), in which the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a *contemporaneous* incident of that arrest, search the passenger compartment of that automobile" as well as "any containers found within the passenger compartment." *Id.* at 460, 101 S.Ct. at 2864 (emphasis added). The rationale underlying the *Belton* rule is that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].' " *Id.* at 460, 101 S.Ct. at 2864 (quoting *Chimel v. California,* 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969)). It follows, therefore, that a warrantless search incident to arrest is not valid if it is "remote in time or place from the arrest," ***635** *Chimel,* 395 U.S. at 764, 89 S.Ct. at 2040 (quoting *Preston v. United States,* 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964), such that "no exigency exists." *United States v. Chadwick,* 433 U.S. 1, 15, 97 S.Ct. 2476, 2485, 53 L.Ed.2d 538 (1977).

In this case, when the search of Lugo's truck began, Lugo was no longer at the scene. He was handcuffed and sitting in the back seat of a patrol car proceeding toward Green River. Once Lugo had been taken from the scene, there was obviously no threat that he might reach in his vehicle and grab a weapon or destroy evidence. Thus, the rationale for a search incident to arrest had evaporated. Sabourin's inventory was not contemporaneous because it was remote in time and in place as regards Lugo and his truck being in entirely different locations, and no exigency existed. As the Court in *Chadwick* explained:

> Once law enforcement officers have reduced ... personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

Chadwick, 433 U.S. at 15, 97 S.Ct. at 2485.[2] Even during the period after Lugo admitted to having a weapon, but prior to his removal from the scene, the officers involved expressed no concern over the possibility of Lugo getting that or any other weapon from his truck. As McDonald testified at the suppression hearing, "[t]he gun wasn't an immediate threat to me. As long as we kept [Lugo] away from the truck, there were two of us there, *there wasn't any urgent need to secure the weapon.*" R.Vol. II at 80 (emphasis added).

Accordingly, we hold that *Belton* is inapplicable to the facts of this case, and that the warrantless search of Lugo's truck was not justifiable as a search incident to arrest. Due to this holding, it is unnecessary for us to address other arguments of the parties on this issue.

B. *The "Community Caretaking" Function*

The district court also found that the search of Lugo's truck was valid under the "community caretaking" function articulated in *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). In *Cady,* the court held that "[w]here ... the trunk of an [impounded] automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, ... the search was not 'unreasonable' within the meaning of the Fourth and Fourteenth Amendments." *Id.* at 448, 93 S.Ct. at 2531. In so holding, the Court described the "community caretaking functions" routinely undertaken by local police officers:

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, *totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.*

Id. at 441, 93 S.Ct. at 2528 (emphasis added). Noninvestigatory searches of automobiles pursuant to this function, according to the Court, do not offend Fourth Amendment principles so long as such activities are warranted "in terms of state law or sound police procedure," and are justified by "concern for the safety of the general

public who might be endangered if an intruder removed" a weapon which police reasonably believed was present and located in a part of the vehicle vulnerable to vandals. *Id.* at 447–48, 93 S.Ct. at 2531. If these criteria are met, evidence which ***636** comes to light during a warrantless search of a vehicle is ordinarily admissible at trial.

We agree with the government's contention that removal of the gun and ammunition from Lugo's truck was a community caretaking task necessary "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.* at 443, 93 S.Ct. at 2529. The issue, however, is whether or not Sabourin's actions in bending over the corner of the vent in the door panel and looking inside, then reaching inside the cavity between the door panel and door to retrieve a paper sack, can fairly be described as a community caretaking function within the meaning of *Cady.* We think not.

The only weapon discussed in the record is the pistol identified by Lugo himself. Sabourin had recovered and secured that pistol, as well as its clip and ammunition, before he looked further. There is no testimony in the record, and no finding by the district court, that Sabourin suspected the presence of any other weapon, or that when he bent down the covering over the vent he was looking for or suspected another gun, or that he was attempting to protect the public from vandals obtaining a weapon from some part of Lugo's truck. To the contrary, Sabourin variously described his activities as an inventory or a search incident to arrest. Public danger is not mentioned. Furthermore, there is no testimony, and no finding by the district court, that the interior door panel of a truck, in these circumstances, was a likely place for a suspected weapon or a place vulnerable to vandals in that area, as was the automobile trunk in *Cady,* for instance.

The government relies on *United States v. Johnson,* 734 F.2d 503 (10th Cir.1984), in which this court held that the search of the passenger compartment of a vehicle, justified by the presence of a revolver in plain view on the passenger seat, permissibly extended to the trunk of the vehicle upon discovery of non-matching bullets in the passenger compartment. In *Johnson,* we reasoned that "the presence of non-matching bullets in the passenger compartment would justify a suspicion that matching bullets may be found elsewhere in the automobile or another weapon." *Johnson,* 734 F.2d at 505. As indicated above, however, Sabourin found the gun where Lugo told him it would be, and immediately located matching ammunition next to the gun and on the floorboard. He then opened the passenger door and stepped out, at which time he noticed the crease in the door panel. He expressed no suspicion, and testified to no fact which would support a reasonable belief that a further search for weapons was necessary. Thus, we hold that the search into the interior of the door panel was not constitutionally justifiable as a community caretaking function.

C. *Inventory Search*

Finally, although the district court declined to resolve the case on this issue, the government urges us to find on appeal that the search of Lugo's truck was permissible as an inventory search.[3] We decline to do so.

An inventory search is a routine administrative procedure designed to effect three distinct purposes: protection of the owner's property which may be stored in the vehicle; protection of the police against claims of lost, stolen or vandalized property; and protection of the police from potential danger. *South Dakota v. Opperman,* 428 U.S. 364, 369, 96 S.Ct. 3092, 3097, 49 L.Ed.2d 1000 (1975). When the police acquire temporary custody of a vehicle, a warrantless inventory search of the vehicle does not offend Fourth Amendment principles so long as the search is made pursuant to "standard police procedures" and for the purpose of "protecting the car and its contents." *Id.* at 372, 373, 96 S.Ct. at 3098, 3099. As such, standardized criteria must regulate inventory searches to ensure that they are not used as a "ruse for a general rummaging in order to discover incriminating ***637** evidence." *Florida v. Wells,* 495 U.S. 1, 4, 110 S.Ct. 1632, 1635, 109 L.Ed.2d 1 (1990).

Although the permissible scope of an inventory search has not been well-defined, searching behind the door panel of a vehicle does not qualify as "standard police procedure,"[4] and does not serve the purpose of "protecting the car and its contents" under any normal construction of those terms, at least on the evidence in this record. *Opperman,* 428 U.S. at 372, 373, 96 S.Ct. at 3098, 3099.

III. CONCLUSION

The most straightforward justification for Sabourin's search behind the door panel would have been probable cause to believe that the hidden space contained contraband. The totality of the circumstances could support such a view. Lugo was armed, travelling interstate, did not have luggage or other

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articles normally associated with such a trip, and he displayed a noticeable interest in locking his truck after being told by officers not to. His weapon was within easy reach, along with a fully loaded clip, and there was additional ammunition on the floor of the truck. The loosened door panel, with a creased edge indicating that someone had accessed the cavity inside, could indicate to an experienced or otherwise properly trained officer the likelihood in these circumstances that contraband was hidden in the space. Indeed, when officer Sabourin saw the condition of the door panel, he immediately gave it his full attention. Such a reaction would not likely be motivated by an abstract interest in vehicle disrepair or maintenance. His curiosity must have been piqued by the belief that this was not an innocent situation. *See United States v. Arango,* 912 F.2d 441, 447 (10th Cir.1990).

However, Sabourin's testimony did not proceed along those lines. It omitted the crucial fact as to whether or not the condition of the door suggested the presence of contraband, based on his training or experience or both. And, it omitted any link between the other circumstances mentioned above and the loosened panel. In any event, we can only deal with the theories and evidence advanced in the district court. For the reasons stated above, these theories, on the evidence presented, are inadequate to justify the search into and behind the door panel of Lugo's truck. Furthermore, the government is estopped by its position below from attempting in any subsequent proceeding in this case to construct new theories, including probable cause.

The denial of Lugo's motion to suppress is REVERSED. For that reason, his conviction is also REVERSED.

All Citations

978 F.2d 631

Footnotes

* The parties have waived oral argument on appeal. After examining the briefs and appellate record, this panel has determined that oral argument would not materially assist the determination of this appeal. The cause is therefore ordered submitted without oral argument. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9.

1 Because we base our decision on other grounds, we do not address the issue, raised by appellant, that his *Miranda* rights were violated during the initial questioning by Officers McDonald and Sabourin.

2 The facts of this case are distinguishable from those in *United States v. Cotton,* 751 F.2d 1146, 1149 (10th Cir.1985), in which this court held that an officer may seize articles found within the passenger compartment of an automobile “even where the arrestee is outside the vehicle and handcuffed.” We based our decision in that case on the need for an arresting officer to retain some measure of flexibility in determining when he may lawfully search within the vehicle.

3 In their briefs, both parties addressed the issue of whether or not Lugo's truck was lawfully impounded, a prerequisite to a valid inventory search. As we deem the impoundment lawful, we need not address this threshold requirement.

4 Trooper Sabourin testified at the suppression hearing that while an inventory search of stereo speakers is “common procedure” for the Wyoming Highway Patrol, removing a speaker cover to look inside a door panel would not be part of a regular inventory search.

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409 Md. 415
Court of Appeals of Maryland.

Francis Eugene WILSON, Jr.
v.
STATE of Maryland.

No. 91, Sept. Term, 2007.
|
July 20, 2009.

Synopsis
Background: Defendant was convicted by jury in the Circuit Court, Washington County, John H. McDowell, J., of disarming a law officer, second degree assault, resisting arrest, possession of marijuana, and disorderly conduct. Defendant appealed. The Court of Special Appeals, 176 Md.App. 7, 932 A.2d 739, affirmed.

The Court of Appeals, Raker, J., granted petition for writ of certiorari, and held that officer's actions, in placing defendant in handcuffs and transporting him to hospital in police cruiser, exceeded those permitted under community caretaker function.

Judgment of Court of Special Appeals reversed; remanded with instructions.

Harrell, J., filed dissenting opinion in which Cathell, J., joined.

Attorneys and Law Firms

****879** Marc A. DeSimone, Jr., Asst. Public Defender (Nancy S. Forster, Public Defender, Baltimore), on brief, for petitioner/cross-respondent.

Kathryn Grill Graeff, Asst. Atty. Gen. (Douglas F. Gansler, Atty. Gen., Baltimore), on brief, for respondent/cross-petitioner.

****880** Argued before BELL, C.J., RAKER,*HARRELL, BATTAGLIA, GREENE, JOHN C. ELDRIDGE (Retired, specially assigned) and DALE R. CATHELL (Retired, specially assigned), JJ.

Opinion

RAKER, Judge.

***420** In this criminal appeal, we consider whether petitioner was seized in violation of the Fourth Amendment to the United States Constitution. We shall hold that the police officer's seizure of petitioner was an unlawful arrest and in violation of the Fourth Amendment to the United States Constitution. Accordingly, the trial court erred in denying his motion to suppress the evidence resulting from his unlawful seizure.

***421 I.**

Francis Eugene Wilson, petitioner, was indicted by the Grand Jury for Washington County on charges of second degree assault, resisting arrest, disarming a law enforcement officer, possession of marijuana, and disorderly conduct. He proceeded to trial before a jury and he was convicted of all the charges, except for disarming a law enforcement officer. He was sentenced to a term of imprisonment of three years on the resisting arrest charge, a consecutive term of one year imprisonment on the marijuana charge, and a concurrent term of imprisonment of sixty days for the disorderly conduct charge.

In the Circuit Court, petitioner filed a motion to suppress the search and seizure conducted by the police. The parties agreed that the trial court could rule on the motion as part of the trial rather than to hold a separate hearing on the motion. After police officer Zimmerer testified before the jury, the trial court excused the jury, and, after argument on the motion, ruled on the motion to suppress. As did the Court of Special Appeals, we shall focus on the officer's testimony up until the point when the court excused the jury and ruled on the motion to suppress.

Officer Zimmerer testified that at approximately 5:00 a.m. on February 13, 2005, while on routine patrol in Hagerstown, Maryland, in an unmarked police car, he saw something in the roadway. He thought the object was a trash bag or tarp that had blown into the roadway, and he activated his emergency lights. As he activated his emergency lights he noticed that the object was actually petitioner lying in the roadway. In response to the lights, petitioner stepped up in front of a van located one lane over to the right of the officer, went onto the sidewalk and started walking westbound, in the same

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direction as the unmarked police car. Officer Zimmerer then slowed down, left his lights on, and pulled up to the curb.

Petitioner continued walking past Officer Zimmerer, at which point the officer exited his vehicle and called to petitioner because "he wanted to see if he was okay." Although Officer Zimmerer was in an unmarked police car, he was ***422** dressed in full uniform and his police badge was displayed. Petitioner did not respond and appeared to the officer "to be picking up his pace." The officer noticed some abrasions on petitioner's face and knuckles. He grabbed petitioner by his coat, sat him down on the curb, and began talking to him. The officer testified that he "tried to find out his name, ask him what was wrong with him, tried to find out where he lived at." In response, petitioner "just sat there with a blank stare." Officer Zimmerer testified that, based upon petitioner's mannerisms, ****881** although he did not know what was wrong with petitioner, he thought that he was "possibly under the influence of a controlled dangerous substance." He told petitioner that he was going to take him to the hospital and that he would have to be handcuffed before he was placed in the police cruiser. He testified that it was department policy to handcuff everyone prior to being put in a police cruiser. Officer Zimmerer then put petitioner's right hand behind his back to place the handcuffs on him. At that point, petitioner began to struggle.

The trial court then dismissed the jury and permitted defense counsel the opportunity to cross-examine the officer. Although he maintained that petitioner was not under arrest, the officer agreed that petitioner was not free to leave. The court then heard argument on the motion to suppress, and denied the motion. The court determined that, given the circumstances, the officer had a right to accost petitioner to see if anything was wrong and that "he had a right to do that because he was building reasonable articulable suspicion." The court stated as follows:

> "And perhaps maybe not at that time, but once he contacted the defendant, saw the injuries I think on his face and hands and knuckles, started gathering more information that something was seriously amiss, asked the defendant his name, asked other questions. The defendant just stared blankly after he had him sit down. So certainly this Officer had reasonable articulable suspicion to believe that something was going on with the defendant, either a crime was being committed because the defendant was under the ***423** influence of drugs, perhaps not alcohol because he couldn't smell it, that the defendant was injured and needed help or assistance, that the defendant was having some type of mental or physical problem for which he needed to go to the hospital. So the officer had a right to detain, to do something that was less intrusive than an actual arrest in order to determine if a crime was being committed, had been committed, the defendant's identity to determine if he needed help or assistance, and there is a community caretaking function here. It's like ..., there have been cases where the appellate courts have said that hearing screams in a building, they have a right to run in there to see if anything or anyone was in need of assistance or a crime was being committed. Here the defendant, because of his actions, the observations of the injuries, seeing him in the middle of the road just lying there, the defendant could have gotten killed at that point in time by a vehicle coming along not observing him until it was too late and running over him. So the Officer had articulable suspicion that perhaps a crime had been committed, was being committed, that the defendant was injured, that the defendant needed help, or that in fact after observing him, that the defendant was either assaulted, having a medical issue, or was under the influence of drugs. So taking him into ..., detaining him was a perfectly valid thing to do at that point in time. And telling him, 'I'm taking you to the hospital,' was also perfectly valid either because there was a basis for a *Terry* type of stop and detention or there was a basis to take him to the hospital because there was cause, certainly cause to believe that the defendant was having an injury, an illness or a medical condition, or was so under the influence that he was potentially going to injure himself or others in the future."

The court denied the motion to suppress, the trial resumed, and additional facts not to be considered on the motion to ****882** suppress were presented to the jury. The jury heard that petitioner continued to resist the officer's attempts to place him in handcuffs and that the officer used pepper spray, a back-up officer used a taser stun gun on petitioner, and ***424** petitioner was ultimately arrested, taken to the hospital, and then to jail. The jury heard also that while petitioner was being processed at the police booking station he requested to go to the bathroom, where he attempted to dispose of a baggie of marijuana.

The jury found petitioner guilty of second degree assault, resisting arrest, possession of marijuana, and disorderly conduct. As indicated, the court sentenced petitioner to four years of incarceration.

Petitioner noted a timely appeal to the Court of Special Appeals. Affirming the judgment of conviction, the intermediate appellate court held that petitioner was detained properly by the police in the exercise of their community caretaking function. *Wilson v. State,* 176 Md.App. 7, 932 A.2d 739 (2007). The court noted that the police caretaking function "permits searches of private property by police that would otherwise violate the Fourth Amendment where the police have initiated the search, not to investigate crime, but to 'aid persons in apparent need of assistance' or to protect property." *Id.* at 13–14, 932 A.2d at 743 (quoting *State v. Alexander,* 124 Md.App. 258, 269, 721 A.2d 275, 280 (1998)). The question not decided by Maryland appellate courts, the court observed, is whether the caretaking function extends beyond searches to *seizures* of persons. *Id.* at 14, 932 A.2d at 743. The intermediate appellate court held that there is no basis, in logic or policy, for drawing a distinction between searches and seizures for community caretaking purposes, because, the same policy underlies both —protection of citizens from likely physical harm. *Id.*

We granted Wilson's petition for writ of certiorari to answer the following question:

> "Did all of the evidence of guilt adduced against petitioner flow from a violation of his Fourth Amendment right against unreasonable seizure where a police officer, lacking even a reasonable suspicion of criminal activity, approached petitioner in full uniform, with weapon and badge displayed, and emergency lights activated; grabbed petitioner by the arm ***425** from behind, interrogated him, informed petitioner that he would be removed from the scene in the rear of a squad car, and then sought to place handcuffs upon him?"

Wilson v. State, 402 Md. 352, 936 A.2d 850 (2007).[1]

II.

In reviewing the trial court's denial of a motion to suppress, we review the evidence in the light most favorable to the State. *Owens v. State,* 399 Md. 388, 403, 924 A.2d 1072, 1080 (2007). We accept the court's factual findings, unless clearly erroneous, but the ultimate question of reasonableness of a search or seizure under the ****883** Fourth Amendment or Article 26 of the Maryland Declaration of Rights is a legal conclusion that we review *de novo*. *Lewis v. State,* 398 Md. 349, 358, 920 A.2d 1080, 1085 (2007). Our review of the propriety of the court's ultimate ruling is based ordinarily upon the evidence presented at the suppression hearing, and in the instant case, by agreement of the parties, on the evidence related to the legality of the search or seizure. *Williamson v. State,* 398 Md. 489, 500, 921 A.2d 221, 228 (2007).

Petitioner presents two arguments.[2] First, he argues that his warrantless arrest was without probable cause to believe ***426** that he was engaged in criminal activity, and consequently, he was privileged to resist the officer's attempt to place handcuffs on him. Petitioner's argument is that he was arrested when Officer Zimmerer approached him, grabbed him by the arm, asked him questions, and then, attempted to handcuff him before placing him into the back seat of the officer's police car. In petitioner's view, the officer's use of handcuffs was the ultimate display of police authority over petitioner, and it required a showing of probable cause. Because probable cause was lacking, petitioner continues, the arrest was unlawful. Therefore, anything that flowed from the unlawful arrest must be seized, and the resisting charge must fail because petitioner had a legal right to resist an unlawful arrest.

Petitioner's second argument involves the "community caretaking" function of the police. He argues that the community caretaking doctrine does not permit involuntary, warrantless seizures of individuals, and even if the doctrine could be extended to encompass seizure of individuals, the seizure of petitioner is outside the confines of this doctrine and thus violates the Fourth Amendment. Petitioner argues that this doctrine "has no prior countenance in the law of this State, and this Court must reject the Court of Special Appeals' wrongful inclusion of this doctrine within the law of Maryland, both as a matter of law, and a matter of policy." Brief of petitioner at 20. It is petitioner's view that the community caretaking doctrine is very limited in scope and only applies to entries onto land and searches of effects. Alternatively, petitioner argues that even if the doctrine is to be recognized in Maryland, the officer was acting outside of its narrow scope when he sought to handcuff petitioner.

The State argues that petitioner was not arrested, but instead was reasonably detained by Officer Zimmerer pursuant to the police community caretaking function. Because petitioner appeared to the officer to be in need of assistance, it was reasonable for the officer to transport petitioner to the ***427** hospital, as well as to place handcuffs on petitioner before putting him into the police car. Alternatively, the State argues that even if the initial detention was improper, petitioner's assault upon the officer constituted an intervening event

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that attenuated any taint from his initial, *arguendo* illegal detention, and therefore any evidence seized by the police was not the fruit of any illegal detention. Finally, the State argues that even if the initial detention was illegal and petitioner's assault on the officer did not constitute an intervening event that attenuated any alleged taint from the initial detention, the only evidence to be suppressed would be the marijuana.

****884 III.**

The Fourth Amendment to the United States Constitution[3] protects persons and places from unreasonable intrusions by the government. The Fourth Amendment does not protect against all seizures, however, but only against *unreasonable* searches and seizures. *United States v. Sharpe,* 470 U.S. 675, 682, 105 S.Ct. 1568, 1573, 84 L.Ed.2d 605 (1985). In assessing whether a search or seizure was reasonable, "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " *Pennsylvania v. Mimms,* 434 U.S. 106, 108–09, 98 S.Ct. 330, 332, 54 L.Ed.2d 331 (1977) (quoting *Terry v. Ohio,* 392 U.S. 1, 19, 88 S.Ct. 1868, 1878–79, 20 L.Ed.2d 889 (1968)). Reasonableness "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." ***428** *Maryland v. Wilson,* 519 U.S. 408, 411, 117 S.Ct. 882, 885, 137 L.Ed.2d 41 (1997) (quoting *United States v. Brignoni–Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 2579, 45 L.Ed.2d 607 (1975))

We turn to the State's community caretaking argument. The State justifies Officer Zimmerer's actions as conduct falling within the police "community caretaking function." In *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973), the Supreme Court first used the term "community caretaker," and validated the police impoundments of automobiles, without underlying probable cause, on the grounds that the police needed to act to protect the public from hazards and interrupted traffic. In that case, the police in Wisconsin were called to an accident scene in which Dombrowski, a Chicago police officer, while driving drunk, had crashed his car into a bridge abutment. Believing that Chicago police officers were required to carry their service revolvers, police searched his car unsuccessfully for the service revolver, and then towed the car to the police station. Dombrowski was arrested for drunk driving, then hospitalized overnight for his injuries. At the police station the next day, the police looked for the service revolver in the trunk of Dombrowski's car. They saw evidence of a murder in the trunk. At trial, the State used the evidence from Dombrowski's car to convict him of the murder which was unrelated to the automobile accident.

The United States Court of Appeals for the Seventh Circuit held that the warrantless search and seizure violated Dombrowski's rights under the Fourth Amendment. *Dombrowski v. Cady,* 471 F.2d 280, 286 (7th Cir.1972). The United States Supreme Court reversed and upheld the search and seizure, holding that the "caretaker" search and seizure was reasonable because it was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" and because the search was aimed at ensuring the safety of the general public, rather than uncovering evidence related to crime detection. *Cady,* 413 U.S. at 441, 447, 93 S.Ct. at 2528, 2531.

***429** Noting that the police were required to take control and custody of Dombrowski's ****885** car because it constituted a nuisance and Dombrowski, because of his condition, could not care for it himself, the Court reasoned that the police had reason to worry that a revolver was inside the car, on an unattended lot, and thereby posed a hazard to the community. The Court concluded that it was reasonable for the police to search Dombrowski's trunk in the exercise of their "community caretaking" responsibilities, "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.* at 443, 93 S.Ct. at 2529. In upholding the search, the Supreme Court explained as follows:

> "Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, *for want of a better term, may be described as community caretaking functions,* totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

Id. at 441, 93 S.Ct. at 2528 (emphasis added).

Since *Cady,* many courts have considered the breadth and scope of the community caretaking function of law enforcement officers.[4] Some courts have construed the notion narrowly ***430** and others have given it wide berth. The so-called doctrine does not have a single meaning, but is rather an umbrella that encompasses at least three other doctrines: (1) the emergency-aid doctrine, (2) the automobile impoundment/inventory doctrine,[5] and (3) the public servant exception.

****886** Some courts have limited community caretaking functions to automobiles and have declined to expand it to the warrantless entry of a residence or business. *See, e.g., United States v. McGough,* 412 F.3d 1232, 1238 (11th Cir.2005) (stating "we ***431** have never explicitly held that the community caretaking functions of a police officer permits the warrantless entry into a private home"); *United States v. Erickson,* 991 F.2d 529 (9th Cir.1993) (refusing to extend community caretaking function to warrantless search of private home); *United States v. Pichany,* 687 F.2d 204 (7th Cir.1982) (declining to extend community caretaking function to warrantless search of warehouse); *State v. Gill,* 755 N.W.2d 454 (N.D.2008) (refusing to apply exception to warrantless search of dwelling). Other courts have addressed community caretaking intrusions in contexts other than automobile stops. *See, e.g., United States v. Garner,* 416 F.3d 1208 (10th Cir.2005) (detention of individual); *United States v. Miller,* 589 F.2d 1117 (1st Cir.1978) (search of a yacht); *State v. Dube,* 655 A.2d 338 (Me.1995) (search of apartment); *Commonwealth v. Waters,* 20 Va.App. 285, 456 S.E.2d 527 (1995) (detention of individual).

This Court has not previously considered the breadth of community caretaking functions, nor has it expressly adopted the "community care doctrine" as an exception to the warrant requirement of the Fourth Amendment as it relates to individuals outside of the home and in need of aid. *See Lewis,* 398 Md. at 373, 920 A.2d at 1094. Nevertheless, we have long recognized at least two categories of police activities that purportedly fall within community caretaking functions: (1) the automobile impoundment/inventory doctrine,[6] and (2) the ***432** emergency aid doctrine. The emergency aid doctrine and the public welfare function often overlap and both appear to be at issue in this case.

The emergency aid doctrine was recognized by the United States Supreme Court in *Mincey v. Arizona,* 437 U.S. 385, 392, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978), as ****887** an exception to the Fourth Amendment warrant requirement, based upon the premise that law enforcement officers should be able to act without a warrant when they reasonably believe a person needs immediate attention. Application of the emergency aid doctrine is firmly established in Maryland.

In *Davis v. State,* 236 Md. 389, 392–93, 204 A.2d 76, 79–80 (1964), firemen and police were called to a house by an individual who discovered a dead body in the back yard. After they arrived, police noticed a trail of blood leading from the victim to the rear door, and they were able to observe a pair of human feet inside the home. The officers then entered the home and discovered defendant sleeping on a couch along with evidence that he committed the crime. *Id.* at 393, 204 A.2d at 79. This Court held that the police officers' warrantless entry into the home was a reasonable search under the emergency aid doctrine. *Id.* at 395, 204 A.2d at 80. The Court reasoned that the officers were required to "offer aid to the person within the house on the very distinct possibility that this person had suffered at the hands of the perpetrator of the homicide discovered in the back yard." *Id.* at 395–96, 204 A.2d at 80.

Reiterating the general rule that a warrant is required to enter a home, the Court noted that an entry made during an emergency situation is a recognized exception. The Court held that the police entry onto the defendant's property was for the purpose of investigating a reported death, and thus, the officers were legitimately on the premises and were not trespassers. Then, "in light of the gory scene which confronted ***433** the police in the back yard of the Davis' home, their duties with regard to investigation of the death of the person found there commanded that they determine whether more than one person had been victimized in the carnage which had obviously taken place." *Id.* at 395, 204 A.2d at 80. The entry in the house was held to be lawful, on the following basis:

> "We find that the entrance of the police officers into the house was reasonable under the circumstances then existing in order to determine whether the feet which were seen therein by Lt. Denell were those of a person in distress, immediate aid to whom might, under similar circumstances, have preserved a human life. Basic humanity required that the officers offer aid to the person within the house on the very distinct possibility that this person had suffered at the hands of the perpetrator of the homicide discovered in the back yard. The delay which would necessarily have resulted from an application for a search warrant might have been the difference between life and death for the person seen exhibiting no signs of

life within the house. The preservation of human life has been considered paramount to the constitutional demand of a search warrant as a condition precedent to the invasion of the privacy of a dwelling house. As aptly stated by Judge Burger in *Wayne v. United States,* 318 F.2d 205, 212 (D.C.Cir.1963):

> 'Breaking into a home by force is not illegal if it is reasonable in the circumstances. * * * But a warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Fires or dead bodies are reported to police by cranks where no fires or bodies are to be found. Acting in response to reports of 'dead bodies,' the police may find ****888** the 'bodies' to be common drunks, diabetics in shock, or distressed cardiac patients. But the business of policemen and firemen is *to act,* not to speculate or meditate on whether the report is ***434** correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response. A myriad of circumstances could fall within the terms 'exigent circumstances' referred to in *Miller v. United States,* [357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958)] *e.g.,* smoke coming out a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within.'

See also People v. Roberts, 47 Cal.2d 374, 303 P.2d 721 (1956)."

Id. at 395–96, 204 A.2d at 80–81; *see also Lebedun v. State,* 283 Md. 257, 272–73, 390 A.2d 64, 71 (1978).

The Court of Special Appeals, in *Alexander,* 124 Md.App. 258, 721 A.2d 275, addressed the community caretaking function in the context of protecting a home where police found an open door. Judge Charles E. Moylan, Jr., writing for the panel, commented upon the "Aiding Persons in Need of Assistance" prong of the doctrine and noted as follows:

> "Whether labeled a 'community caretaking function' or not, one such duty is to aid persons in apparent need of assistance. If when glancing through the window of a home from the public sidewalk, for instance, the police see an elderly man clutch his chest and fall to the floor or even if they only see a prostrate figure already on the floor, their duty is to respond promptly to a possible medical emergency. Undue concern with Fourth Amendment niceties could yield a dead victim who might otherwise have survived."

Id. at 269, 721 A.2d at 280. The court reiterated that the touchstone of the doctrine is that the police "were engaged in a community caretaking function and not in an investigative function and that the appropriate standard for judging such police behavior is that of general reasonableness." *Id.* at 280, 721 A.2d at 286.

***435** Maryland courts have upheld the emergency aid doctrine in various other circumstances. *See, e.g., Carroll v. State,* 335 Md. 723, 646 A.2d 376 (1994) (holding entry into home to be reasonable when law enforcement officers have probable cause to believe that a burglary is either in progress or recently has been committed; the exigencies of the situation permit the officers to enter the premises without a warrant to search for intruders and to protect an occupant's property); *Oken v. State,* 327 Md. 628, 612 A.2d 258 (1992) (police respond to a missing persons report); *Alexander,* 124 Md.App. 258, 721 A.2d 275 (police entered home in response to neighbor's call stating that he believed the home had been broken into and the residents were away); *Burks v. State,* 96 Md.App. 173, 624 A.2d 1257 (1993) (police entered motel room without a warrant to rescue two kidnaping victims).

The caretaking function has been recognized also as a general public welfare rule or what is sometimes known as the "public servant" exception. When the police act to protect the public in a manner outside their normal law enforcement function, many courts have applied the doctrine to validate many warrantless searches and seizures, and in a variety of circumstances. *Garner,* 416 F.3d 1208 (officer exercised community caretaking function when he told defendant to come back and sit down ****889** so that fire department could examine him); *Miller,* 589 F.2d 1117 (boarding an abandoned boat and finding evidence of narcotics trafficking was lawful under the community caretaking doctrine because the possible drowning of the boat owner was being investigated); *People v. Ray,* 21 Cal.4th 464, 88 Cal.Rptr.2d 1, 981 P.2d 928 (1999) (officers lawfully entered apartment in response to a call that it was in shambles and its door had been left ajar all day, to check on the welfare of the persons inside the apartment); *People v. Luedemann,* 222 Ill.2d 530, 306 Ill.Dec. 94, 857 N.E.2d 187 (2006) (officer exercised community caretaking function in checking on defendant, who appeared

intoxicated and was seated in driver's seat of parked car at night); *Dube,* 655 A.2d 338 (initial entry of police into defendant's apartment to oversee custodian's plumbing repair lawful as a community ***436** caretaking function); *Waters,* 456 S.E.2d 527 (officers' community caretaking functions include checking on well-being of individual in a public space who appears ill or in need of assistance); *State v. Kinzy,* 141 Wash.2d 373, 5 P.3d 668 (2000) (community caretaking function extends to officer approaching at risk youth in high narcotics trafficking areas to check on their safety).

The common denominator throughout these cases is the non-criminal, non-investigatory police purpose. In *Cady,* the police were responding to a traffic accident rather than investigating criminal activity or seeking to implicate the defendant in a crime. The Supreme Court's recognition of a separation between investigatory and non-investigatory functions of the police underlies the application of the public servant exception beyond the automobile impoundment/ inventory search to justify initial encounters and intrusions in other circumstances.

It is the public servant/general public welfare rule that the State invokes in this case to justify the police officer's initial contact with petitioner. Law enforcement contact in the noncriminal context arises most often in two general circumstances. The first is when police approach parked cars where the driver appears to be sick or when the car appears to be functioning improperly. A second area, which is at issue in the case *sub judice,* is when law enforcement officers approach pedestrians who appear to need assistance because they appear sick, in danger or in need of some emergency assistance. These encounters are commonly justified only when the purpose of the police is unrelated to criminal investigations.

The "public safety" doctrine is based upon a recognition that law enforcement officers perform a myriad of functions and responsibilities, the enforcement of criminal laws being only one of them. *Williams v. State,* 962 A.2d 210, 216–17 (Del.2008); 3 Wayne R. LaFave, Search and Seizure, § 5.4(C) (4th ed. 2004). The Supreme Court of Delaware, in *Williams,* described the underpinnings of the doctrine as follows:

> ***437** "The modern police officer is a 'jack-of-all-emergencies,' with complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses; by default or design he [or she] is also expected to aid individuals who are in danger of physical harm, assist those who cannot care for themselves, and provide other services on an emergency basis. To require reasonable articulable suspicion of criminal activity before police can investigate and render assistance in these situations would severely hamstring their ability to protect and serve the public."

****890** *Williams,* 962 A.2d at 216–17 (internal citations omitted).

As did the Delaware Supreme Court, as well as the majority of jurisdictions in the country, we find that the public welfare component of the community caretaking function of the police "encompasses a non-investigative, non-criminal role to ensure the safety and welfare of our citizens," reflecting that principle that the role of the police is not limited to the investigation, detection and prevention of crime in this State. *See id.* at 218; *see also State v. Lovegren,* 310 Mont. 358, 51 P.3d 471, 475–76 (2002).

Many courts have embraced the community caretaking doctrine/public welfare exception, thereby permitting police to investigate or aid citizens who may need assistance or are in danger. The exercise of this power by the police is not without strict limits, however. The caretaking function of the police must always be balanced with the rights and protections enjoyed by our citizens under the United States Constitution and the Maryland Declaration of Rights. *See, e.g., United States v. King,* 990 F.2d 1552, 1560 (10th Cir.1993) (stating that "[w]hether the seizure of a person by a police officer acting in his or her noninvestigatory capacity is reasonable depends on whether it is based on specific articulable facts and requires a reviewing court to balance the governmental interest in the police officer's exercise of his or her 'community caretaking function' and the individual's interest in being free from arbitrary government interference").

***438** The Delaware Supreme Court fashioned a test to protect fundamental rights, based upon the Montana approach. *Williams,* 962 A.2d at 219. The test is formulated as follows:

> "[W]e must ascertain that the encounter was part of the police officer's community caretaker function; that the officer's actions during it remained within the caretaking function; and that once the caretaking function had ceased, either the encounter was terminated, or some other justification existed for its continuance."

Id. The specific test formulated by Montana, and subsequently adopted in Delaware reads as follows:

> "First, as long as there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, then that officer has the right to stop and investigate. Second, if the citizen is in need of aid, then the officer may take appropriate action to render assistance or mitigate the peril. Third, once, however, the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated then any actions beyond that constitute a seizure implicating not only the protections provided by the *Fourth Amendment,* but more importantly, those greater guarantees afforded under [state law]."

Lovegren, 51 P.3d at 475–76.

The Court of Special Appeals adopted the three-part test to determine whether a detention by police was pursuant to their community caretaking function. The test, as articulated by the United States Court of Appeals for the Tenth Circuit in *Garner,* 416 F.3d 1208, for a detention to qualify as an exercise of the community caretaking function, must be:

> "(1) based upon specific and articulable facts which ... reasonably warrant an intrusion into the individual's liberty;
>
> (2) the government's interest must outweigh the individual's interest in being free from arbitrary governmental interference; and
>
> ****891** ***439** (3) the detention must last no longer than is necessary to effectuate its purpose, and its scope must be carefully tailored to its underlying justification."

Wilson, 176 Md.App. at 16–17, 932 A.2d at 744–45 (citing *Garner,* 416 F.3d at 1213).

As did the Court of Special Appeals, and our sister jurisdictions, with a goal toward assuring that the exercise of the public welfare community caretaking function is conducted reasonably, we adopt a somewhat similar test. To enable a police officer to stop[7] a citizen in order to investigate whether that person is in apparent peril, distress or in need or aid, the officer must have objective, specific and articulable facts to support his or her concern. If the citizen is in need of aid, the officer may take reasonable and appropriate steps to provide assistance or to mitigate the peril. Once the officer is assured that the citizen is no longer in need of assistance, or that the peril has been mitigated, the officer's caretaking function is complete and over. Further contact must be supported by a warrant, reasonable articulable suspicion of criminal activity, or another exception to the warrant requirement. The officer's efforts to aid the citizen must be reasonable. In assessing whether law enforcement's actions were reasonable, we consider the availability, feasibility and effectiveness of alternatives to the type of intrusion effected by the officer. *See State v. Kramer,* 315 Wis.2d 414, 759 N.W.2d 598, 612 (2009).

***440 IV.**

We now assess the reasonableness of Officer Zimmerer's contact with petitioner. Some courts have analyzed the police encounter in the context of whether the contact is a seizure; others have determined that it is not a seizure but that the police conduct was reasonable. We have made clear that the Fourth Amendment guarantees are not implicated in all circumstances where the police have contact with an individual. *See Swift v. State,* 393 Md. 139, 149, 899 A.2d 867, 873–74 (2006) (citing *California v. Hodari D.,* 499 U.S. 621, 625–26, 111 S.Ct. 1547, 1550–51, 113 L.Ed.2d 690 (1991)); *Scott v. State,* 366 Md. 121, 133, 782 A.2d 862, 869 (2001). We employed a three-tier analysis of police interaction with citizens. *Haley v. State,* 398 Md. 106, 131–32, 919 A.2d 1200, 1214–15 (2007); *Swift,* 393 Md. at 149–51, 899 A.2d at 873. The most intrusive encounter is an arrest, which requires probable cause to believe that a person has committed or is committing a crime. The second category is the investigatory stop or detention, known commonly as a *Terry* stop, an encounter considered less intrusive than a formal custodial arrest and one which must be supported by reasonable suspicion that a person has committed or is about to commit a crime and permits an officer to stop and briefly detain an individual. The third contact is considered the least intrusive police-citizen contact, and one which involves no restraint of liberty and elicits ****892** an individual's voluntary cooperation with non-coercive police contact. A consensual encounter, or a mere accosting, need not be supported by any suspicion and because an individual is free to leave at any time during such an encounter, the Fourth Amendment is not implicated; thus, an individual is not considered to have been "seized" within the meaning of the Fourth Amendment. Regardless of whether the court has held the contact to be a seizure or not, all courts seem to require that the officer's actions be reasonable. *Swift,* 393 Md. at 149–51, 899 A.2d at 873–74.

Officer Zimmerer's initial encounter with petitioner did not rise to the level of a seizure implicating the Fourth ***441**

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Amendment. Writing for the majority in *Crosby v. State,* 408 Md. 490, 503, 970 A.2d 894, 901 n. 14 (2009), Judge Harrell noted that a "mere accosting" is the lowest level of an encounter that an individual may have with the police. An accosting occurs when a police officer, as in the case *sub judice,* simply calls out to an individual without any show of authority or signs of force or weapons. The Fourth Amendment does not apply to an accosting because "such an encounter does not entail any show of authority by the police." *Crosby,* 408 Md. at 503, n. 14, 970 A.2d at 901.

The officer saw petitioner lying in the middle of the roadway and initially simply called out to check upon his well-being. From the time that Officer Zimmerer grabbed petitioner by his coat, however, sat him down on the curb and began talking to him, a reasonable person would have believed that he was no longer free to leave. This belief was reinforced by Officer Zimmerer conveying to petitioner that he was going to take him to the hospital after placing him in handcuffs in the police cruiser. At the time that Officer Zimmerer detained petitioner so that he was no longer free to leave, the encounter between the officer and petitioner rose to the level of a seizure, and we therefore examine it under the Fourth Amendment.

The officer's encounter with petitioner was conducted to provide emergency aid to petitioner or in the officer's capacity to protect the public welfare. Officer Zimmerer testified that he approached petitioner because of his concern for petitioner's health and safety, and when he first observed petitioner, Officer Zimmerer approached him to "see if he was okay." The officer had no indication or reason to suspect that petitioner was involved in criminal activity and, therefore, he could not have entertained the reasonable articulable suspicion required to make a *Terry* stop. *Terry,* 392 U.S. 1, 88 S.Ct. 1868. Neither petitioner's silence when the officer accosted him, nor the abrasions on petitioner's face and knuckles, provided the officer with sufficient probable cause to arrest him. The encounter between Officer Zimmerer and petitioner ***442** could reasonably continue because, consistent with the public welfare function, Officer Zimmerer wanted to find out petitioner's "name, ask him what was wrong with him, ... find out where he lived at." The officer then determined that petitioner should be examined at a hospital and placed handcuffs on him so that he could receive proper medical assistance. The question then becomes whether Officer Zimmerer's seizure of petitioner was *reasonable,* notwithstanding the absence of a warrant.

We hold that Officer Zimmerer's decision to place petitioner in handcuffs and to transport him to the hospital in his police cruiser was not carefully tailored to the underlying justification for the seizure. Just as an intrusion conducted pursuant to ****893** the community caretaking doctrine must be "limited in scope to the extent necessary to carry out the caretaking function," *Opperman,* 428 U.S. at 375, 96 S.Ct. at 3100; *United States v. Andrews,* 22 F.3d 1328, 1334 (5th Cir.1994), so too must a seizure conducted to provide emergency aid. This does not mean that the method of intrusion must be the least intrusive one available, *see Illinois v. Lafayette,* 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983)[8]; *Plakas v. Drinski,* 19 F.3d 1143, 1149 (7th Cir.1994), but the intrusion must be "reasonably related in scope to the circumstances which justified the interference in the first place." *New Jersey v. T.L.O.,* 469 U.S. 325, 341, 105 S.Ct. 733, 743, 83 L.Ed.2d 720 (1985).

In assessing whether law enforcement's actions were reasonable, we consider the availability, feasibility and effectiveness of alternatives to the type of intrusion effected by the officer. Placing handcuffs on petitioner to transport him to ***443** the hospital for medical treatment, under the circumstances herein, was not reasonable. Petitioner committed no crime, and was not suspected of criminal activity. If medical treatment was necessary, the record does not indicate any reason why an ambulance was not called. Officer Zimmerer's actions exceeded those permitted under the community caretaker function. His seizure of petitioner was therefore unreasonable.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AND REMAND TO THAT COURT FOR A NEW TRIAL. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY WASHINGTON COUNTY.

Dissenting Opinion by HARRELL, J., which CATHELL, J., joins.

I dissent. The Majority opinion is fine until its very end (Maj. op. at 442–43, 975 A.2d at 893) when it misapplies its careful analysis and recitation of the community care-taking function as it should be applied in Maryland. The Majority holds that Officer Zimmerer violated Wilson's Fourth Amendment rights when he handcuffed Wilson and transported him to

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the hospital. Maj. op at 442, 975 A.2d at 892. Calling it "unreasonable" (i.e., not narrowly tailored) to handcuff Wilson in order to place him in the cruiser for such transport, the Majority finds it important to its conclusion that it discerns no reason in the record for why an ambulance was not summonsed for the purpose. Maj. op. at 441–42, 975 A.2d at 892. The Majority's reasoning overrides the latitude that ought to be granted to law enforcement officers to make discretionary calls as to what additional public services may be necessary under varying circumstances. The record tells me that, other than some scraped knuckles on his hands and his general catatonic behavior, Wilson's observed condition may not have commanded an ambulance and an EMT. In any event, what ***444** makes the Majority imagine that, under these circumstances, Wilson's liberty would not have been restricted by restraints had he been transported by ambulance? Transport by police vehicle seems ****894** eminently reasonable, appropriate to the occasion, and fiscally sound. To call Officer Zimmerer's exercise of judgment here unreasonable and unconstitutional is wrong.

As Chief Judge Krauser stated for the Court of Special Appeals in its opinion in this matter:

> [A]lthough the officer thought that [Wilson] might "possibly [be] under the influence of a controlled dangerous substance," he testified that he stopped [him] and later transported him to the hospital out of concern for [Wilson's] safety and the safety of others, and not to detect or investigate any criminal conduct by [Wilson]. The officer stated that he got out of his vehicle to follow [Wilson] because he "wanted to make sure that [Wilson] was okay"; that, in light of [Wilson's] condition, he decided to take him to the hospital; that he handcuffed [him] not to consummate an arrest but in accordance with department policy; and that he could not be sure of what was wrong with [Wilson].
>
> * * *
>
> In the instant case, Officer Zimmerer's initial attempt to place handcuffs on [Wilson] did not amount to an arrest. Zimmerer did not detain [Wilson] "for the purpose of prosecuting him for a crime." He detained him for the purpose of taking him to the hospital. He also never told [Wilson] that he was under arrest, nor did he believe that [Wilson] was under arrest until after he resisted attempts to handcuff him. In fact, the officer told [Wilson] that he was taking him not to a police station, but to the hospital and further explained that he was being handcuffed so that he could be placed into the police cruiser and transported there.
>
> When asked by the State why he handcuffed [Wilson], Officer Zimmerer replied, "It's departmental policy that everybody be handcuffed prior to being ... put in the ***445** vehicle," and that "[s]econd of all, I didn't know what was wrong with him. Like I said, I believed he was possibly under the influence of a controlled dangerous substance." When the Sate inquired as to whether [Wilson] was arrested at this point, the officer said, "no." Thus, [Wilson] was handcuffed in accordance with department policy and "to protect the officer," because he did not know "what was wrong with" [him]. The officer's attempt to handcuff was only transformed into an arrest, according to Officer Zimmerer, when [Wilson] assaulted Officer Zimmerer in resisting that procedure.
>
> 176 Md.App. 7, 20–21, 932 A.2d 739, 746–47 (2007).

The Court of Special Appeals got it right, in my view. Accordingly, I would affirm its judgment that Wilson's motion to suppress was denied correctly by the Circuit Court for Washington County.

Judge CATHELL has authorized me to state that he joins in this dissent.

All Citations

409 Md. 415, 975 A.2d 877

Footnotes

* Raker, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, she also participated in the decision and adoption of this opinion.

1 We granted the State's conditional cross-petition, which presented the following question:

"Did Wilson's assault on several police officers and his subsequent abandonment of drugs constitute intervening events that attenuated any alleged taint from his initial detention?"

Wilson, 402 Md. 352, 936 A.2d 850. Because the trial judge denied petitioner's motion to suppress evidence, the State did not have an opportunity, or need, to present its alternative argument related to intervening factors and attenuation to the trial court. The issue was not argued or developed below and we will not consider the question on this record; but, because we are reversing the judgment below, the State is free to present the argument to the trial court in any further proceedings.

2 Because the Petitioner has not asserted a Fourteenth Amendment liberty interest in the right to refuse medical treatment, an interesting issue about which we have not had the opportunity to opine, we will not address it in this case. *See* Paul C. Redrup, *When Law Enforcement and Medicine Overlap: The Community Caretaker Exception and the Right to Refuse Medical Treatment,* 38 U. Tol. L.Rev. 741 (2006).

3 The Fourth Amendment to the United States Constitution reads as follows:

"The 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. IV.

4 Some states have enacted community caretaking statutes. *See, e.g.,* Or.Rev.Stat. § 133.033 (2007). That statute provides, in part:

"(1) Except as otherwise expressly prohibited by law, any peace officer of this state ... is authorized to perform community caretaking functions.

(2) As used in this section, 'community caretaking functions' means any lawful acts that are inherent in the duty of the peace officer to serve and protect the public. 'Community caretaking functions' includes, but is not limited to:

(a) The right to enter or remain upon the premises of another if it reasonably appears to be necessary to:

(A) Prevent serious harm to any person or property;

(B) Render aid to injured or ill persons; or

(C) Locate missing persons."

Or.Rev.Stat. § 133.033.

5 The second permutation of the police community caretaking function is the inventory search. In *South Dakota v. Opperman,* 428 U.S. 364, 368, 96 S.Ct. 3092, 3097, 49 L.Ed.2d 1000 (1976), the United States Supreme Court set out the caretaker purposes underlying the automobile inventory search. Recognizing and reiterating the distinction between a home and an automobile for Fourth Amendment purposes, and the lesser expectation of privacy in an automobile, the Court observed that law enforcement officials are brought into frequent contact with automobiles, mostly in a noncriminal nature. *Id.* Using the term "community caretaking function," the Court stated:

"In the interests of public safety and as part of what the Court has called 'community caretaking functions,' automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge."

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Id. at 368–69, 96 S.Ct. at 3097 (footnotes and citations omitted). The purposes underlying this warrant exception include a duty to the owner of the car as well as a way to protect the police from dangerous items and from claims for damaged or lost property. Almost all states have upheld the caretaking function in this regard. *Id.* at 369–71, 96 S.Ct. at 3097–98.

6 In *Duncan and Smith v. State,* 281 Md. 247, 256, 378 A.2d 1108, 1114 (1977), we noted that "[a]ctivities concerning automobiles carried out by local police officers in the interests of public safety and as 'community caretaking functions' frequently result in the automobile being taken in custody." Citing *Opperman,* 428 U.S. at 368–69, 96 S.Ct. at 3097, we further observed the following:

> "Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge."

Duncan, 281 Md. at 256, 378 A.2d at 1114.

7 We take no position in this case as to whether the public welfare/community caretaking function of the police would permit the police to stop a moving vehicle on the highway. Because many of our sister states have noted abuse of this authority by police, and because this issue has not been briefed nor argued in this case, we do not address those circumstances and await opining on the issue until it is properly presented. *See, e.g., Doheny v. Comm'r of Pub. Safety,* 368 N.W.2d 1, 1–2 (Minn.Ct.App.1985) (refusing to apply the exception to the stop of a moving car); *State v. Sarhegyi,* 492 N.W.2d 284, 288 n. 1 (N.D.1992) (focusing on the difference between stopped and moving cars); *State v. Anderson,* 149 Wis.2d 663, 439 N.W.2d 840, 847–48 (1989) (stopping a moving car improper under community caretaking analysis) *overruled on different grounds* by *State v. Anderson,* 155 Wis.2d 77, 454 N.W.2d 763 (1990).

8 In *Lafayette,* the United States Supreme Court noted that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Lafayette,* 462 U.S. at 647, 103 S.Ct. at 2610. The Court pointed out that in *Cady,* "[the] fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Id.* at 648, 103 S.Ct. at 2610.

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