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Supreme Court No. 102321-9
Court of Appeals No. 82749-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABDULKADIR OSMAN GARGAR,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Abdulkadir Osman Gargar requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Gargar, No. 82749-9-I, filed on August 7, 2023. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A person is "seized" for purposes of article I, section 7 when a law enforcement officer restrains his freedom of movement and a reasonable person would believe he was not free to leave. Where an officer positions his vehicle in such a manner as to block a person's car from leaving the scene, this amounts to a seizure. Here, Officer Brom "seized" Mr. Gargar when he parked his patrol vehicle in such a manner as to prevent Mr. Gargar from leaving the scene.

2. A warrantless seizure is unlawful under article I, section 7 unless it falls under one of the narrow and jealously guarded exceptions to the warrant requirement. One such

exception is a "Terry" investigative stop. To justify a Terry stop, the officer must have a well-founded suspicion, based on specific and articulable facts, that the person is engaged in criminal conduct. Here, the Terry exception did not apply because the officer lacked a well-founded, articulable basis to believe Mr. Gargar was engaged in criminal conduct.

3. A warrantless seizure may be justified under the "community caretaking" exception to the warrant requirement if the officer believes the person needs emergency medical aid. The officer's decision to invade the person's privacy rights must be "totally divorced" from the detection and investigation of criminal conduct. Further, the officer must have a reasonable, objective basis to believe the person needs immediate assistance. Here, the community caretaking exception did not apply because the officer was motivated, at least in part, by a desire to investigate possible criminal activity. And the officer lacked a reasonable, objective basis to believe Mr. Gargar needed immediate medical aid.

C. STATEMENT OF THE CASE

On June 23, 2020, at around 8:30 a.m., Kent Police Officer Daniel Brom was patrolling the Sunset Motel on Pacific Highway in Kent. RP 76, 78. That motel is known to law enforcement as a high-crime area with a particularly large number of calls relating to stolen vehicles, suspected drug use, drug sales, and prostitution. RP 73-74, 77.

As Officer Brom drove through the parking lot, he noticed a Toyota sedan backed into a parking space. RP 79, 129. Abdulkadir Gargar was sitting in the driver's seat of the Toyota, "slumped over to the side as if he was passed out or sleeping." RP 79. Officer Brom decided to check on Mr. Gargar because he thought he was either intoxicated or experiencing a "medical emergenc[y]." RP 79, 83-85. Officer Brom acknowledged Mr. Gargar could have been sleeping, meditating, or simply sitting with his eyes closed. RP 130. But he suspected Mr. Gargar might be engaged in criminal activity because this was a high-crime area and "it's odd to have people

sleeping in their vehicles at a hotel, particularly if they have rooms there." RP 131. At the same time, Officer Brom "wanted to make sure he was okay." RP 133.

Officer Brom parked his car, got out, and began to walk toward Mr. Gargar's car when he noticed the Toyota's engine was running. RP 82, 93. Officer Brom immediately returned to his vehicle and moved it forward so that it blocked the Toyota's egress. RP 82, 89, 132. He did so because he was afraid that if the car was in drive with Mr. Gargar's foot on the brake, and he startled Mr. Gargar while trying to wake him up, the car might drive forward and injure a passerby in the parking lot. RP 82-83, 132. Thus, Officer Brom blocked in Mr. Gargar's car intentionally, "for the safety of others." RP 84.

Officer Brom approached the Toyota and saw that it was in park. RP 84, 96. But when he looked inside the car, he also saw an open can of Mike's Hard Lemonade in the center console and an open bottle of vodka on the passenger seat. RP 84. At that point, Officer Brom suspected Mr. Gargar was

"under the influence." RP 85. He called for a backup officer to assist him. RP 86.

Officer Melvin Partido arrived on the scene. RP 28-30, 94. Officer Partido agreed with Officer Brom that the totality of the circumstances were "suspicious" enough to justify Brom's decision to park his patrol car in a manner that prevented the Toyota from leaving. RP 31, 49. Those circumstances were: the car was running, Mr. Gargar was asleep at the wheel, it was unknown whether he was in lawful possession of the vehicle, and the car was parked in a high-crime area. RP 31, 49-51, 61-62. But Officer Partido also acknowledged Mr. Gargar could have been hot sitting in the car on a warm June morning and decided to turn on the engine in order to run the air conditioner. RP 61.

The two officers approached the Toyota and Officer Brom knocked on the driver's side window, waking Mr. Gargar. RP 32, 96-97. As Officer Brom engaged Mr. Gargar in conversation, he noticed the butt of a revolver situated between

Mr. Gargar's right thigh and the center console. RP 101. Officer Brom instructed Mr. Gargar to exit the vehicle, which he did without incident. RP 102-07. The officers placed him in handcuffs and ran his identification through dispatch. RP 107, 113, 119. They discovered Mr. Gargar was a felon and arrested him for unlawful possession of a firearm. RP 119.

The State charged Mr. Gargar with one count of unlawful possession of a firearm in the first degree. RP 66.

Mr. Gargar filed a motion to suppress, arguing the police officers exceeded their authority when they seized him without a warrant and all fruits of the unlawful seizure must be suppressed. CP 19-31; RP 202-08, 213-14. After a hearing, the trial court concluded Mr. Gargar was not actually seized until he woke up because a person who is unconscious cannot be "seized" for constitutional purposes. RP 220, 223. The court found the seizure was justified by the officers' reasonable suspicion that Mr. Gargar was engaged in criminal conduct. RP 220. By that point, the officers had reasonable cause to believe

Mr. Gargar was committing the crime of physical control of a vehicle while intoxicated[1] because they had seen the open bottles of alcohol inside the car and the car was running with the keys in the ignition. RP 220, 223. The court therefore denied the motion to suppress. RP 211-24.

Following a trial, the jury found Mr. Gargar guilty of unlawful possession of a firearm in the first degree as charged. CP 69. Mr. Gargar appealed and the Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Officer Brom unlawfully seized Mr. Gargar when he blocked his car so that he could not leave the parking lot. All fruits of the unlawful seizure must be suppressed.

Officer Brom seized Mr. Gargar at the moment when he parked his patrol car in a manner that prevented Mr. Gargar from leaving his parking space because a reasonable person in

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[1] "A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if the person has actual physical control of a vehicle . . . [w]hile the person is under the influence of or affected by intoxicating liquor or any drug." RCW 46.61.504(1)(c).

that situation would not believe they were free to go. Because the officer did not have a warrant and none of the narrow and jealously guarded exceptions to the warrant requirement applied, the seizure was unlawful. All fruits of the seizure must be suppressed.

1. Officer Brom seized Mr. Gargar when he parked his patrol car in a manner that prevented Mr. Gargar from leaving.

Article I, section 7 of our state constitution provides, "[n]o person shall be disturbed in his private affairs . . . without authority of law." It is well-established that article I, section 7 provides greater protection of privacy rights than the Fourth Amendment. State v. Winterstein, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009).

The "authority of law" required by article I, section 7 is generally a warrant, issued upon probable cause that is established by a sworn affidavit. State v. Chenoweth, 160 Wn.2d 454, 465, 158 P.3d 595 (2007). Warrantless seizures are per se unreasonable under article I, section 7 unless the State

demonstrates the seizure falls under a narrow exception to the warrant requirement. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). These exceptions are "jealously and carefully drawn." Id.

A "seizure" occurs for constitutional purposes when a law enforcement officer restrains a person's freedom of movement by means of physical force or a show of authority, and a reasonable person would believe either that he is not free to leave or that he is not free to decline an officer's request and terminate the encounter. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003).

Unlike the Fourth Amendment, Washington's standard for determining whether a seizure occurred is "purely objective." State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). Specifically, a determination of whether a reasonable person would feel free to leave is based on the officer's conduct. Id.; O'Neill, 148 Wn.2d at 574.

Where an officer positions his vehicle in such a manner as to block a person's car from leaving the scene, this amounts to a seizure. State v. Carriero, 8 Wn. App. 2d 641, 658, 439 P.3d 679 (2019). In Carriero, two police officers responded to a report of a suspicious vehicle parked at the end of a narrow alley in a high-crime neighborhood. Id. at 646-47. One of the officers parked his car one car length away from Carriero's car and the other officer parked directly behind him. Id. at 647. In doing so, the officers blocked Carriero's car from leaving the scene. Id. The totality of these circumstances compelled Carriero to remain in his car, cooperate with law enforcement, and obey their instructions. Id. at 659-60. No reasonable person would have felt free to leave or ignore the officers' requests. Id. Thus, the officers' actions amounted to a seizure.

Here, as in Carriero, Officer Brom parked his vehicle directly next to Mr. Gargar's Toyota so that it blocked the Toyota from leaving the scene. RP 82, 89, 132. No reasonable person in Mr. Gargar's position would have felt free to leave

the scene, as his car had nowhere to go. The totality of the circumstances compelled him to remain in his car, cooperate with the officers, and obey their instructions. Thus, Mr. Gargar was "seized" for purposes of article I, section 7. Carriero, 8 Wn. App. 2d at 659-60.

2. The warrantless seizure was unlawful because none of the narrow and jealously guarded exceptions to the warrant requirement applied.

a. *Officer Brom did not have a reasonable, articulable basis to believe Mr. Gargar was engaged in criminal activity.*

One narrow exception to the warrant requirement is a "Terry" stop, which is a brief investigatory seizure. Doughty, 170 Wn.2d at 61; Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A Terry stop requires a well-founded suspicion that the person is engaging in criminal conduct. Doughty, 170 Wn.2d at 61-62. "'[I]n justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences

from those facts, reasonably warrant that intrusion.'" Id. (quoting Terry, 392 U.S. at 21).

A Terry stop must be reasonable. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). When reviewing the merits of an investigatory stop, the Court evaluates the totality of the circumstances presented to the investigating officer. Doughty, 170 Wn.2d at 62.

A person's presence in a high-crime area at any hour does not, by itself, give rise to a reasonable suspicion to detain that person. Doughty, 170 Wn.2d at 62. Instead, the circumstances must suggest a substantial possibility that the person has committed a specific crime or is about to do so. State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2005). An officer's inarticulate hunch does not alone warrant police intrusion into everyday people's lives. Doughty, 170 Wn.2d at 63.

Here, Officer Brom was not justified in seizing Mr. Gargar under the "Terry" stop exception to the warrant

requirement. Officer Brom had no specific, articulable basis to believe Mr. Gargar was engaged in criminal conduct. The only facts known to the officer at the time of the seizure were: Mr. Gargar was parked in a motel parking lot in a high-crime area in the morning, and he appeared to be either asleep or unconscious. RP 73-79. Mr. Gargar's presence in a high-crime area was not alone sufficient to give rise to a reasonable suspicion of criminal activity. Doughty, 170 Wn.2d at 62. And sleeping or being unconscious in a car is not a crime. Officer Brom was aware of no additional information at the time of the seizure to indicate Mr. Gargar had committed any crime. The "Terry" stop exception to the warrant requirement did not apply.

b. The community caretaking exception to the warrant requirement did not apply.

The "community caretaking exception" is a recognized exception to the warrant requirement. State v. Boisselle, 194 Wn.2d 1, 10, 448 P.3d 19 (2019). Under that exception, law enforcement officers may invade a person's constitutionally

protected privacy rights in a limited way as necessary to perform their community caretaking functions. Id. "This exception recognizes that law enforcement officers are 'jacks of all trades' and frequently engage in community caretaking functions that are unrelated to the detection and investigation of crime, 'including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid.'" Id. (quoting State v. Kinzy, 141 Wn.2d 373, 387, 5 P.3d 668 (2000)).

Key to the community caretaking exception is that an officer's decision to invade a person's privacy rights is "totally divorced" from the detection and investigation of criminal activity. Boisselle, 194 Wn.2d at 11. Thus, the threshold question the court must decide before applying the community caretaking exception test is whether the community caretaking exception was used as a pretext for a criminal investigation. Id.

A pretextual seizure occurs where an officer relies on some legal authorization as a mere pretense "to dispense with

[a] warrant when the true reason for the seizure is not exempt from the warrant requirement." State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999) (cited in Boisselle, 194 Wn.2d at 15). In determining whether a seizure was pretextual, "the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." Ladson, 138 Wn.2d 1t 359 (cited in Boisselle, 194 Wn.2d at 15). If the officer has "significant suspicions" of criminal activity and is not solely motivated by a perceived need to provide immediate aid, the seizure is "necessarily associated with the detection and investigation of criminal activity" and is pretextual. Boisselle, 194 Wn.2d at 16.

Here, Officer Brom's seizure of Mr. Gargar was pretextual. The officer was motivated, at least in part, by a desire to investigate possible criminal conduct. He testified he suspected Mr. Gargar might be engaged in criminal activity because he was parked in a high-crime area and "it's odd to

have people sleeping in their vehicles at a hotel, particularly if they have rooms there." RP 131. Officer Partido echoed these suspicions and testified he believed Officer Brom was justified in blocking in the Toyota because the car was running, Mr. Gargar was asleep at the wheel, it was unknown whether he was in lawful possession of the vehicle, and the car was parked in a high-crime area. RP 31, 49-51, 61-62. Because the officers had significant suspicions of criminal activity and were not solely motivated by a perceived to provide immediate aid, the seizure was pretextual and thus was not justified by the community caretaking exception to the warrant requirement. Boisselle, 194 Wn.2d at 16.

Even if the Court concludes the seizure was not pretextual, the community caretaking exception still did not apply. The applicable test depends on the community caretaking function the officer utilized. Boisselle, 194 Wn.2d at 11. An officer may lawfully seize a person under the community caretaking exception if the officer is either

conducting a "routine check[] on health and safety" or rendering "emergency aid." Id.

Where the seizure involves a routine check on health and safety, it is constitutionally permissible only if it is reasonable. Boisselle, 194 Wn.2d at 12. This requires balancing the citizen's privacy interest in freedom from police intrusion against the public's interest in having police perform a "community caretaking function." Id. The public's interest must outweigh the citizen's privacy interest. Id.

If the person has not been actually "seized," balancing these interests usually results in favoring the police action, as a person's interest in being free from police intrusion is "minimal" in the absence of a "seizure." Kinzy, 141 Wn.2d at 386. Further, "[m]any citizens look to the police to assist them in a variety of circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid." Id.

But once a seizure occurs, “a citizen’s interest in being free from police intrusion is no longer minimal.” Id. at 388. Thus, when weighing the public’s interest, courts must cautiously apply the community caretaking function exception because of “a real risk of abuse in allowing even well-intentioned stops to assist.” Id.

The “emergency aid” function of the community caretaking exception, on the other hand, “‘arises from a police officer’s community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm.’” Boisselle, 194 Wn.2d at 12 (quoting Kinzy, 141 Wn.2d at 386 n.39). Compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and greater intrusions into privacy rights. Boisselle, 194 Wn.2d at 12. Due to the great potential for abuse, courts apply additional factors to determine whether a warrantless search falls under the emergency aid function of the community caretaking exception. Id. The emergency aid

function applies where (1) the officer subjectively believed an emergency existed requiring him to provide immediate assistance to preserve life or property or to prevent serious injury; (2) a reasonable person in the same situation would similarly believe there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the specific action that resulted in the invasion of privacy rights. Id. at 14.

The community caretaking exception normally does not apply where an officer is aware only that a person is sitting in a parked car apparently asleep or unconscious. In State v. Harris, 9 Wn. App. 2d 625, 628, 631, 444 P.3d 1252 (2019), a concerned citizen flagged down two police officers in the middle of the day and reported seeing two people passed out in a car in a public parking lot. The officers approached the car and saw Harris and another person inside, both slumped over their seats and either asleep or unconscious. Id. Aware there was an opioid epidemic in the community at large, the officers

were concerned the two individuals had overdosed on heroin. Id. But instead of attempting to rouse them, the officers opened the doors of the car and looked inside, finding drug paraphernalia consistent with heroin use. Id. at 628. In addressing whether the community caretaking exception justified the intrusion, the Court explained the officers had a reasonable, objective basis to contact Harris as a routine health and safety check and inquire if he needed assistance. Id. at 633. But because they could not distinguish whether Harris was unconscious or asleep, and no other facts suggested an emergency situation, the officers lacked a reasonable, objective basis to justify an intrusion into the vehicle. Id. Officers must "take at least some minimum step to identify a specific basis to support their belief that the person whose privacy interests at issue needs emergency assistance." Id. at 632-33. General concerns about the opioid epidemic did not help the officers determine if this particular situation was an emergency. Id. at 633. Further, individuals may be found sleeping in their cars in

the middle of the day for a variety of non-emergency related reasons, such as because they are homeless and live in their cars or are simply napping. Id. at 634. Because the officers did not attempt to rouse the suspected overdose victim before invading his privacy rights, the community caretaking exception to the warrant requirement did not apply. Id.

Here, as in Harris, the community caretaking exception did not justify Officer Brom's warrantless seizure of Mr. Gargar. The officer did not attempt to rouse Mr. Gargar before blocking in the Toyota. RP 82, 89, 132. Although Officer Brom may have suspected Mr. Gargar had overdosed on drugs, he had no specific basis to draw that conclusion. Mr. Gargar could have been sleeping in his car for any number of non-emergency related reasons. Officer Brom needed to gather more information before he could reasonably conclude Mr. Gargar was in need of immediate emergency aid. Harris, 9 Wn. App. 2d at 632-34. The community caretaking exception did not

excuse Officer Brom's unreasonable intrusion into Mr. Gargar's private affairs. Id.

3. This Court's decision in State v. Sum further demonstrates Mr. Gargar was unlawfully seized.

In State v. Sum, 199 Wn.2d 627, 511 P.3d 92 (2022), the Court emphasized that a person is "seized" as a matter of independent state law if, based on the totality of the circumstances, "an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate a police encounter due to law enforcement's display of authority or use of physical force." Id. at 653. The seizure analysis is objective, looking to the actions of the law enforcement officer. Id. at 642. For purposes of the analysis, "an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against BIPOC in Washington." Id. at 653.

In Sum, the Court concluded that, based on the totality of the circumstances, including Sum's Asian/Pacific Islander race, he was unlawfully seized. Id. at 655. The circumstances were: a deputy on patrol noticed Sum, a person of color, asleep in his car parked on a public street in a high crime area; the deputy knocked on Sum's window but did not ask about his health or safety or whether he or his passenger required assistance; instead, the deputy asked what they were doing, clearly implying they did not belong there; Sum said they were visiting a friend but that was insufficient to satisfy the deputy because he then asked to whom the car belonged; Sum provided his name but this also failed to satisfy the deputy because he then requested Sum's identification; when Sum asked why the deputy wanted his identification, the deputy responded that the two men were sitting in an area known for stolen cars and Sum did not appear to know to whom the car he was sitting in belonged. Id. at 654-55. The Court concluded Sum was seized because "it would have been clear to any reasonable person that

Deputy Rickerson wanted Sum's identification because he suspected Sum of car theft." Id. at 655. An objective observer could easily conclude that if Sum had refused to identify himself and requested to be left alone, the deputy would not have honored that request because he was investigating Sum for car theft. Id. at 656. "In other words, an objective observer could conclude that Sum was not free to refuse Deputy Rickerson's request due to the deputy's display of authority. At that point, Sum was seized." Id.

Similarly, here, it would have been clear to any reasonable person that Officer Brom seized Mr. Gargar because he suspected him of engaging in criminal activity. Similar to the defendant in Sum, Mr. Gargar was a person of color[2] sitting in a car parked in a motel parking lot in a high crime area. RP 131. An objective observer would be aware that "implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police

contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington." Id. at 631. In fact, Officer Brom candidly admitted that from the moment he observed Mr. Gargar apparently unconscious in the driver seat of the car, he was suspicious he was engaged in criminal activity. RP 131. Because an objective observer could conclude that Mr. Gargar was not free to refuse any of Officer Brom's requests from the beginning of the encounter due to the officer's display of authority, Mr. Gargar was unlawfully seized.

4. All of the evidence obtained as a direct result of the unlawful seizure must be suppressed.

Evidence obtained as the direct result of an unlawful seizure is "tainted" by the illegality and must be excluded. State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002); Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

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[2] Mr. Gargar is Black. RP 602; CP 102.

Because the warrantless seizure violated Mr. Gargar's article I, section 7 right to privacy, all of the evidence obtained as a direct result of the seizure must be suppressed.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

I certify this brief complies with RAP 18.17 and contains 4260 words.

Submitted this 5th day of September 2023.

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ABDULKADIR GARGAR, Appellant.	No. 82749-9-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Abdulkadir Gargar asserts that he was unconstitutionally seized when an officer blocked his running car into its parking spot after observing him unconscious in the driver's seat. Gargar was prohibited by a previous court order from possessing a firearm but upon a search of his person and car, officers discovered a firearm and ammunition. A jury found Gargar guilty of unlawful possession of a firearm in the first degree. Gargar appeals, contending the trial court erred by concluding that Gargar was constitutionally seized when his car was blocked in by a patrol vehicle.

Because Gargar was constitutionally seized pursuant to the community caretaking exception to warrantless seizures, we affirm.

FACTS

On the morning of June 23, 2020, Officer Daniel Brom was conducting a routine patrol in the parking lot of the Sunset Motel in Kent, Washington, known to be a high-crime area. Noticing Abdulkadir Gargar in a car, apparently asleep,

Officer Brom stopped his patrol vehicle to exit and check on Gargar. Gargar's car was backed in to a parking spot on an incline, with its front angled down toward the parking lot. Almost immediately after exiting his patrol vehicle, Brom noticed that Gargar's car was running—a fact captured by video footage from Brom's body camera. Brom then reentered his vehicle and parked it in front of Gargar's car, preventing it from exiting the parking space. Brom testified that he did so to prevent the car from rolling away if Gargar "had left the [car] in drive and [his foot was] just sitting on [his] brake," citing a concern for the safety of the various pedestrians in the parking lot that morning and for Gargar himself.

After repositioning his patrol vehicle, Brom approached Gargar's car to determine if it was in park and to check on Gargar. Looking into the car, Brom noticed an open can of Mike's Hard Lemonade in the center console and a half-consumed but capped bottle of vodka in the passenger seat. Brom called for backup before waking Gargar, and Officer Melvin Partido responded. Officers Partido and Brom positioned themselves on the passenger and driver sides of Gargar's car, respectively. Brom then awoke Gargar by tapping on his window. After Gargar rolled his window down at Brom's request, Brom asked him several questions concerning his residence at the motel and the ownership of his car.

Roughly a minute or so into this interaction, Brom noticed a gun in Gargar's car, tucked between the driver's seat and center console by Gargar's right leg. Brom immediately asked Gargar to place his hands on the steering wheel, then to unlock the car, and eventually to exit the car. Gargar followed Brom's instructions without incident. Brom placed Gargar in handcuffs, told him

he was detained, and read him his Miranda[1] rights. Upon retrieving and running Gargar's identification, Brom discovered that Gargar had an outstanding warrant and arrested him.

Gargar was charged with unlawful possession of a firearm in the first degree. Before trial, Gargar brought a CrR 3.6 motion to suppress all evidence following the moment Brom blocked his car, and the State brought a CrR 3.5 motion to admit Gargar's prearrest statements. The court heard testimony from Brom and Partido about their interaction with Gargar. Following their testimony, the court heard arguments on both motions. The court granted the CrR 3.5 motion in part but excluded any statements Gargar made after Brom read him his Miranda rights.

The court denied Gargar's CrR 3.6 motion to suppress. During argument on the CrR 3.6 motion, Gargar claimed that he was unlawfully seized when Brom initially repositioned his car in front of Gargar's and that Brom had no reasonable basis to suspect Gargar was engaging in criminal activity at that point. Therefore, Gargar contended, all fruits of the search following the moment Brom blocked Gargar's car should be suppressed. The State maintained that Brom performed a valid community caretaking function when he initially blocked Gargar's car. In addition, the State asserted that Gargar was not seized until

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

awoken, at which point his seizure was permissible under the Terry[2] stop exception to warrantless seizures.

In denying Gargar's CrR 3.6 motion, the court stated that an unconscious individual "wouldn't objectively know of any of the facts surrounding the encounter at that time until they actually gain consciousness," and concluded that Gargar was therefore not seized until he was awoken by Brom. Over the course of argument, the trial court also made clear its impression that Brom's motivation for blocking Gargar's car in its parking spot was "exceedingly credible." Brom testified that he blocked Gargar's car out of a concern that it could have rolled forward into the parking lot had Gargar fallen asleep with his foot on the brake pedal. These concerns were heightened because Gargar's car was running and could have been in drive. Further, the court opined that if Brom had indeed wanted to seize Gargar from the onset of this interaction, "[t]hen he would have parked his car in front of Mr. Gargar's the first time, but he didn't."

Because the court denied Gargar's CrR 3.6 motion, the firearm evidence Brom and Partido collected during their search of Gargar and his car was admitted at trial. A jury found Gargar guilty of first degree possession of a firearm as a convicted felon. He appeals.

ANALYSIS

Gargar asserts that the court erred in concluding that he was constitutionally seized when Brom parked his patrol vehicle in front of Gargar's car. We conclude that the trial court did not err when it determined that Brom

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[2] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

was acting in his capacity as a community caretaker when he reparked his patrol vehicle. We further conclude that at the moment Brom noticed open containers of alcohol in Gargar's car, his community caretaking check transformed into a Terry stop, as Brom then possessed a reasonable articulable suspicion of criminal activity.

Standard of Review

We review findings of fact entered after a suppression hearing using the substantial evidence standard to determine if they support the trial court's conclusions of law.[3] State v. Russell, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of stated premise.' " Russell, 180 Wn.2d at 866-67 (internal quotation marks omitted) (quoting State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1038 (2009)). Conclusions of law will be reviewed de novo. State v. Boisselle, 194 Wn.2d 1, 14, 448 P.3d 19 (2019). Any unchallenged findings of fact are verities on appeal. State v. Johnson, 8 Wn. App. 2d 728, 737, 440 P.3d 1032 (2019).

Exceptions to Warrantless Searches and Seizures

The Washington Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Art. I, § 7. "This

[3] It should be noted that under CrR 3.6, the superior court "shall enter written findings of fact and conclusions of law" for appellate review if an evidentiary hearing is conducted. No such findings were entered. Failure to enter written findings of fact and conclusions of law is error, but it is a harmless error "if the court's oral findings are sufficient to allow appellate review." State v. Miller, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998). The court's oral rulings are sufficient for appellate review. Additionally, Gargar did not raise any issue concerning the trial court's lack of written findings and conclusions on appeal.

provision protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.' " State v. Rankin, 151 Wn.2d 689, 694-95, 92 P.3d 202 (2004) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). The United States Constitution also protects against unreasonable searches and seizures. U.S. CONST. amend. IV. Therefore, "if a police officer's conduct or show of authority, objectively viewed, rises to the level of a seizure," it must be lawfully justified under these constitutional protections. State v. Meredith, 1 Wn.3d 262, 590-91, 525 P.3d 584 (2023) (quoting State v. O'Neill, 148 Wn.2d 564, 576, 62 P.3d 489 (2003)). Exceptions to these provisions are " 'narrowly and jealous[l]y drawn.' " State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007) (quoting State v. Stroud, 106 Wn.2d 144, 147, 720 P.2d 436 (1986)).

Two exceptions to the warrant requirement relevant in this case are Terry investigative stops and instances in which police serve their role as community caretakers. State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000).

The Community Caretaking Exception

Gargar claims that "the court erred in finding the officers were justified in blocking in [his vehicle] on the basis of public safety" and alleges that Brom's invocation of the community caretaking exception to justify blocking Gargar's car in was pretextual. We conclude that Brom did not act pretextually when he blocked Gargar's car in but instead acted out of concern for the safety of Gargar and the pedestrians present in the parking lot. We further conclude that when

Brom initially blocked Gargar's car, any seizure that may have occurred was constitutionally permissible.

1. Pretext

As a threshold matter, we address Gargar's assertion that any reliance on community caretaking here was pretextual. Gargar contends that the community caretaking exception does not apply in this case because Brom "was motivated, at least in part, by a desire to investigate possible criminal activity" when he initially reparked his patrol vehicle to block Gargar's car. In other words, Gargar alleges that Brom used his role as a community caretaker pretextually.

A pretextual search occurs when officers rely on some legal authorization as a mere pretense " 'to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement.' " Boisselle, 194 Wn.2d at 15 (alteration in original) (quoting State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999)). "The community caretaking function exception may not be used as a pretext for a criminal investigation." Kinzy, 141 Wn.2d at 394. "[W]hen determining whether a given search is pretextual, 'the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.' " Boisselle, 194 Wn.2d at 15 (quoting Ladson, 138 Wn.2d at 359). It is imperative that "[t]he community caretaking function exception should be cautiously applied because of its potential for abuse." Kinzy, 141 Wn.2d at 395.

Brom's blocking of Gargar's car was not pretextual. The trial court found that when Brom noticed Gargar's car was running, "[h]e couldn't tell or hear that

the car was on when he was driving."[4] It also found that Brom "initially park[ed] and he did not block the car at all. He initially parks, gets out and realizes the car is on, realizes that the person in the driver's seat appears to be unconscious or asleep," and subsequently "moves his [vehicle] for safety purposes." Footage from Brom's body camera admitted at the CrR 3.6 hearing confirms this, showing that he only spent twelve seconds outside of his vehicle before realizing Gargar's car was running. Brom's body camera footage supports that he only saw the open containers in Gargar's car *after* he reparked his patrol vehicle and subsequently approached Gargar's car to see whether it was in park or not. Relying on these facts, we conclude that nothing about Brom's interaction with Gargar would suggest that his reparking of his patrol vehicle was pretextual. His intent was purely to render aid.

Gargar relies on the idea that Brom was patrolling a high-crime area when he first encountered Gargar to assert that he must have been acting with at least some intent to conduct a criminal investigation. This fact, however, is not itself determinative that no pretext existed—we must look to the totality of the

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[4] This statement, like others relied on in this opinion, is arguably not a finding of fact because it was made by the court during argument, not after. But we nevertheless treat it as a finding for several reasons. First, it is clear from the tenor of discussion during and after argument on the CrR 3.5 and CrR 3.6 hearings that the court held a single opinion throughout, unchanged by counsel. Second, at the beginning of its official oral findings on the CrR 3.6 motion, the court says "I am going to deny, as I think everyone figured out through the argument, the motion to suppress." We treat this as incorporating the court's statements during argument into its findings. Finally, Gargar does not assign error to any findings of fact. They are therefore treated as verities but we can also conclude that this failure also entitles us to assume that Gargar's arguments are purely legal in nature.

circumstances to determine whether the actual purpose of Brom's initial contact with Gargar arose out of a desire to investigate criminal activity. Brom's patrolling of a high-crime area was certainly the reason Brom was in a position to notice Gargar. But Gargar's car was running, and Gargar was apparently asleep in the driver's seat. The trial court found Brom's motivation to repark "exceedingly credible." Brom testified his motivation was solely to prevent Gargar's car from rolling out of its parking spot. The question here is whether Brom was acting pretextually when he blocked in Gargar's car. We conclude that Brom's patrolling of a high-crime area does not preempt the court's finding that his actions were not pretextual.

2. Community Caretaking Analysis

Having concluded that Brom did not act pretextually, we next determine whether his blocking in of Gargar's car was justified by the community caretaking exception to the warrant requirement.

A seizure by an officer without a warrant is per se unreasonable. Kinzy, 141 Wn.2d at 394. An exception, however, arises "when police are serving in their role as community caretakers." Kinzy, 141 Wn.2d at 394. The community caretaking function exception was borne out of a recognition that "law enforcement officers are 'jacks of all trades' and frequently engage in community caretaking functions that are unrelated to the detection and investigation of crime." Boisselle, 194 Wn.2d at 10. Such functions include " 'delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and administering first aid.' " Boisselle, 194 Wn.2d at 10

(quoting Kinzy, 141 Wn.2d at 387). The community caretaking function is categorized into "situations involving . . . emergency aid or routine checks on health and safety." Kinzy, 141 Wn.2d at 386. Additionally, "[b]oth situations may require police officers to render aid or assistance." Kinzy, 141 Wn.2d at 386.

Here, Brom was employing the emergency aid function of his community caretaking role. The emergency aid function " 'arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm.' " Boisselle, 194 Wn.2d at 12 (internal quotation marks omitted) (quoting Kinzy, 141 Wn.2d at 396 n.39). Further, "the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion" than routine checks on health and safety. Kinzy, 141 Wn.2d at 386. In this case, the court found it credible that Brom acted out of a concern that either Gargar or one of the pedestrians in the parking lot faced imminent harm had Gargar's car been in drive.

Washington has developed several alternative methods to analyze whether the emergency aid function of the community caretaking exception is justified, so the Boisselle court found it necessary to synthesize the competing formulations. Boisselle, 194 Wn.2d at 14. Additionally, courts must " 'cautiously apply the community caretaking function exception because of a real risk of abuse in allowing even well-intentioned stops to assist.' " State v. Moore, 129 Wn. App. 870, 879, 120 P.3d 635 (2005) (internal quotation marks omitted) (quoting State v. Acrey, 148 Wn.2d 738, 750, 64 P.3d 594 (2003)). The emergency aid function of the community caretaking exception applies when:

> (1) the officer subjectively believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or to prevent serious injury, (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched.

Boisselle, 194 Wn.2d at 14.

Additionally, "[i]f a warrantless search falls within the emergency aid function, a court resumes its analysis and weighs the public's interest against that of the citizen's." Boisselle, 194 Wn.2d at 12. That weighing of interests involves balancing "a citizen's privacy interest in freedom from police intrusion against the public's interest in having police perform a 'community caretaking function.' " Boisselle, 194 Wn.2d at 12 (quoting Kinzy, 141 Wn.2d at 394).

Regarding the first Boisselle factor, we conclude, relying on the trial court's determinations, that Brom subjectively believed that Gargar and the surrounding pedestrians required immediate assistance. The trial court found that it is "entirely consistent with [Officer Brom] being concerned about the safety of Mr. Gargar and others that he moves his car after he gets out and realizes that the car was on." The court also found that Gargar was unconscious until Brom woke him up: "What . . . is peculiar or suspicious is to see someone slumped with their head at an odd angle. That is only consistent with someone that is either passed out or asleep."

Brom testified that he blocked the car "for safety of others," and that "people were coming going [sic] down that hill all the time and going around our car." On the basis of this testimony, the court concluded that Brom had a reasonable belief that Gargar and the surrounding pedestrians in the parking lot

required immediate assistance. Brom was worried that Gargar had fallen asleep or unconscious while his car was still in drive, and that his foot was merely resting on the brake. Brom's actions were informed by his experience dealing with "vehicles that people had left the vehicle in drive and are just sitting on their brake," and he testified that he acted to mitigate the "possibility of that person letting up off the brake in a vehicle driving forward." Thus, Brom subjectively believed that immediate assistance would be required to ensure the safety of those around him.

Regarding the second Boisselle factor, we conclude that a reasonable person in Brom's position would believe there was a need for assistance. The trial court concluded that the facts of the case "are consistent with Officer Brom in particular being concerned for both Mr. Gargar's safety and the safety of other people in the parking lot that there's someone who is unconscious behind the steering well [sic] of a car that is on." The court further held that an unconscious individual "behind the driver's seat of a car that is on is a public safety threat." We agree that the potential harm that a rolling car could cause in the parking lot would lead a reasonable person in Brom's position to believe that Gargar required assistance.

Regarding the third Boisselle factor, we conclude that Brom had reason to associate the things Gargar claims he seized—Gargar and his car—with a need for assistance. It is important to note that while the third Boisselle factor only explicitly mentions "searches," the community caretaking function has long excused both unwarranted searches and seizures. See Kinzy, 141 Wn.2d at 386

(holding that "the community caretaking function exception [encompasses] . . . the 'search and seizure' of automobiles"). Since Brom's primary concern when he reparked his patrol vehicle was to prevent Gargar's car from rolling forward had it been in drive, he reasonably associated a need for assistance with Gargar and his car. Brom reasonably exercised the emergency aid function of the community caretaking exception.

Finally, having concluded that the Boisselle emergency aid factors have been met, we turn to whether the public's interest in Officer Brom performing a community caretaking check on Gargar outweighs Gargar's own interest in freedom from police intrusion. We conclude that it does. On the one hand, the public possessed a significant interest in the safety of the pedestrians that were present in the Sunset Motel's parking lot, the property located there, as well as Gargar's own safety. On the other hand, while Gargar certainly possesses an interest in freedom from police interference, the potential safety threat he posed to the public means that this interest cannot overcome the public's own interest in Brom performing a community caretaking function. This is particularly true because Gargar was asleep and did not even realize Brom had blocked his car in until Brom woke him up.

Therefore, even if we were to conclude that a seizure occurred when Brom initially parked his patrol vehicle in front of Gargar's car, that seizure would

be permissible and not pretextual pursuant to Brom's role as a community caretaker.[5]

The Terry Stop Exception

Gargar also asserts that Brom did not have a reasonable suspicion that he was engaging in criminal activity under the Terry stop exception to warrantless searches. We conclude that Gargar's interaction with Brom began as a community caretaking function and shifted into a Terry investigative stop at the moment Brom noticed open alcohol containers in Gargar's running vehicle. Thus, throughout their interaction, an exception to the warrant requirement existed.

Terry stops are an exception to the warrant requirement. Johnson, 8 Wn. App. 2d at 746. A Terry stop is permissible if an officer can articulate a reasonable suspicion, based on objective facts and the totality of the circumstances, that the person stopped has been or is about to be involved in criminal activity. Terry, 392 U.S. at 21-22. An analysis of the totality of the circumstances includes factors such as "the detaining officer's experience and training, the location of the investigatory detention, and the suspect's conduct." Johnson, 8 Wn. App. at 747. Washington has incorporated Terry stops as an

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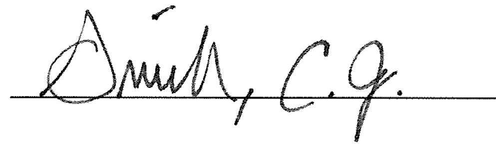
[5] Gargar claims he was seized from the moment Officer Brom first reparked his vehicle in front of Gargar's car. The State disagrees, asserting that Gargar could not be seized because he was asleep, and therefore unable to feel unfree to leave. We do not reach whether a seizure occurred when Gargar was asleep, because any seizure would be allowable due to the community caretaking exception to the warrant requirement.

exception to the warrant requirement within our state jurisprudence. Kinzy, 141 Wn.2d at 384-85.

Here, Brom looked into Gargar's car and saw two open containers of alcohol. Given that Gargar asleep in the driver's seat of a running car, Brom had a reasonable articulable suspicion that Gargar had physical control over his car while under the influence, in violation of RCW 46.61.504(1)(c).

We affirm.



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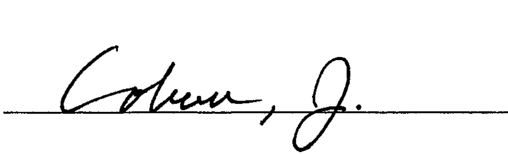

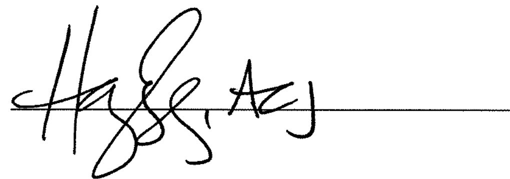

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 102321-9**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: September 5, 2023

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