STATE OF WISCONSIN

C O U R T O F A P P E A L S

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

A. Introduction.

As it did at the trial level, the state suggests on appeal that the fact of a car accident, even in the absence of any evidence of an injury, permits police to enter the home of the driver or passenger – without consent – in order to check on his wellbeing. The state's brief goes even further. It suggests that any time a citizen is hit on the head with an object – "even something as soft as a soccer ball" – police could similarly enter his home. (State's brief at 5). And if a citizen sustains an injury, but appears well, police might still check on his wellbeing because injured persons can appear "ambulatory or lucid" after an injury, only to later slip into "unconsciousness or death." (State's brief at 6). Presumably, the state thinks that student and professional athletes have no right to privacy in their home whatsoever, given the frequency of injuries in these fields. More relevant to this case (and more widely applicable), no driver who has been in a fender-bender has a right to privacy in his home for at least a day, maybe more, after the accident, until law enforcement officers are satisfied that he is out of any conceivable danger.

The state is wrong. Regardless of whether police are acting out of law enforcement or paternalistic concerns, they must act "reasonably." U.S. Const. Amend. IV. And when police enter a private home without a warrant – the "'chief evil against which the wording of the Fourth Amendment is directed'" – their actions are held to the highest standard.

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)). This is reflected in the balancing test applicable to police actions taken pursuant to the community caretaking function. *See* ***State v. Pinkard***, 2010 WI 81, ¶¶ 20, 26, __ Wis. 2d __, __ N.W.2d __ (July 15, 2010). The simple fact of an event that *could* cause an injury, in the absence of any evidence of an injury, cannot justify a warrantless, nonconsensual entry into a private home under the community caretaker exception.

When a community caretaker function is asserted as the basis for a search or seizure, the court first determines whether the police were exercising a bona fide community caretaker function and then, if so, it balances the public interest against the intrusion upon the privacy of the individual. ***Pinkard***, 2010 WI 81, ¶ 29.

B. The officers were not engaging in bona fide community caretaking activity when they entered Ms. Ultsch's home.

The state's brief asserts that "[c]hecking to see whether someone may be injured and in need of help is a bona fide community caretaker function." (State's brief at 4). This statement lacks an important qualification. Checking to see whether someone may be injured and in need of help *may be* a bona fide community caretaker function if there is "an objectively reasonable basis under the totality of the circumstances for the community caretaker function." ***Pinkard***, 2010 WI 81, ¶ 31 (quoting ***State v. Kramer***, 2009 WI 14, ¶ 36, 315 Wis. 2d 414, 759 N.W.2d 598). In other words, a police officer does not have license to enter any home – or any car or pants pocket, for that matter – in order to check whether someone is injured and needs help

unless there is an "objectively reasonable basis under the totality of the circumstances" for believing that the individual is injured and needs help. *See* ***id.***

Here, law enforcement lacked an objectively reasonable basis for believing that Ms. Ultsch was injured and needed their help. The state argues that someone "could" have been injured by the car accident that officers were investigating. (State's brief at 4). It notes that the "front end impact between a moving vehicle and an immovable wall *raised the possibility* that the driver had been injured." (*Id.* at 5 (emphasis added)). It cites to websites like "Web MD" and "Wikipedia" for the notion that even seemingly minor head injuries, from minor impacts, "can" turn out to be very serious. (*Id.* at 5-6). Therefore, in this case, even though the driver drove home after the accident and then walked a quarter mile through deep snow to get home; even though the damage to the SUV was minor and limited to the front quarter panel area, with no damage to the windshield, windows, or passenger compartment, and the airbags were not deployed; even though the owner of the house said that the driver was asleep and did not express concern about her or say that she was injured – police "could not rule out the possibility" that the driver had sustained a serious head injury. (*Id.*).

But it is not "objectively reasonable" for police to believe that someone has a head injury requiring their prompt assistance every time they cannot "rule out" the possibility of such an injury. That is particularly clear in this case, in which there was no evidence of *any* injury, much less a head

injury, still less a serious head injury that could involve a lucid interval followed by death.[1] It would not be reasonable for an officer to suspect a person of having committed a crime simply because he cannot conclusively prove that he has not committed a crime. *See* ***Terry v. Ohio***, 392 U.S. 1 (1968). Similarly, here, it was not reasonable for police to believe that someone in Ms. Ultsch's home was injured and required assistance because the officers were unable to prove that she had a clean bill of health.

C. The public interests and exigencies present on the night of Ms. Ultsch's arrest did not justify the significant intrusion on her privacy.

In Ms. Ultsch's brief-in-chief, she made two arguments regarding the community caretaker balancing test. First, she argued that this court should modify the test as applied to entry into a home by clarifying that the public interest at issue must amount to an "emergency" requiring immediate aid and that the state could not meet this standard. (Brief-in-chief at 12-14). Second, she argued that, without any modification of the ordinary balancing test, the state did not meet its burden of showing that the public interest outweighed the private interest in this case. (*Id.* at 15-17).

After the filing of the brief-in-chief, the state supreme court released ***Pinkard***, which held that the community caretaker warrant exception applies to entry into a home. 2010 WI 81, ¶ 20. In doing so, the court applied the basic

[1] In ***Michigan v. Fisher***, which the state cites, the issue was whether officers needed evidence of a "life-threatening" injury, rather a less serious injury requiring aid. __ U.S. __, 130 S. Ct. 546, 548 (2009). The Supreme Court did not address the quantum of evidence needed to justify a belief that there was any injury. *See* ***id.***

community caretaker balancing test, without specifying that only an emergency could overcome the private interest in excluding the government from one's home. *See* ***id.*** Because the court of appeals may not modify a decision of the supreme court, even if it believes that the decision is erroneous, this appears to foreclose Ms. Ultsch's first argument regarding the need for an emergency. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶ 54, 324 Wis. 2d 325, 782 N.W.2d 682.[2] Therefore, this brief turns to Ms. Ultsch's second argument, based on the ordinary community caretaker balancing test.

Here, even if this court finds that the officers were acting in a bona fide community caretaking capacity, application of the balancing test reveals that the entry into Ms. Ultsch's home was unreasonable. The state's arguments to the contrary do not merit serious consideration.

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[2] ***Pinkard*** did not directly address Ms. Ultsch's argument, which is based in large part on two recent Federal Supreme Court cases: ***Michigan v. Fisher***, __ U.S. __, 130 S. Ct. 546, 548 (2009), and ***Brigham City v. Stuart***, 547 U.S. 398, 403 (2006). The ***Pinkard*** court did not cite to these cases, just as the briefs in that case had not cited to them. In ***Pinkard***, the parties focused on whether the community caretaker exception could be applied to entry into a home at all. 2010 WI 81, ¶ 19. Here, Ms. Ultsch argues that, regardless of whether the community caretaker exception applies to entry into a home, the United States Supreme Court has held that, absent probable cause, officers may only enter a home in the event of an emergency. ***Stuart***, 547 U.S. at 403. Therefore, under federal law, in order to apply the community caretaker exception to entry into a home, an emergency must be present. *See* ***id.***

If this court denies relief for Ms. Ultsch, she can raise this argument in a petition to the state supreme court. However, given this court's inability to modify a supreme court decision, she accepts that this court cannot decide the issue.

The state does not address the first factor relevant to reasonableness, which is "the degree of the public interest and the exigency of the situation." ***Pinkard***, 2010 WI 81, ¶ 42.[3] As discussed in Ms. Ultsch's brief-in-chief, this factor weighs heavily in her favor. The officers had no real evidence that there was any exigency requiring immediate entry into the home, much less a particularly urgent or compelling one.

The state's brief notes that police entered Ms. Ultsch's house without consent or a warrant around 9:30 a.m., a "reasonable time to visit someone's residence." (State's brief at 8). There is no reasonable time for the government to unlawfully enter a private home.

The state also notes that police knocked and announced their presence before entering, then entered through an unlocked door, rather than breaking in by force. (State's brief at 8-9). This no doubt made the entry itself less dangerous for the police and those inside the house, but it fails to show anything that justifies the entry.[4] Furthermore, there is no evidence that police knocked for any length of

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[3] To the extent that the state relies on its argument regarding whether the officers' exercise of the community caretaking function was bona fide, for the reasons set forth above, that does not suffice.

[4] In discussing this factor, the state suggests that the balancing test is intended to ferret out whether an officer was acting in a bona fide community caretaking role. It says that police did not engage in "forceful, violent, frightening or demanding actions which would be inconsistent with a purpose to help someone rather than investigate a crime." (*Id.* at 9). However, if this court thinks that officers were not acting in a bona fide community caretaking function, then it need not even address the balancing test. Under the ***Pinkard*** standard, if this court has concluded that officers were acting as community caretakers, *then* it turns to whether the specific actions that they took in furtherance of that role were reasonable. *See* ***Pinkard***, 2010 WI 81, ¶¶ 26, 41.

time, knocked or yelled loudly, or waited for a response for a significant period after knocking.

Finally, the state asserts that there was no "feasible or effective" alternative to the actions that police took in this case. But it supports this assertion with pure speculation. The state contends that police "could not have obtained information" about Ms. Ultsch's condition from the homeowner because "he was not even willing to tell the police her name much less her condition." (State's brief at 9). But the officers did not ask the homeowner about Ms. Ultsch's condition, so we have no way of knowing how he might have responded. The fact that he did not want to reveal Ms. Ultsch's name, potentially incriminating her in a hit-and-run investigation, has no bearing on whether he would have told the officers that she was well, if they had cared to ask.

Similarly, the state posits that the homeowner would not have consented to entry into the home. (State's brief at 9). The state cannot know this, because police did not ask for consent. The fact that the homeowner drove away after responding to the questions that police actually asked may have indicated that he, at around 9:30 a.m., had to get to work or to some other appointment. The officers did not know, and they apparently did not try to find out.

Finally, the state argues that officers did not need to pound on the door, yell out to anyone inside, make noise, or call the telephone because "none of it would have done any good" since Ms. Ultsch was drunk and therefore would not have heard it.[5] (State's briefs 9-10). This is irrelevant to the reasonableness analysis. The state cannot justify an

[5] Under the state's logic, presumably the officers did not need to knock at all.

unreasonable search by pointing to facts not known to police at the time of the search. Furthermore, the state's "facts" here amount to more speculation regarding how Ms. Ultsch might have responded to more reasonable police actions if police had actually taken those actions.

Contrary to the state's arguments, police did not act reasonably. Lacking any evidence of an exigency inside the house, they knocked on Ms. Ultsch's door and announced their presence, then walked in, walked through her house, walked into her bedroom, and found and questioned her there. Their actions were not calculated to protect the residents' privacy or their constitutional rights.

CONCLUSION

For the reasons stated above and in her brief-in-chief, 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 16th day of August, 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 2,279 words.

Dated this 16th day of August, 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 16th day of August, 2010.

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