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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1303-06T5

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID MONTALVO,

Defendant-Appellant.

Submitted August 21, 2007 - Decided August 27, 2007

Before Judges Lisa and Holston, Jr.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Municipal Appeal 32-07-06.

Levow & Associates, attorneys for appellant (Evan M. Levow, of counsel and on the brief).

David J. Weaver, Sussex County Prosecutor, attorney for respondent (Robin M. Lawrie, Assistant Sussex County Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant, David Montalvo, appeals from the Law Division's October 13, 2006 order entered after de novo review of the record of the Hamburg Municipal Court finding him guilty of

driving under the influence of alcohol (DUI), contrary to N.J.S.A. 39:4-50. We affirm.

Defendant was arrested at approximately 5:00 a.m. by Patrolman Aronson of the Hamburg Police Department on February 18, 2006 for violations of N.J.S.A. 39:4-50 and N.J.S.A. 39:4-50.2, refusal to consent to the taking of a breath sample. Defendant filed a motion to suppress evidence of his stop and seizure. The municipal court judge denied defendant's motion. Defendant then entered a conditional guilty plea to the DUI charge, pursuant to Rule 7:6-2(c), and as part of a plea agreement the State dismissed the refusal charge.

Thereafter, defendant filed a notice of appeal with the Law Division. After conducting a trial de novo on the record of the motion to suppress before the municipal court, Judge Critchley denied the motion to suppress. This appeal followed.

On February 18, 2006, Patrolman Aronson was working the nightshift on patrol checking Hamburg businesses for criminal activity and anything unusual. At approximately 4:45 a.m., the officer observed an occupied GMC pickup truck parked with its engine running in a parking area in front of the Market Place Deli on Route 23. The deli was closed and scheduled to open between 5:00 and 5:30 a.m. Aronson had patrolled the area for

several years and had driven by this parking lot "countless times."

Due to the hour, Aronson thought "something was not right," since at this hour none of the businesses in the mall were opened. Aronson repositioned his patrol car to get a closer look at the pickup truck. Aronson testified that he wanted to make sure the driver was "okay," and make sure the car was not stolen. Aronson verified the car was not stolen. In repositioning himself, he was able to peer into the truck's window and noticed a man in the driver's seat who appeared to be asleep. Aronson testified that the man appeared physically fine and was breathing.

Aronson exited the patrol car. He observed the engine of the truck was "racing," and there was exhaust coming out of the tailpipe. Aronson did not believe it to be normal for the engine to be racing. Aronson concluded the engine was racing since the engine sounded "a lot higher than that of a normal idl[ing engine.]" Aronson walked to the passenger side window and observed that the car keys were in the ignition. The vehicle was in park and the driver appeared to be asleep. Aronson believed his foot was on the gas pedal.

Aronson walked to the front of the truck on the driver's side in an attempt to make contact with the driver. He knocked

on the window, but the driver did not wake up. Aronson found the door unlocked so he opened it to try to talk to the driver.

Immediately upon opening the door, Aronson could smell the odor of alcoholic beverages from within the vehicle. At that point, the officer again tried to talk to the driver and was eventually able to do so.

On de novo review in denying defendant's motion to suppress evidence of his stop and seizure, Judge Critchley stated:

> I think its reasonable to be concerned about a running vehicle. Someone with their foot on the accelerator, but not in apparent control; themselves not able to respond to the knocking on the window.
>
> . . . .
>
> But, in any event, here we have a car running with the key in the ignition, foot on the accelerator, and unresponsive driver behind the wheel. And in that context, and all of the circumstances and measured by the dynamics of the totality of the circumstances, from the perspective of the Officer on the scene, I don't find at all that what he was doing was unreasonable. In fact, I find it would have been unreasonable to have stopped his inquiries at any point short of what he did.
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> So based upon that, I'm going to sustain the lower court's denial of the motion to suppress.

Defendant presents the following arguments for our consideration:

POINT I: THE "COMMUNITY CARETAKER" EXCEPTION DOES NOT APPLY TO THIS CASE.

POINT II: ONCE THE INVESTIGATING OFFICER DETERMINED THAT THE INDIVIDUAL WAS ALRIGHT, HIS "INVESTIGATION" SHOULD HAVE ENDED.

POINT III: NO REASONABLE OR PARTICULARIZED SUSPICION OF CRIMINAL ACTIVITY WAS PRESENT, WHERE, IN THE MONTH OF FEBRUARY, A RUNNING VEHICLE WAS PARKED OUTSIDE A BUSINESS THAT WAS DUE TO OPEN IN FORTY-FIVE MINUTES.

Defendant contends that Aronson lacked a sufficient legal basis to approach defendant's truck, when it was parked in a mini-mall parking lot at 4:45 a.m., even though the stores in the mall were closed and not scheduled to open for forty-five minutes, and the motor of the vehicle was racing and the driver appeared to be asleep in the driver's seat. We disagree.

We are convinced that Aronson's actions fall within the community caretaking exception to the warrant requirement of the Fourth Amendment to the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution. As explained by the Supreme Court in State v. Diloreto, 180 N.J. 264, 275 (2004) (quoting State v. Cassidy, 179 N.J. 150, 161 n.4 (2004)), "[t]hat doctrine applies when the 'police are engaged in functions, [which are] totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" The police need not

demonstrate probable cause or an articulable suspicion that evidence of a crime will be found when acting in a community caretaker role. Id. at 276. Courts review this type of a citizen-police interaction based on the reasonableness of the police conduct. Ibid. "Community caretaking . . . is based on a service notion that police serve to ensure the safety and welfare of the citizenry at large." Ibid. (quoting John F. Decker, Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions, 89 J. Crim. L & Criminology, 433, 445 (1999)).

Community caretaking relates directly to a local official's duty to investigate accidents or disabled vehicles on public roadways. Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d, 706, 714-15 (1973). It is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Ibid.

New Jersey first recognized the community caretaking function in State v. Goetaski, 209 N.J. Super. 362 (App. Div. 1986). In Goetaski, the court recognized that the police have the ability to make benign automobile stops for the purpose of rendering assistance. Id. at 365-66. Community caretaking stops are differentiated from pretextual and unconstitutional

abuses of authority by the unique facts that give rise to such stops. Id. at 363-64 (stopping a car driving slowly on the shoulder of a rural road at 4:00 a.m. was a proper exercise of community caretaking authority); see e.g., State v. Garbin, 325 N.J. Super. 521 (App. Div. 1999) (warrantless entry into defendant's garage to investigate smoke emanating therefrom was a proper exercise of the community caretaking function); State v. Martinez, 260 N.J. Super. 75 (App. Div. 1992) (stopping a vehicle moving between five or ten miles per hour in a residential area at 2:00 a.m. was a proper exercise of the community caretaking function). Thus, community caretaking inquiries have been classified as a "'benign' automobile stop made to assist the occupant of the vehicle if necessary." Goetaski, 209 N.J. Super. at 365.

We are satisfied that Aronson had a reasonable basis to approach the pickup truck occupied by defendant. The factual situation here is similar to that in State v. Drummond, 305 N.J. Super. 84 (App. Div. 1997). In Drummond police officers on routine motor patrol late at night noticed a darkened car sitting in the exit lane of a closed car wash. Id. at 86. The police could not tell if the car was occupied. Id. at 87. They pulled into the car wash to see what the vehicle was doing there or to talk to the occupants, if there were any. Id. at 86-87.

Seeing the police car, defendant and another occupant exited the vehicle and defendant discarded a cigarette pack containing drugs in the presence of the police. Ibid. He was thereupon arrested and charged with possession of CDS. Ibid. At trial, the judge granted defendant's motion to suppress, finding insufficient justification to carry out an investigatory stop. Id. at 86-88. He felt that the police "c[a]me to the conclusion that something wrong was going on and then looked for the facts. . . . " Id. at 88 (internal citations omitted). We reversed, holding that the police were justified in approaching the darkened car in the course of a "community caretaking inquiry." Ibid. We reasoned, that "the initial purpose was not to stop, but merely to see what a darkened car was doing at an hour deemed by experienced police officers to be atypical for the location." Ibid.

As in Drummond, it was reasonable for Patrolman Aronson to have approached defendant's truck after observing the defendant's truck in the parking area of the mini-mall at 4:45 a.m. The pickup truck appeared to be occupied and the engine was running. Due to the hour, the officer thought "something was not right." At that hour, none of the businesses in the mall were opened. The deli, which the truck was parked in front of was not scheduled to open until approximately forty-five

minutes later. The officer approached defendant's truck and observed defendant possibly asleep. The officer wanted to make sure the driver was "okay," nothing was wrong with the businesses and that the truck was operating properly. The truck's engine was racing and defendant's foot was on the gas pedal. The officer was concerned that the defendant may have been sick, passed out or even worse.

We are equally satisfied that having tapped on the windshield in order to arouse the driver and being unable to obtain a response from him, it was reasonable for the officer to open the driver door in order to further ascertain the driver's physical condition. As the Supreme Court iterated in Diloreto, supra, "the caretaker doctrine permits the police to exceed a field inquiry's[1] level of intrusiveness, provided that their action is unconnected to a criminal investigation and is objectively reasonable under the totality of the circumstances." 180 N.J. at 278. As we stated in Drummond, supra, "[t]he initial question for resolution is whether a reasonably objective police officer would be justified in making "an

[1] A field inquiry is a limited form of police [criminal] investigation that . . . may be conducted "without grounds for suspicion." A permissible inquiry occurs when an officer questions a citizen in a conversational manner that is not harassing, overbearing, or accusatory in nature. Id. at 275 (internal citations omitted).

inquiry on property and life" after making the observations that he made, i.e., was it "objectively reasonable for the police officer to deem the situation worthy of a community caretaking inquiry." 305 N.J. Super. at 88. We are convinced that under the facts as observed by Officer Aaronson defendant was lawfully subject to limited inquiry based upon an objectively reasonable exercise of the officer's community caretaking function. Accordingly, the Law Division's October 13, 2006 order denying defendant's motion to suppress is affirmed.