STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2010AP895-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN A. ULTSCH,

Defendant-Appellant.

On Appeal from the Judgment of Conviction
Entered in Marquette County Circuit Court,
the Honorable Richard O. Wright Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

1. Did law enforcement officers enter the defendant's residence without a warrant or any other lawful justification, in violation of the United States Constitution and the Wisconsin Constitution?

   The trial court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted to clarify the application of the community caretaker doctrine to a warrantless entry into the home and to clarify the relationship between the community caretaker and the emergency aid doctrines. This court may find oral argument helpful in resolving the issue and, if so, the defendant would welcome the opportunity for argument.

STATEMENT OF THE CASE

The criminal complaint alleged that the defendant, Kathleen A. Ultsch, had operated a motor vehicle on a highway while under the influence of an intoxicant and with a prohibited blood alcohol concentration, 4th offense, in violation of Wis. Stat. §§ 346.63(1)(a) & 346.65(2)(am)4, and that she had violated the terms of misdemeanor bail, in violation of Wis. Stat. § 946.49(1)(a). (2:1-2). Ms. Ultsch filed a motion to suppress all evidence taken from her on January 1, 2008, the date of her arrest, on the ground that it was taken in violation of her rights under the federal and state constitutions. (6:1-4). The court held a hearing on the motion after which the parties filed briefs. (27; 8; 9). In a

written decision filed December 9, 2008, the court denied the motion. (10:1-2; App. 101-02).

Later, the state amended counts one and two from a 4th offense to a 5th offense. (11:1). The court held a preliminary hearing on the new charges. (29). Afterward, Ms. Ultsch filed a motion to reconsider the denial of the motion to suppress, based on additional facts elicited at the preliminary hearing. (15:1-7). The court held a hearing on the motion to reconsider at which it issued an oral ruling denying the motion. (31:13-14; App. 103-04).

Ultimately, Ms. Ultsch pleaded no contest to operating while intoxicated, 5th or 6th offense, and the court sentenced her to thirty months of probation with conditional jail time. (19). Ms. Ultsch filed a timely notice of intent to pursue postconviction relief and a timely notice of appeal. (20; 24).

STATEMENT OF FACTS

The facts relevant to the only issue presented to this court came in through the testimony of Marquette County Deputy Sheriff Jeffrey J. Tomlin, who testified at both the motion hearing and the preliminary hearing as follows:

On January 1, 2008, Deputy Tomlin was dispatched to East Montello Street in the City of Montello to investigate a car accident. (27:4). It was approximately 8:45 a.m. (29:9). A car had hit a brick building. (27:4). At the scene of the accident, Deputy Tomlin saw some vehicle parts and broken bricks and debris. (*Id.* at 5). The brick wall was caved in on one side such that the owners were worried about whether they would be able to open their shop. (*Id.* at 15).

Between thirty and forty-five minutes later, Deputy Tomlin found the vehicle that was involved in the accident on

a county road in Packwaukee at the foot of a driveway. (27:5, 10; 29:9). It was about two or three miles from the accident. (27:5). Deputy Tomlin was investigating the vehicle for a possible hit-and-run. (*Id.* at 10). The vehicle, a Dodge Durango, had damage to the bumper and engine compartment. (*Id.* at 5-6). At the motion hearing, Deputy Tomlin testified that the front end was severely damaged and "[p]robably totaled." (*Id*. at 5). He said that the front end was "pushed back into the motor." (*Id.* at 16). Deputy Tomlin could not recall whether the air bags had deployed or whether there was windshield damage. (*Id.* at 5,7,13). He believed that there had not been damage to the driver's or passenger's areas. (*Id.* at 13, 17). Further, he conceded that the vehicle had been driven at least two miles from the scene of the accident and that it was a large SUV. (*Id.* at 13, 17). He did not see blood or any other indication of injury in the car or on the ground. (*Id.* at 7, 13). However, he "felt that there was a strong possibility there could be an injury to whoever was driving, or any occupants." (*Id.* at 6).

At the preliminary hearing, Deputy Tomlin identified Exhibits 1, 2, and 3 as pictures of the Durango on the night in question. (29:10). He said that, "[b]y the looks of the brick wall I assumed that there was more major damage to the vehicle." (*Id.*). However, he confirmed that he did not see any damage to the vehicle on the night of January 1, 2008, other than the damage indicated in the pictures. (*Id.*). He admitted that on the night of the accident he had not gotten "really up close" to the vehicle. (*Id.*). The pictures of the Durango reveal that the air bags were not deployed, none of the windows or even headlights were broken, and there was no damage to the passenger compartment of the vehicle. (12; App. 105). The pictures reveal one dent to the left, front quarter-panel of the truck, around the tire. (*Id.*).

After discovering the Durango, law enforcement officers called a "wrecker" to tow it for impoundment. (27:7). While they were standing there, a man drove down the driveway adjacent to the vehicle and said that he was the property owner and that the vehicle belonged to a "friend or girlfriend." (*Id.* at 7). The man did not say that the driver was hurt or needed assistance. (*Id.* at 12). When asked the driver's name, the man said the officers should look up the license plate and find out for themselves, then he drove away from the house. (*Id.* at 7, 11). The man had driven down the driveway, which was steep and covered in heavy snow, in a four-wheel-drive vehicle. (*Id.* at 8). The officers could not drive their squad cars up the driveway due to the heavy snow. (*Id.*). The driveway was about a quarter of a mile long. (*Id.* at 11). Deputy Tomlin conceded that if someone was severely injured, it was "possible" that they would have had a hard time walking up the driveway. (*Id.* at 14).

Shortly after the interaction with the homeowner, two detectives arrived at the scene with a four-wheel-drive vehicle and Deputy Tomlin drove up to the house with them. (27:8). He knocked on the door and announced that he was from the Sheriff's Department. (*Id.*). No one answered. (*Id.*). Deputy Tomlin "tried the knob and the door was unlocked." (*Id.*). The homeowner had said that the driver "was at the residence and probably in bed or asleep," so Deputy Tomlin "went into the bedroom and found her." (*Id.*). The bedroom was in the far back of the house at the end of a long hallway. (*Id.* at 14). Deputy Tomlin found Ms. Ultsch in bed. (*Id.* at 9).

Upon finding Ms. Ultsch in the bedroom, Deputy Tomlin questioned her about the accident and smelled "the odor of an intoxicant" and believed her to be intoxicated. (29:5). He took her to the sheriff's department and conducted

field sobriety tests. (*Id.* at 5). Another deputy, Nancy Giese, administered a chemical breath test. (*Id.* at 7-8).

Deputy Tomlin testified that he entered the house to find the driver of the vehicle because he "wanted to make sure that she was okay." (27:8). He was concerned "[d]ue to the severe damage to the vehicle and the building that was struck by the vehicle, due to the fact that she walked through two feet of snow approximately a quarter of a mile to the residence. It was a cold day." (*Id.* at 9). He was concerned for her "well-being." (*Id.*).

ARGUMENT

I. Introduction

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ." The Wisconsin Constitution contains an identically-worded provision. Wis. Const. art. I § 11. In reviewing the legality of a search or seizure, this court considers the question as one of "constitutional fact." ***Pallone***, 2000 WI 77, ¶ 26, 236 Wis. 2d 162, 613 N.W.2d 568. It applies a deferential standard to the circuit court's findings of historical fact, relying on them unless they are "clearly erroneous." ***Id.*** at 27. However, it independently applies constitutional principals to the facts. ***Id.***

"'The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***State v. Richter***, 2000 WI 58, ¶ 28, 235 Wis. 2d 524, 612 N.W.2d 29 (quoting ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984)). Therefore, "[i]t is a

basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." ***Payton v. New York***, 445 U.S. 573, 586 (1980).

Any evidence found or statements taken inside of the home subsequent to an unlawful entry are "presumptively unlawful because of the warrantless entry itself." ***State v. Ferguson***, 2009 WI 50, ¶ 18, 317 Wis. 2d 586, 767 N.W.2d 187 (citing ***New York v. Harris***, 495 U.S. 14, 20 (1990)). Furthermore, any evidence collected subsequent to an unlawful entry is considered to be the "fruit of the poisonous tree" and also unlawful unless it was not discovered as a result of the "exploitation of the illegal entry or was sufficiently attenuated as to dissipate the taint caused by that entry." ***State v. Trecroci***, 2001 WI App 126, ¶ 45, 246 Wis. 2d 261, 630 N.W.2d 555 (citing ***State v. Phillips***, 218 Wis. 2d 180, 204, 577 N.W.2d 794 (1998)).

The prohibition on warrantless entries into the home is subject only to a few well-delineated exceptions which are "carefully and jealously drawn." ***Welsh v. Wisconsin***, 466 U.S. 740, 749-50 (1984). The state bears the burden of proving the existence of one of these exceptions. *See* ***Ferguson***, 317 Wis. 2d 586, ¶ 20.

Here, Deputy Tomlin entered Ms. Ultsch's home without a warrant and subsequently discovered her identity and discovered facts that caused him to suspect that she had committed a crime and to seize and search her. The state has conceded that law enforcement did not have consent to enter Ms. Ultsch's home. (9:1). It has exclusively argued that the warrantless entry was justified because Deputy Tomlin was acting in his community caretaker function when he entered Ms. Ultsch's home to "check on the well being" of an

unknown person who had been involved in a car accident. (9:1; 27:3).[1]

II. The Community Caretaker Doctrine Did Not Justify the Warrantless Entry into Ms. Ultsch's Home.

A. Legal Standard and Introduction to Argument

The Wisconsin Courts have recognized an exception to some Fourth Amendment protections that is applicable when a law enforcement officer acts within the scope of a reasonable community caretaker function. ***State v. Kramer***, 2009 WI 14, ¶ 20-21, 315 Wis. 2d 414, 759 N.W.2d 598. The community caretaker exception arose out of a United States Supreme Court case, ***Cady v. Dombrowski***, in which the Court noted that officers "frequently investigate vehicle accidents in which there is no claim of criminal liability" and engage in functions that are divorced from the job of law enforcement. 413 U.S. 433, 441 (1973).

The state supreme court has found that the community caretaker function justified police seizures in three cases. ***Kramer***, 315 Wis. 2d 414, ¶ 20-21 (addressing the exception and discussing ***State v. Kelsey C.R.***, 2001 WI 54, 243 Wis. 2d 422, 626 N.W.2d 777, and ***Bies v. State***, 76 Wis. 2d 457, 251 N.W.2d 461 (1977)). It recently set the standard as follows:

[1] Ms. Ultsch attached to her motion to suppress evidence that she was living in the home that law enforcement entered at the time of the entry. (7:1). The state has never contested this fact or argued that Ms. Ultsch did not have a privacy interest in the home.

> When a community caretaker function is asserted as justification for the seizure of a person, the trial court must determine: (1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.

Kramer, 315 Wis. 2d 414, ¶ 21 (quoting ***State v. Anderson***, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987)).

In the present case, Ms. Ultsch focuses on the second and third parts of the ***Anderson***/***Kramer*** standard. The application of the second part of the standard to this case is fairly straightforward. As to the third part of the standard, Ms. Ultsch contends that, in order to comply with federal constitutional law, this court must clarify that, as applied to a warrantless entry into a home, the balancing test must reveal an emergency requiring immediate aid. Regardless of whether this court clarifies the legal standard, the entry into Ms. Ultsch's home was unreasonable and therefore the circuit court erred in denying Ms. Ultsch's suppression motion.

B. The Officers Were Not Engaging in Bona Fide Community Caretaking Activity When They Entered Ms. Ultsch's Home.

Whether police conduct constituted bona fide community caretaking activity is dependent on "the totality of the circumstances as they existed at the time of the police conduct." ***Kramer***, 315 Wis. 2d 414, ¶ 30. The question is whether there was an "objectively reasonable basis" for the community caretaking activity. ***Id.***, ¶ 36. The officer's subjective motivation for his actions "is a factor that may warrant consideration" but is not dispositive. ***Id.***, ¶¶ 27, 36.

Given the objective nature of the test, whether an officer conducted a bona fide community caretaking activity is a question of law, not of historical fact, subject to de novo review. *See* ***id.***, ¶¶ 36-39.

Here, there was no objectively reasonable basis for Deputy Tomlin's professed belief that that someone inside Ms. Ultsch's house had sustained injuries in an automobile accident. Deputy Tomlin had evidence that an unidentified woman inside the house had been in a car accident in which a large SUV had hit a brick wall at least an hour, and maybe much longer, before he approached the house.[2] (27:4, 13; 29:9). The accident dented the left, front quarter-panel of the vehicle around the tire, but it did not cause other damage, such as damage to the windshield or the passenger compartment. (12; App. 105; *see also* 27:5, 13, 17). Although the vehicle had airbags, the accident did not trigger deployment of the airbags. (27:6; 12; App. 105). After the accident, the vehicle was at least operational enough – and the driver uninjured enough – to drive two or three miles. (27:5, 13, 17). After parking the vehicle, the driver was apparently able to walk a quarter of a mile, uphill, through heavy snow. (*Id.* at 8, 11, 13). Deputy Tomlin did not see blood or other evidence of injury in or around the vehicle. (*Id.* at 7, 13). The driver's friend or boyfriend told officers that she was sleeping and did not suggest that she had sustained any injury or seem concerned about her. (*Id.* at 7, 11-12). When

[2] Deputy Tomlin first came upon the vehicle outside of the home about thirty or forty-five minutes after reporting to the scene of the accident. (29:9). He then waited for a four-wheel-drive vehicle to carry him up the driveway. (27:8). Therefore, the minimum time that had passed was likely an hour. However, the accident may have occurred long before 8:45 a.m., when Deputy Tomlin responded to the call about a damaged brick wall. (29:9).

Deputy Tomlin arrived at the house, he did not hear or see any signs of distress. (*See id.* at 8-9).

These facts did not provide a reasonable basis for concluding that the relatively minor car accident caused a significant injury. In the circuit court's written decision, it referred to the accident as "severe" and "likely injury causing" and said that the home owner's lack of concern with the driver "could only heighten the concern." (10:1; App. 101). However, the photographs of the vehicle belie the court's characterization of the accident as severe. (12; App. 105). Assuming that it is true, as the court stated at the reconsideration hearing, that "you do not need a big dent to have an injury, particularly a head injury," this does not make it objectively reasonable for a law enforcement officer to conclude that any car accident, no matter how minor, likely caused an injury significant enough to require his attention. (*See* 31:14; App. 104). Furthermore, it is not objectively reasonable for an officer to conclude that the fact that a friend does not report any injury and seems unconcerned indicates that there has in fact been an injury worthy of concern.

C. The Public Interests and Exigencies Present on the Night of Ms. Ultsch's Arrest Did Not Justify the Significant Intrusion on Her Privacy.

1. Wisconsin's Balancing Test

The third step of the ***Anderson*/*Kramer*** standard balances the public interest "furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen." ***Kramer***, 315 Wis. 2d 414, ¶ 40. "The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable." ***Id.***, ¶ 41.

The Wisconsin courts have identified four factors relevant to this balancing:

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

Kramer, 315 Wis. 2d 414, ¶ 41 (quoting ***Anderson***, 142 Wis. 2d at 169-70).

The third factor, whether an automobile has been involved, refers to searches and seizures of automobiles, which involve a citizen's "lesser expectation of privacy in an automobile." ***Anderson***, 315 Wis. 2d at 169 n.4.[3]

2. This Court Needs to Clarify that the Balancing Test Requires an "Emergency" in Cases Involving Entry into a Home.

Under the Federal Constitution, regardless of whether an officer is acting in a community caretaker role, he may not enter a home without a warrant unless there are exigencies that make the "needs of law enforcement so compelling" that the entry is objectively reasonable. ***Michigan v. Fisher***, __ U.S. __, 130 S. Ct. 546, 548 (2009); ***Brigham City v. Stuart***, 547 U.S. 398, 403 (2006). In a situation where the officer lacks probable cause and one of the related exigencies (hot pursuit or imminent destruction of evidence) he may only

[3] The original community caretaker case, ***Cady***, involved the seizure and search of an automobile that was abandoned on the highway and was a nuisance there. 413 U.S. at 442-43.

enter the home if there is an "emergency" requiring him to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury." ***Stuart***, 547 U.S. at 403; *see also* ***Mincey v. Arizona***, 437 U.S. 385, 392 (1978). This is known as the "emergency aid doctrine." ***Stuart***, 547 U.S. at 401; *see also* ***State v. Larsen***, 2007 WI App 147, 302 Wis. 2d 718, 736 N.W.2d 211 (applying the doctrine in a Wisconsin case).[4] The officer does not need poof that the injury is life threatening, but he must have an "objectively reasonable basis" for believing that someone is injured or likely to be injured such that they need "immediate aid." ***Fisher***, 130 S. Ct. at 548-49.

The emergency aid doctrine is a subcategory of the community caretaker doctrine given that "rendering aid to persons in distress is one of the community caretaking functions of the police." ***People v. Davis***, 497 N.W.2d 910, 920 (Mich. 1993); *see also* ***State v. Leutenegger***, 2004 WI App 127, ¶ 7 n.2, ¶ 10 n.3, 275 Wis. 2d 512, 685 N.W.2d 536 (recognizing a relationship between the doctrines); ***State v. Ferguson***, 2001 WI App 102, ¶ 17, 244 Wis. 2d 17, 629 N.W.2d 788 (same). Specifically, it is the subcategory of community caretaking cases that presents an exigency "so compelling" that it justifies physical entry into the home, *see* ***Fisher***, 130 S. Ct. at 548, which is the "chief evil against which the wording of the Fourth Amendment is directed," ***Welsh***, 466 U.S. at 748. It is for this reason that many other courts have clarified that the community caretaking doctrine, absent circumstances that

[4] Other courts, including this court, have alternatively used the terms "emergency exception" and "emergency doctrine." *See, e.g.,* ***Larsen***, 302 Wis. 2d 718, ¶ 15. For the sake of using consistent terms when discussing both federal and state case law, this brief refers to it as the "emergency aid doctrine."

satisfy the emergency aid standard, cannot justify entry into a home under the Fourth Amendment. *See, e.g.,* ***United States v. Bute***, 43 F.3d 531, 535 (10th Cir. 1994); ***United States v. Erickson***, 991 F.2d 529, 531-33 (9th Cir. 1993); ***United States v. Pichany***, 687 F.2d 204, 208-09 (7th Cir. 1982); ***State v. Ryon***, 108 P.3d 1032, 1043 (N.M. 2005); ***Davis***, 497 N.W.2d at 920-21.

This court should clarify this matter in Wisconsin by specifying that, when applying the third step of the ***Anderson***/***Kramer*** standard to entry into a home, the court must find that there was an emergency at hand. In other words, it must find that there were specific, articulable facts that provided an objectively reasonable basis for concluding that someone in the house was injured or would imminently be injured and that they required immediate aid. *See* ***Fisher***, 130 S. Ct. at 548-49; ***Stuart***, 547 U.S. at 403; *see also* ***Larsen***, 302 Wis. 2d 718, ¶ 17. The third step of the ***Anderson***/***Kramer*** standard already requires the court to balance the location and the degree of the police intrusion with the degree of public interest and the exigency of the situation, as well as the availability of alternatives to the intrusion. ***Kramer***, 315 Wis. 2d 414, ¶ 41. These factors easily form the basis for an ultimate conclusion regarding an emergency. Therefore, the proposed clarification does not alter the ***Anderson***/***Kramer*** method of analysis; it simply indicates that, in a case involving entry into a home, the factors must add up to an injury or an imminent injury that requires immediate aid. Permitting entry into a home based on anything less would contradict federal constitutional law on the subject. ***Fisher***, 130 S. Ct. at 548; ***Stuart***, 547 U.S. at 403; ***Bute***, 43 F.3d at 535; ***Erickson***, 991 F.2d at 531-33; ***Pichany***, 687 F.2d at 208-09; ***Ryon***, 108 P.3d at 1043; ***Davis***, 497 N.W.2d at 920-21.

Clarifying this matter in Wisconsin does not require this court to overturn or abrogate any of its prior cases. This court has decided four published cases involving application of the community caretaker doctrine to entry into a home.[5] ***State v. Ziedonis***, 2005 WI App 249, 287 Wis. 2d 831, 707 N.W.2d 565; ***Ferguson***, 244 Wis. 2d 17; ***State v. Paterson***, 220 Wis. 2d 526, 535-36, 583 N.W.2d 190 (Ct. App. 1998); ***State v. Dull***, 211 Wis. 2d 652, 660-61, 565 N.W.2d 575 (Ct. App. 1997). Each of these cases explicitly or implicitly recognized the need for an emergency to justify the entry.

In ***Ferguson***, the court explicitly applied both the ***Anderson***/***Kramer*** community caretaker standard and the Ninth Circuit's emergency aid standard. 244 Wis. 2d 17, ¶¶ 12-20 (citing and discussing ***United States v. Cervantes***, 219 F.3d 882 (9th Cir. 2000)). It noted that the tests were similar and that the facts before the court, indicating that there had been an "immediate need" for the officers to gain entry into a room due to the "emergency at hand," met both standards. ***Id.***, ¶¶ 18-20.

In ***Ziedonis***, another case in which the court found that that the entry into the home was reasonable, the court did not cite to the emergency aid doctrine. 287 Wis. 2d 831. However, the court ultimately found that the facts had led the officers to "reasonably conclude[]" that the situation

[5] The Wisconsin Supreme Court, like the United States Supreme Court, has never addressed application of the community caretaker doctrine to entry into a home. It has found that an emergency requiring immediate aid justifies entry into the home without discussing the community caretaker doctrine. ***State v. Boggess***, 115 Wis. 2d 443, 340 N.W.2d 516 (1983); ***State v. Pires***, 55 Wis. 2d 597, 201 N.W.2d 153 (1972).

presented was an "emergency" necessitating entry into the home. ***Id.***, ¶ 29.

In contrast, the facts of two cases in which the court found that entry into the home was not reasonable did not reveal any emergency. ***Paterson***, 220 Wis. 2d at 535-36 (finding that the facts were "unremarkable" and did not present an "overly worrisome situation"); ***Dull***, 211 Wis. 2d at 660-61 (finding that the facts left the court "uncertain" as to why the officer concluded that he had to enter the house). In ***Paterson***, the court noted that the defendant had the "highest level of privacy expectation" because he was in his home, which contributed to the court's determination that entry into the home was not reasonable. 220 Wis. 2d at 536.

3. The Facts of This Case Did Not Justify the Significant Invasion of Ms. Ultsch's Privacy under the ***Anderson***/***Kramer*** Balancing Test and/or the Emergency Aid Standard.

The present case involved a search of a private residence, not an automobile, and therefore implicated the "highest level of privacy expectation." ***Paterson***, 220 Wis. 2d 526, 535-36; *see also* ***Kramer***, 315 Wis. 2d 414, ¶ 41 (discussing the balancing test). Moreover, the public interest and the exigency of the situation were low. As discussed above, while Deputy Tomlin had reason to believe that an unnamed person inside the house had been in a car accident, the damage to the vehicle had been relatively minor. (12; App. 105). The accident did not break the vehicle's windows or headlights, damage the passenger compartment, or cause the airbags to be deployed. (*Id.*). Furthermore, Deputy Tomlin knew that the person had driven the vehicle – a large SUV – two or three miles after the accident, parked,

then apparently walked a quarter of a mile uphill through heavy snow. (27:5, 8, 11, 13, 17). Deputy Tomlin did not see blood or other evidence of injury in or around the vehicle. (*Id.* at 7, 13). He spoke with the friend or boyfriend of the driver, who told Deputy Tomlin that the driver was sleeping and did not express concern about her or indicate that she was injured. (*Id.* at 7, 11-12). To the extent that these facts suggested any injury at all, they certainly did not present exigencies indicating a need for immediate aid.

Furthermore, there were several alternative actions that Deputy Tomlin could have taken short of entering Ms. Ultsch's home. *See* ***Kramer***, 315 Wis. 2d 414, ¶ 41 (discussing the balancing test). He could have asked the owner of the house, before the owner drove away, whether the driver was injured and needed any help. Or he could have asked the owner for consent to enter the house to check on the driver. Deputy Tomlin also could have called the house or he could have knocked for a longer period of time and made additional noise, particularly given that he was warned that the driver was asleep. Once he opened the door, Deputy Tomlin could have called out again or otherwise loudly announced his presence in an attempt to summon the driver outside.

Instead, faced with the knowledge that someone in the house had been in a relatively minor car accident and with no additional evidence of injury, Deputy Tomlin drove up to the house, knocked and called out, then stepped in, walked down a long hallway to a back bedroom, and found Ms. Ultsch in bed, sleeping, in the inner sanctum of her home.

Even if this court were to not clarify the legal standard as discussed above, application of the generally-applicable ***Anderson***/***Kramer*** balancing test demonstrates that the law

enforcement actions were unreasonable.[6] The facts of this case are a far cry from the situations that this court has found sufficient to justify entry into a home under the community caretaker doctrine. *See* ***Ziedonis***, 287 Wis. 2d 831, ¶¶ 2-5 (in which "vicious" Rottweilers were running loose and chasing people, the door to the owner's home was ajar late at night in a high crime area, and all of the house lights were on, yet after hours of attempting to subdue the dogs and get the owner's attention with sirens, air horns and loud speakers, the owner did not stir); ***Ferguson***, 244 Wis. 2d 17, ¶¶ 3-5 (in which officers came upon a home filled with drunk teenagers, including one so inebriated that he was vomiting and could not stand, and sought to find any additional teenagers in a closed room by knocking and yelling for a long period of time).

Furthermore, upon consideration of the factors relevant to the balancing test under the emergency aid standard, it is plain that there was no objectively reasonable basis for concluding that someone in Ms. Ultsch's home was injured and that she required "immediate aid." ***Fisher***, 130 S. Ct. at 548-49. Therefore, the entry into her home was unreasonable and violated the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. ***Id.***; *see also* ***Stuart***, 547 U.S. at 403.

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[6] This court could reverse the circuit court's decision on the suppression motion and vacate the judgment of conviction without clarifying the ***Anderson***/***Kramer*** standard or addressing the emergency aid doctrine. However, this court could not affirm the decision and judgment without addressing the matter because the Wisconsin courts may not provide a criminal defendant with less protection than the Federal Constitution affords. *See* ***County of Kenosha v. C & S Mgmt.***, 223 Wis. 2d 373, 387-88, 588 N.W.2d 236 (1999). Regardless, it makes sense for this court to take this opportunity to clarify the law in order to provide guidance to trial courts and litigants.

CONCLUSION

For the reasons stated, Ms. Ultsch respectfully requests that this court vacate the judgment of conviction and instruct the circuit court to suppress the evidence collected in this case.

Dated this 25th day of June, 2010.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,954 words.

Dated this 25th day of June, 2010.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of June, 2010.

Signed:

SHELLEY M. FITE
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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of June, 2010.

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