

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2472-CR

Cir. Ct. No. 2007CF27

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY DOUGLAS CRAWFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Judgment reversed; order reversed and cause remanded with directions.*

¶1 PETERSON, J.¹ Anthony Crawford claims he was unlawfully arrested and therefore evidence of illegal drugs found in subsequent searches

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

should have been suppressed. The circuit court, however, concluded Crawford was legally arrested pursuant to the police's community caretaker role, and that the subsequent searches were therefore proper. Because Crawford's arrest was not totally divorced from the investigation of criminal activity, we conclude the arrest was unlawful and that the evidence seized afterward should have been suppressed. We therefore reverse the judgment of conviction and order denying his suppression motion, and remand for the circuit court to grant the motion.

BACKGROUND

¶2 Officers Barry Cech and William Kurtz responded to the scene of a vehicle rollover. Emergency medical technicians told the officers the driver of the vehicle fled, but that they followed the driver's footprints in the snow into woods alongside the road. There, the EMTs said they sighted an individual later determined to be Anthony Crawford. Crawford appeared to be injured, but when Crawford saw the EMTs, he waved them off and told them he did not need medical attention.

¶3 The officers split up to intercept Crawford. Cech followed the prints on foot. Kurtz drove ahead using the squad car's loudspeaker to notify Crawford he was under arrest. When Kurtz determined he had likely overtaken Crawford, Kurtz walked into the woods to wait. Soon after, he saw Crawford step into a clearing. Kurtz drew his handgun, but holstered it and drew his taser once he saw Crawford was unarmed. He then instructed Crawford to put his arms in the air, and told him he was under arrest. At this time, Cech approached the clearing. He noticed a bloody duffel bag lying among some trees. He grabbed the bag and drew his taser. The officers then handcuffed Crawford and walked him to the ambulance.

¶4 Before placing Crawford in the ambulance, the officers conducted a pat down of his body. When the pat down produced a rock of cocaine, Crawford said, “everything you find is for my personal use.” The officers then opened the duffel, in which they found more drugs, drug paraphernalia, and cash. Crawford was charged with possession of cocaine with intent to deliver, possession of THC, and possession of drug paraphernalia.²

¶5 Crawford moved to suppress all evidence obtained after his arrest, arguing that he was arrested without probable cause. At the suppression hearing, the State did not argue probable cause existed to arrest Crawford. Instead, it argued solely that the arrest was justified by the police’s community caretaker role, contending Crawford had to be secured for medical treatment.

¶6 The circuit court concluded Crawford’s arrest was justified as an exercise of the police’s community caretaker authority, and denied Crawford’s suppression motion. Pursuant to a plea agreement, Crawford pled no contest to reduced charges.

² Based on the evidence obtained from Crawford’s protective pat down and the subsequent search of his duffel bag, the officers obtained a warrant to search Crawford’s residence.

DISCUSSION

¶7 “Whether evidence should be suppressed is a question of constitutional fact.” *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182 (citation omitted). We review questions of constitutional fact under a mixed standard of review. *Id.* We will uphold the circuit court’s findings of historical fact unless clearly erroneous, but we review independently the application of these facts to constitutional principles. *Id.*

¶8 Crawford argues the officers were not acting as community caretakers when they intercepted him in the woods and arrested him. We agree.

¶9 To comply with the Fourth Amendment’s prohibition against unreasonable searches and seizures, police generally may not seize an individual absent reasonable suspicion or probable cause. However, courts have recognized a narrow exception to this rule when police are engaged in a “bona fide community caretaker activity.” *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987). For conduct to be a bona fide community caretaker activity, it must be “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”³ *Id.* at 166.

³ *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987), articulates a three-prong test to determine whether the community caretaker exception applies: (1) whether a seizure within the meaning of the Fourth Amendment occurred; if so, (2) whether the conduct is a bona fide community caretaker activity; and if so, (3) whether the public need and interest outweigh the intrusion upon the privacy of the individual. Neither party disputes the requisite seizure occurred. Because we conclude the second prong is not satisfied, we need not address the third.

¶10 The circuit court neither referred to nor applied this standard. Instead, it stated:

[E]ven if you're in a community caretaker role, as opposed to a traditional reasonable suspicion or probable cause, it's still, kind of, a totality of the circumstances analysis.

And, as the two of those meld together here and ... physical contact is then initiated by law enforcement as they get closer to Mr. Crawford, they have a reasonable suspicion that, perhaps, he might [have] a weapon. ... Then they notice it's a ... cell phone ... [and] they realize they don't have to take as aggressive of a stance But, at the same time, they're now seeing ... the extent the injuries exist. ... So, this is where the two start to meld into one.

Not only is this an inaccurate statement of the law,⁴ but the court's assertion that there were elements of reasonable suspicion in the officers' conduct recognizes their actions were not divorced from the detection, investigation, or acquisition of evidence.

¶11 We conclude the evidence presented at the suppression hearing shows the officers' conduct was not divorced from investigating criminal conduct. First, the officers displayed authority consistent with apprehending a criminal suspect. They repeatedly told Crawford he was under arrest, and brandished both a gun and tasers when they intercepted him. Second, the measures they used when physically seizing him were similar to those used when arresting a criminal suspect. Although both officers testified they saw Crawford was severely injured, they nonetheless placed him in handcuffs to walk him to the ambulance. Finally,

⁴ Reasonable suspicion, probable cause, and the community caretaker role do not "meld into one" as the circuit court stated. See *State v. Kramer*, 2009 WI 14, ¶29, 759 N.W.2d 598 (when a community caretaker function is ongoing, police conduct is not based on reasonable suspicion or probable cause).

Cech's testimony itself confirmed the officers' actions were not totally divorced from investigating criminal conduct. He testified they tracked and arrested Crawford for two reasons: first, concern for Crawford's safety; and second, because Crawford "left the scene of an accident we needed to investigate."⁵

¶12 The State did not argue before the circuit court or before this court any other basis to uphold Crawford's arrest.⁶ Because the arrest was not a legitimate exercise of the police's community caretaker role, the evidence seized afterward should have been suppressed. On remand, the court is directed to grant Crawford's suppression motion.

By the Court.—Judgment reversed; order reversed and cause remanded with directions.

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

⁵ The State correctly points out that when an objectively reasonable basis for the community caretaker role is shown, "that determination is not negated by the officer's subjective law enforcement concerns." *Kramer*, 759 N.W.2d 598, ¶30. But this does not mean that a community caretaker situation may exist even when police are in fact engaged in the detection, investigation, and acquisition of evidence. *Kramer* acknowledges that because of the multifaceted nature of police work, an officer may have law enforcement concerns even while performing a community caretaker function. *Id.*, ¶32. It does not hold, however, that the articulation of a possible community caretaker concern transforms police conduct that is objectively investigatory into a bona fide community caretaker activity. To conclude otherwise would eviscerate the distinction between the two.

⁶ At the suppression motion hearing, the State contended Crawford had abandoned the duffel bag. However, it neither argued to the circuit court that this provided a basis, independent of his initial seizure, to search his body or belongings, nor raised the issue of abandonment on appeal. Issues not raised on appeal are deemed abandoned. *A. O. Smith Corp. v. Allstate Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

