

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALYSSA MARIE BURR,
Appellant.

No. 2 CA-CR 2013-0408
Filed June 25, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20101572001
The Honorable Paul E. Tang, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

STATE v. BURR
Decision of the Court

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 After a jury trial, appellant Alyssa Burr was convicted of four counts of aggravated driving under the influence of an intoxicant (DUI). On appeal, she argues the trial court erred in applying the community caretaker exception to the Fourth Amendment, and consequently erred in denying her motion to suppress evidence or dismiss the case. Finding no error, we affirm.

Factual and Procedural Background

¶2 We consider only the evidence presented at the evidentiary hearing on the motions to dismiss and suppress, and we view that evidence in the light most favorable to upholding the trial court's rulings. See *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000). Tucson Police Department Sergeant Michael Humphries observed a motorized scooter stopped in the westbound lane of 7th Street, perpendicular to the flow of traffic. The driver "was bent over looking down, working with the engine." After watching the driver "for a couple minutes . . . [he] went over to check welfare, render aid, see what needed to happen to open up the roadway and make the situation safe." But when he drove behind the driver, the driver drove thirty feet away, moved the scooter onto the sidewalk, and stopped. Humphries testified he had not directed her to pull up on the sidewalk or to stop.

¶3 Humphries then approached the driver, Burr, who exhibited "signs and symptoms of impairment." She was unable to put the kickstand down on the scooter and let it fall to the ground, breaking a mirror. She also had "bloodshot, watery eyes," "balance problems," "a strong odor of intoxicants on her breath," and "slurred speech." Burr admitted she had been drinking. Another officer conducted a horizontal gaze nystagmus test on Burr, and

STATE v. BURR
Decision of the Court

“observed six out of possible six cues of nystagmus indicating neurological impairment, one of which could be alcohol intoxication.”

¶4 Burr testified at the hearing, admitting that when Humphries first approached, he “asked [her], are you okay?” She further testified Humphries had instructed her to pull her scooter onto the sidewalk, but she ignored his direction instead “driving onto the sidewalk rather than walking it,” stopping thirty feet away. Burr admitted to drinking and driving the vehicle. The trial court denied the motion to suppress or dismiss, finding that Humphries had initiated a valid welfare check and developed probable cause only after legitimately stopping to render aid.

¶5 Burr was tried and convicted as noted above. The trial court suspended the imposition of sentence and placed her on probation for four years, conditioned upon her serving four months’ imprisonment. We have jurisdiction over Burr’s appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Motion to Suppress/Dismiss

¶6 Burr argues the trial court erred in applying the community caretaker exception to the Fourth Amendment, and therefore erred in either denying her motion to suppress evidence from the officer’s initial encounter with her or to dismiss the charges. “We review the court’s decision ‘for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo.’” *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007), quoting *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶7 “[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, [and] asking him if he is willing to answer some questions.” *State v. Wyman*, 197 Ariz. 10, ¶ 7, 3 P.3d 392, 395 (App. 2000), quoting *Florida v. Royer*, 501 U.S. 491, 497 (1983) (alterations in *Wyman*). If law enforcement officers wish to search or seize an individual, however, ordinarily they must obtain a warrant based on probable cause. *State v. Organ*, 225 Ariz. 43, ¶ 11, 234 P.3d

STATE v. BURR
Decision of the Court

611, 614 (App. 2010). But “‘because the ultimate touchstone of the Fourth Amendment is reasonableness,’ those requirements are subject to certain exceptions.” *Id.*, quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

¶8 The United States Supreme Court has recognized that because police officers often must respond to disabled vehicles, local law enforcement may engage in “community caretaking functions” related to public safety. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). Those functions are “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Id.* Thus actions taken pursuant to law enforcement’s community caretaking function are an exception to the ordinary warrant requirements for a search or seizure. *Organ*, 225 Ariz. 43, ¶¶ 11, 13, 234 P.3d at 614.

¶9 To determine whether law enforcement officers appropriately acted pursuant to their caretaker function, courts evaluate whether “‘a prudent and reasonable officer [would] have perceived a need to act in the proper discharge of his or her community caretaking functions.’” *Id.* ¶ 15, quoting *People v. Ray*, 88 Cal. Rptr. 2d 1, 11 (1999). In conducting our analysis, we bear in mind that the reasonable officer is often “‘expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of community services to preserve and protect community safety.’” *State v. Mendoza-Ruiz*, 225 Ariz. 473, ¶ 9, 240 P.3d 1235, 1237 (App. 2010), quoting *United States v. Rodriguez-Morales*, 929 F.2d 780, 784-85 (1st Cir. 1991).

¶10 Law enforcement may engage in limited, warrantless intrusions on a person’s privacy pursuant to its caretaking function, so long as the intrusion is

suitably circumscribed to serve the exigency which prompted it... The officer’s... conduct must be carefully limited to achieving the objective which justified the [search]—the officer may do no more than is reasonably necessary to ascertain whether someone is in need of

STATE v. BURR
Decision of the Court

assistance [or property is at risk] and to provide that assistance [or protect that property].

Organ, 225 Ariz. 43, ¶ 14, 234 P.3d at 615, quoting *In re Tiffany O.*, 217 Ariz. 370, ¶ 21, 174 P.3d 282, 288 (App. 2007) (alterations in *Tiffany O.*).

¶11 Here, Humphries observed Burr stopped at a stop sign with her scooter and facing perpendicular to traffic flow. She did not move for two minutes. As any conscientious fellow traveler might, Humphries was free to approach Burr and ask if she needed assistance without implicating the Fourth Amendment. See *Wyman*, 197 Ariz. 10, ¶ 7, 3 P.3d at 395.

¶12 But even assuming the officer seized her from the moment of his first interaction with her, his observations were sufficient reason for Humphries to seize Burr under his community caretaking function to see if she needed help and to clear the hazard she was creating from the road. See *Organ*, 225 Ariz. 43, ¶ 18, 234 P.3d at 615. Just as in *Organ*, “[b]ased on the facts known to [Humphries] at the time of the stop, it was reasonable for him to believe [Burr] was having some emergency or trouble, that [Burr] may have needed assistance and that a welfare check was necessary.” *Id.* And Burr testified below that Humphries’ first interaction was limited to asking her “are you okay?” and then directing her to move her vehicle from the road to the sidewalk. This initial approach, question, and direction were “‘suitably circumscribed’” to the goal of determining whether Burr needed help and keeping the road safe. See *Organ*, 225 Ariz. 43, ¶ 14, 234 P.3d at 615, quoting *Tiffany O.*, 217 Ariz. 370, ¶ 21, 174 P.3d at 288.

¶13 But once that contact was lawfully initiated, nothing prevented Humphries from using his ordinary powers of observation to deduce that Burr likely was operating the scooter while intoxicated and to change the encounter from a welfare check into a criminal investigation. See *Organ*, 225 Ariz. 43, ¶ 19, 234 P.3d at 615 (“It was only after the officer noticed other suspicious behavior while performing the welfare check that his inquiry changed from ascertaining if [Burr] needed assistance into a

STATE v. BURR
Decision of the Court

potential criminal investigation.”). After engaging Burr, Humphries noticed “a strong odor of intoxicants,” “balance problems,” “slurred speech,” and “watery, bloodshot eyes,” and Burr admitted she had been drinking. Those observations, in conjunction with observing her driving the scooter from the road to the sidewalk, permitted him to escalate the stop from a welfare check to a criminal investigation. *See id.* Accordingly, the trial court did not abuse its discretion in denying the motion based on its determination that the community caretaker function justified Humphries’ initial contact with Burr. *See Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d at 790.

¶14 Moreover, although Burr argues Humphries exceeded the scope of the community caretaker function by “approach[ing] a person who was conscious and aware and appeared to be working on her vehicle,” testimony established she was doing so in a lane of traffic, that her vehicle was facing perpendicular to the flow of traffic, and that she had remained there for at least two minutes. Those observations were sufficient to justify Humphries in approaching Burr directly, rather than “call[ing] out from across the street to ask if she needed help.” *See Organ*, 225 Ariz. 43, ¶ 18, 234 P.3d at 615.

Disposition

¶15 For the foregoing reasons, we affirm Burr’s conviction and sentence.