STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2010AP895-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

KATHLEEN A. ULTSCH,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR MARQUETTE COUNTY,
RICHARD O. WRIGHT, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES CITED

Page

STATUTE CITED

OTHER AUTHORITY

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2010AP895-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN A. ULTSCH,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR MARQUETTE COUNTY,
RICHARD O. WRIGHT, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would not add to the arguments presented by the parties in their briefs.

The opinion should not be published because this appeal may be decided by applying established law to the facts of this case.

ARGUMENT

THE POLICE WERE PROPERLY ACTING AS COMMUNITY CARETAKERS WHEN THEY ENTERED ULTSCH'S HOUSE WITHOUT A WARRANT OR CONSENT TO DETERMINE WHETHER SHE NEEDED ASSISTANCE BECAUSE OF INJURIES SHE MIGHT HAVE RECEIVED IN A RECENT VEHICLE ACCIDENT.

The police may enter a residence without a warrant or consent when they are properly exercising their community caretaking function. *State v. Pinkard*, 2010 WI 81, ¶¶ 13-27, __ Wis. 2d. __, __ N.W.2d __, 2010 WL 2773583 (July 15, 2010).[1]

The police act as community caretakers when they perform numerous tasks that are an important part of their police role primarily intended to assist members of the public and maintain peace, order and safety in the community rather than to detect, investigate or acquire evidence of crime. *See Pinkard*, 2010 WL 2773583, ¶¶ 18, 20; *State v. Kramer*, 2009 WI 14, ¶¶ 30-32, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Anderson*, 142 Wis. 2d 162, 166-67, 417 N.W.2d 411 (Ct. App. 1987). *See also* 3 Wayne R. LaFave, SEARCH AND SEIZURE, § 6.6(a) (4th ed. 2004) (listing some of many non-criminal situations in which warrantless entry to home permitted).

This broad community caretaking function must be distinguished from the more narrow emergency exception to the warrant requirement, *Pinkard*, 2010 WL 2773583, ¶ 26, n.8, which is part of the exigent circumstances rule. *State v. Leutenegger*, 2004 WI App 127, ¶¶ 6-9 & n.2, 275 Wis. 2d 512, 685 N.W.2d 536. Although the police may act as community caretakers when responding to an emergency, no emergency is necessary to properly act as a

[1] *Pinkard* was decided three weeks after Ultsch filed her brief in this Court.

community caretaker. *Pinkard*, 2010 WL 2773583, ¶ 26, n.8.[2]

The state has the burden to prove that a warrantless, non-consensual entry into a home was an objectively reasonable exercise of the community caretaking function under the totality of the circumstances. *Pinkard*, 2010 WL 2773583, ¶¶ 20, 29, 31; *Kramer*, 315 Wis. 2d 414, ¶¶ 30, 36.

To assess whether the entry was permitted, a court should consider: (1) whether there was an entry into a residential unit without a warrant or consent, (2) whether the police were exercising a bona fide community caretaking function when they entered, and (3) whether the entry was reasonable because the community's interest in the intrusion outweighed the resident's interest in privacy. *Pinkard*, 2010 WL 2773583, ¶¶ 29-30. *See Kramer*, 315 Wis. 2d 414, ¶ 21; *Anderson*, 142 Wis. 2d at 169.

In weighing these competing interests, the court should consider: (1) the need for making an immediate entry including the exigencies of the situation, (2) the nature of the entry including the time, location and degree of overt authority or force used, and (3) the availability, feasibility and effectiveness of alternatives to the entry. *Pinkard*, 2010 WL 2773583, ¶¶ 41-42. *See Kramer*, 315

---

[2] The United States Supreme Court has not announced a different rule. Although that Court has stated that the police may enter a home without a warrant to render emergency assistance, it has made clear that this is just one circumstance in which a warrantless entry may be made. *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). The Supreme Court has never held that an emergency is the only situation in which a warrantless home entry is permitted. And it has never considered whether the community caretaking doctrine may justify a warrantless entry in circumstances that may not qualify as an emergency. *Pinkard*, 2010 WL 2773583, ¶ 98 (Bradley, J., dissenting). Of course, decisions of lower federal courts are not binding on Wisconsin courts. *State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993).

Wis. 2d 414, ¶ 41. The greater the need for the entry and the less invasive it is, the more likely the actions of the police will be reasonable. *Pinkard*, 2010 WL 2773583, ¶ 41; *Kramer*, 315 Wis. 2d 414, ¶ 41.

In short, the question is whether a warrantless entry into a home was made in the exercise of a bona fide community caretaking function, and if so, whether that function was reasonably exercised, thereby permitting the seizure of evidence in plain view. *Pinkard*, 2010 WL 2773583, ¶ 63.

A. The Police Had Reason To Believe They Needed To Enter Ultsch's House Immediately To Determine Whether A Person Had Been Injured And Needed Assistance.

Checking to see whether someone may be injured and in need of help is a bona fide community caretaker function, regardless of whether the police might also have some subjective law enforcement reason for the entry. *Pinkard*, 2010 WL 2773583, ¶¶ 34, 40, 45, 48; *State v. Ziedonis*, 2005 WI App 249, ¶¶ 17, 29, 287 Wis. 2d 831, 707 N.W.2d 565 (citing *State v. Ferguson*, 2001 WI App 102, ¶ 22, 244 Wis. 2d 17, 629 N.W.2d 788). *See* LaFave, § 6.6(a) at 461.

In this case, the police entered the house where the defendant-appellant, Kathleen A. Ultsch, resided without a warrant or consent to determine whether the driver of a vehicle parked partially in the driveway might have been injured in an accident (27:4-10).

The police had an objectively reasonable basis for believing that someone in the house could be injured. They determined that the vehicle parked in the driveway had crashed into the brick wall of a building that morning (27:4-5). The wall was caved in (27:15). The vehicle that hit the wall had significant damage on the driver's side

front fender (12; 29:10). The fact that there was a front end impact between a moving vehicle and an immovable wall raised the possibility that the driver had been injured.

The problem is that it was unclear whether the driver might have been injured badly enough to need assistance. Some facts suggested that she was while others suggested she was not.

The driver left the scene of the accident without providing any identifying information as required by Wis. Stat. § 346.69 (2007-08) (27:5,10). This indicated that the driver was not incapacitated by the crash. But it also suggested that the driver could have left immediately to try to get assistance for physical injuries, or that she could have had a head injury that kept her from thinking clearly about what she was supposed to do in that situation.

Although the police did not find any blood, damage to the windshield or passenger compartment of the vehicle, or deployed airbags (12; 27:7,13), they could not rule out the possibility of an internal head injury from an impact that did not leave any external evidence. As the circuit court noted (31:14), it does not take much to cause a serious head injury. All that is needed is jarring or shaking of the brain hard enough to bounce it against the inside wall of the skull. http://www.webmd.com/fitness-exercise/head-injuries-causes-and-treatments. This can be caused by forceful contact between the head and some object, even something as soft as a soccer ball or someone else's head. *Id.* Moreover, even impacts elsewhere on the body can create enough force to jar the brain. *Id.*

A male resident of the house came down the driveway while the police were at the street (27:7). He said the damaged vehicle belonged to his girlfriend who was in the house possibly asleep (27:7-8,11-12). The boyfriend did not mention anything about the driver being injured or needing assistance (27:12). But the boyfriend refused to tell the police anything besides the location of

the driver, not even the driver's name, before he drove off (27:7).

The boyfriend's statements and actions could have suggested that the driver was not injured and did not need assistance. Or it could have been that the boyfriend did not know or care whether the driver had been injured. The driver could have been unconscious because of a head injury instead of merely asleep. And the boyfriend was obviously angry, possibly because his girlfriend had been out on New Year's Eve with a different man (29:4-5). As the circuit court stated, the boyfriend's conduct would not necessarily satisfy an officer that the driver was okay (31:14).

The fact that the driver was in the house means she probably walked a quarter mile up a deeply snow covered driveway (27:11). But as we all know from the recent highly publicized case of actress Natasha Richardson, it can be some time before even very serious head injuries manifest themselves in unconsciousness or death, the injured person being ambulatory or lucid in the interval. *See* http://en.wikipedia.org/wiki/Natasha_Richardson. In *State v. Edmunds*, 2008 WI App 33, ¶¶ 5, 11, 15, 308 Wis. 2d 374, 746 N.W.2d 590, this Court noted that there is currently a debate in the medical community whether a shaken baby can exhibit a significant lucid interval after receiving a traumatic brain injury.

When the police went up to the house they knocked on the door and announced their presence with no response (27:8). They found the door unlocked, opened it, and might have announced their presence again through the open doorway (27:8,14). Still no one responded (27:14). So either the driver was sleeping very soundly or she was unconscious.

At this point the police entered Ultsch's house (27:8,14).

These facts, ambiguous though they may be, show that the police could have reasonably believed they needed to enter Ultsch's house right away without waiting for a warrant or consent because she could have been the victim of a head or other injury sustained in an automobile accident which required medical help.

It has been said several times now that the police should not be forced to tell citizens who might need help, "Sorry. We can't help you. We need a warrant and can't get one." *Pinkard*, 2010 WL 2773583, ¶ 33 (quoting *State v. Horngren*, 2000 WI App 177, ¶ 18, 238 Wis. 2d 347, 617 N.W.2d 508) (internal quotation marks omitted). *Accord Ziedonis*, 287 Wis. 2d 831, ¶ 15.

This statement echoes the one made in many investigative stop cases that police officers who lack the level of information necessary to make an arrest should not be required to simply shrug their shoulders and allow a crime to occur or a criminal to escape. *E.g., State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Rather, police officers may act to resolve an ambiguous situation, notwithstanding the possibility of innocent explanations for the suspect's conduct, if a reasonable inference of criminal conduct can also be drawn. *Waldner*, 206 Wis. 2d at 60-61.

Likewise, police officers should not be required to let a possibly injured person suffer or die simply because there is some ambiguity in the information available to them about the person's condition. Rather, officers should be allowed to enter a residence to resolve the ambiguity as long as it is reasonable to infer that a person inside could be injured and in need of assistance.

"Principles of reasonableness demand that we ask ourselves whether the officers would have been derelict in their duty had they acted otherwise." *Pinkard*, 2010 WL 2773583, ¶ 59 (internal quotation marks omitted). The fact that it turns out no one was injured does not matter. *Id.*

Indeed, in *Ziedonis*, this Court concluded that the police properly acted as community caretakers where "the officers did not know the physical condition of the person and reasonably concluded that the situation was an emergency." *Id.*, 287 Wis. 2d 831, ¶ 29.

Similarly, in *Pinkard*, the Wisconsin Supreme Court concluded that the police properly acted as community caretakers when entering a residence where the condition of two unresponsive people lying in a bed was unknown, and they could have possibly been unconscious due to a drug overdose. *See id.*, 2010 WL 2773583, ¶ 32.

Even the United States Supreme Court, in a case where the police "found signs of a recent injury, perhaps from a car accident," said that, "Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the [narrower] emergency aid exception." *Michigan v. Fisher*, 130 S. Ct. 546, 548-49 (2009).

Thus, the police had sufficient objective reasons to believe they needed to enter Ultsch's house immediately without a warrant or consent to exercise a bona fide community caretaking function.

B. The Police Exercised Their Community Caretaking Function In A Reasonable Way.

1. The police made their entry into Ultsch's house in a reasonable manner.

The police entered Ultsch's house about 9:30 in the morning (29:9), generally considered a reasonable time to visit someone's residence.

The first thing the police did to try to gain entry was to knock on the door and announce their presence (27:8).

When they received no response, they tried the door and found that it was unlocked (27:8). They might have announced their presence again through the open door (27:14). But in any event, they did not break into the house using force but simply walked in through the door they opened normally (27:8,14).

And having been advised that the owner of the damaged vehicle was possibly asleep, they walked down a hall to the back bedroom where they found her (27:14).

Thus, the police did not engage in any forceful, violent, frightening or demanding actions which would be inconsistent with a purpose to help someone rather than investigate a crime.

2. There were no feasible alternatives to the actions taken by the police.

Ultsch suggests several theoretical alternatives to the actions taken by the police, Brief for Defendant-Appellant at 16, but none of them were feasible or effective in the circumstances of this case.

The police could not have obtained information about Ultsch's condition from her boyfriend. Even if the boyfriend knew what Ultsch's condition really was, he was not even willing to tell the police her name much less her condition.

Similarly, Ultsch's boyfriend would not have given the police permission to enter the house. By telling the police to check the damaged vehicle's registration to get his girlfriend's name, then driving off, the boyfriend showed unequivocally that he had no intent to cooperate with the police.

The police could have pounded on the door more, yelled more, made more noise, and called Ultsch on the phone, and none of it would have done any good. Ultsch

was not just snoozing late on a holiday morning, but was sleeping off a drunken binge. Even after being taken to the police station, Ultsch registered .141 and .134 on the two breathalyzer tests she took (29:18-19). Moreover, Ultsch was sleeping off her drunken binge in a bedroom in the back of the house at the end of a long hallway far from the front door (27:14).

The only thing the police could reasonably do to check to see whether Ultsch was injured and in need of help was to walk into her house and into the bedroom where her boyfriend said she appeared to be sleeping.

CONCLUSION

In this case, the police were properly exercising their community caretaking function when they entered Ultsch's house without a warrant or consent. The police had objective reasons to believe that Ultsch might have been injured in an automobile accident and needed assistance. Although there were facts that suggested the contrary, the police would have acted unreasonably by ignoring the facts that suggested she needed help. The police exercised their community caretaking function reasonably by entering the house peaceably, and taking the only course of action that was feasible under the circumstances.

Because the entry into Ultsch's house was proper under the community caretaking exception to the warrant requirement, there was no reason to suppress the evidence obtained by the police as a result of the entry.

It is therefore respectfully submitted that the judgment convicting Ultsch of drunk driving should be affirmed.

Dated at Madison, Wisconsin: July 29, 2010.

J.B. VAN HOLLEN
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

CERTIFICATION

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. The length of the brief is 2,671 words.

_____
THOMAS J. BALISTRERI

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief, excluding the appendix, is identical in content and format to the printed form of the brief filed as of this date.

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

Dated: July 29, 2010.

_____

THOMAS J. BALISTRERI
Assistant Attorney General