STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2010AP3034-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH M. SOBCZAK,

DEFENDANT-APPELLANT.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE PATRICK J. FARAGHER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument.

Publication is warranted. The distinction between consent to enter and consent to search find little discussion in Wisconsin's published cases. There is also scant authority in Wisconsin on the issue of the actual or apparent authority of a guest to consent to entry.

STATEMENT OF THE CASE

The Circuit Court for Washington County sentenced Kenneth Sobczak to three years of initial confinement and three years of extended supervision after his no contest plea to possession of child pornography (19). Sobczak filed a motion to suppress evidence seized from his residence and his computer (7). He entered his plea after the circuit court denied his motion (8:46). He appeals that denial (26). The evidence at the suppression hearing follows.

Nathanial Dorn, a Hartford city police officer (8:5), testified that on September 5, 2009, at 5:32 p.m., dispatch sent him to 1558 Chestnut Court in Hartford (8:6-7). The address is a single family residence (8:7). Kristina Podella met Dorn when he arrived (8:8). Podella appeared to be about twenty years old (8:8).

On the porch of the residence, Podella explained that she had been dating Sobczak for about three months (8:9-10). Sobczak invited her to stay with him for the weekend (8:10). Sobczak's parents, who owned the house, were gone on vacation (8:11). Sobczak was at work and Podella was alone in the house (8:11). When Sobczak left for work, Podella asked him for permission to use his laptop computer because she had no

transportation and was unfamiliar with Hartford (8:11-12). Sobczak gave her permission to use his laptop (8:12).

While Podella was using the laptop computer, an "error message came up" (8:12). Podella opened the file and observed a video of two naked females, who Podella believed were not adults, "pleasuring each other" (8:12). Podella shut off the video because it disturbed her (8:12). Podella observed four or five other videos with titles that indicated under-age participants (8:13). Podella then contacted police (8:13-14).

After the above discussion, Dorn told Podella "I'm going to need to view the video. . . . [W]e can either go inside and look at it or you can bring it out here; whatever is more comfortable for you" (8:14). Podella replied, "[N]o, we can go inside and look at it" (8:14). Dorn asked if it was all right if he went inside the residence. Podella said "sure" and took Dorn inside (8:14).

The computer was twenty to thirty feet inside the front door (8:15). Dorn asked if Podella could show him the video (8:15). Podella searched for the video, found it again and got it up for Dorn to view (8:15). Podella pressed "play" and Dorn viewed the video (8:16). Dorn observed two girls removing each other's clothes and rubbing each other (8:16-17). Dorn fast-forwarded and also observed the girls "pleasuring each other" with "adult toys" (8:17). Podella showed Dorn other video files which Dorn briefly opened and observed (8:17-18). Dorn also observed a picture of Sobczak and

Podella on the "regular screen" of the computer when he closed the video (8:19). After consulting with the Chief of Police by cell phone, Dorn seized the computer (8:19-20).

Later that evening, Dorn obtained a search warrant for the Chestnut Court residence (8:20, 26). Dorn also met and spoke to Sobczak (8:20).[1] Sobczak confirmed that he and Podella had been in a dating relationship for a few months; he had invited Podella to stay with him for the weekend; the laptop computer was his alone; and he gave Podella permission to use his computer when he left for work (8:21).

On cross-examination, Dorn indicated Podella had arrived at the Chestnut Court residence on Friday, September 4, 2009 (8:23). Dorn indicated he believed Podella had authority to allow him entry into the house (8:24). He based his belief on the fact Podella was at the residence legally, had been invited to the house by a resident, and she had unrestricted access to all parts of the home (8:24).

STANDARD OF REVIEW

In reviewing the denial of a motion to suppress evidence, appellate courts will uphold a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 695 N.W.2d 277 citing *State v.*

[1] According to Dorn's preliminary hearing testimony, Sobczak returned home from work during the execution of the search warrant (3:16).

Vorburger, 2002 WI 105, ¶ 32, 255 Wis. 2d 537, 648 N.W.2d 829. However, the court reviews *de novo* the circuit court's application of constitutional principles to those facts. *Id.*

ARGUMENT

I. PODELLA HAD ACTUAL OR APPARENT AUTHORITY TO CONSENT TO DORN'S ENTRY INTO SOBCZAK'S RESIDENCE.

Sobczak argues the police committed two separate violations of the Fourth Amendment in this case. First, he contends Podella did not have actual or apparent authority to consent to Dorn's entry into the Chestnut Court residence without a warrant, resulting in a violation. Second, he contends Podella did not have actual or apparent authority to consent to Dorn's search of Sobczak's computer without a warrant, resulting in a second violation. He does not contend that Podella's consent was involuntarily given. The State will address each of these arguments in turn.

A. PODELLA HAD ACTUAL AUTHORITY TO CONSENT TO ENTRY.

Warrantless searches are "per se" unreasonable and are subject to only a few limited exceptions. *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998) citing *Katz v. United States*, 389 U.S. 347, 357 (1967). So too are warrantless entries into a person's residence. *See State v. Ferguson*, 2009 WI 50, ¶ 17, 317 Wis. 2d 586, 767 N.W.2d 187; *Payton v. New York*, 445 U.S. 573, 586 (1980). One well-established exception to the warrant requirement is a search conducted pursuant to

voluntary consent. *State v. Artic,* 2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 N.W.2d 430; *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

The State may show consent from a third party under appropriate circumstances. *Kieffer*, 217 Wis. 2d at 541; *United States v. Matlock*, 415 U.S. 164, 171 (1974).

> when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed *common authority over* or other *sufficient relationship to* the premises or effects sought to be inspected.

Matlock, id. (emphasis added)(footnote omitted).

> [T]he authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Kieffer, 217 Wis. 2d at 542 quoting *Matlock*, 415 U.S. at 171 n.7 (citations omitted).

Under *Kieffer* and *Matlock*, if Podella had joint access or control for most purposes, she had actual authority to consent to Dorn's entry into the house. The evidence establishes when Sobczak left for work, he left Podella as the sole adult occupant of the house and she had the run of the house. There is no evidence he placed any restrictions on her use of the premises, nor that he told her not to

admit anyone. At least during the time that Sobczak was at work, she had joint access and control of the house.

Sobczak's primary contention appears to be that Podella was a weekend guest. It is true that whatever access and control Podella had was confined to that weekend. Nevertheless, the evidence presented establishes that she had complete access during that weekend and complete control while Sobczak was at work.

This court has upheld a house-sitter's consent to police entry in *State v. Harrell*, 2010 WI App 132, 329 Wis. 2d 480, 791 N.W.2d 677. The trial court found Harrell's house-sitting status gave him sufficient authority to permit police to enter the house. The *Harrell* court held that finding was not clearly erroneous and upheld the trial court's conclusion. *Id.* ¶ 11.

In *Morrison v. State*, 508 S.W.2d 827 (Tex. Crim. App. 1974), Morrison had given Edgar Heard permission to use Morrison's apartment while Morrison was out-of-town. Heard did not have a key. The landlady unlocked the door and police entered with Heard's consent. *Id.* at 828. The court held "third persons can consent to searches of premises which they exercise control over and have authority to use. It is a question of fact whether the consenting party has the right to use and occupy a particular area to justify his permitting officers to search that area." *Id.* at 828. The trial court found:

> Heard previously had been to appellant's apartment on at least one occasion and that he had permission to use the apartment during appellant's absence; that Heard returned on the day of the seizure to

> retrieve personal belongings he had left there earlier, and that McCourt was present at Heard's invitation.

Id. at 829. The appellate court found evidentiary support for those findings and upheld the "search." (The items were in plain view once the officer entered the apartment. *Id.*)

In *United States v. Turbyfill*, 525 F.2d 57 (8th Cir. 1975), the court was presented with the question of whether Church, the person who answered the door and permitted officers to enter Turbyfill's residence, had authority to permit or invite the officers in. Church had been staying in the house for several weeks and had the run of the house. *Id.* at 58-59. The court characterized him as an occupant of indefinite duration rather than a casual visitor. *Id.* at 59. The court concluded he "was authorized under the principles stated [in *Matlock*] to allow others to enter the premises." *Id.*

Professor LaFave observes:

> [W]here the guest is actually present inside the premises at the time of the giving of the consent and the consent is merely to a police entry of the premises into an area where a visitor would normally be received[,] [t]here is sound authority that, at least when the guest is more than a casual visitor and "had the run of the house," his lesser interest in the premises is sufficient to render that limited consent effective.

4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 8.5(e), 235 (4th ed. 2004). In *Commonwealth v. Netting*, 461 A.2d 1259 (Pa. Super. Ct. 1983), the court made a similar distinction between a search and an entry: "we see a distinction between the situation where the police receive permission from a third party to conduct a warrantless search of

another person's premises and the situation where the police are provided limited access to a person's premises, by a guest of that person, into an area of the premises where a visitor would normally be received . . . ." *Id.* at 1260-61.

Likewise, in *People v. Shaffer*, 444 N.E.2d 1096 (Ill. App. Ct. 1982), Shaffer's brother, Scott, who was a frequent visitor, permitted police into Shaffer's house. *Id.* at 1097. After citing *Turbyfill,* the court observed:

> [a]lthough Scott Shaffer was not "an occupant of indefinite duration," as was the guest in *Turbyfill*, neither was he merely a "casual visitor." He was the brother of defendant Richard Shaffer and a frequent visitor who had never been prevented from inviting friends into defendant's home. Under the circumstances we think that Scott Shaffer had sufficient relationship to the premises to allow others to enter and, hence, had actual authority to permit police to enter an area where a visitor would normally be received.

Id. at 1099.

The distinction between a consent to search and a consent to enter is in keeping with the policy underlying third-party consent. A guest has a lesser interest in the premises than the host. 4 LAFAVE, SEARCH AND SEIZURE, § 8.5(e) at 233-34. But entry is a lesser intrusion on the host's privacy interest than a search. And where the guest is more than casual, *i.e.*, the guest either by frequency of visits or a relationship, has a connection with the host beyond a casual one, it makes sense under an objective reasonableness standard to conclude the host "assumed the risk

that [the guest] might permit [another entry to] the common area [where guest might be received]." *See Kieffer*, 217 Wis. 2d at 542.

It is true that in *Turbyfill* and *Shaffer*, the host was present. *Turbyfill*, 525 F.2d at 58; *Shaffer*, 444 N.E.2d at 1099. But the host was absent in *Harrell* and *Morrison*. *Harrell*, 329 Wis. 2d 480, ¶ 11; *Morrison,* 508 S.W.2d at 828. Moreover, since third-party consent is premised on actual use and control of the premises, an absent host who leaves a house or apartment guest alone and places no restrictions on the guest would seem to have ceded more use and control of that premises than a host who is present and can exercise his/her superior interest. *See Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (A physically present co-occupant's stated refusal to permit entry prevails, rendering a warrantless search with the other co-occupant's consent unreasonable and invalid as to him.)

Sobczak argues Podella could not give consent here because she was merely a guest in Sobczak's house.[2] He relies on *State v. Verhagen*, 86 Wis. 2d 262, 272 N.W.2d 105 (Ct. App. 1978), and *State v. McGovern*, 77 Wis. 2d 203, 252 N.W.2d 365 (1977). But *Verhagen* involved a consent to search, not just to entry, given by an estranged wife who

[2] Sobczak's parents owned the house on Chestnut Court. As *Kieffer* and *Matlock* recognize, the law of property informs but does not control Fourth Amendment jurisprudence. *Kieffer*, 217 Wis. 2d at 542; *Matlock*, 415 U.S. at 171 n.7. The State does not contest Sobczak was a joint occupant of the premises.

herself had only a limited right to enter. *Verhagen,* 86 Wis. 2d at 264-67. The court made no distinction between a search and the lesser intrusion of entry.

The *McGovern* court also made no distinction between a consent to search and a consent to enter. More importantly, the trial court found the guest had no authority to consent (we are not told consent to what) and had no joint access or control. *McGovern*, 77 Wis. 2d at 214-15.

And as demonstrated by the cases above, the mere fact that the third party is a guest, does not per se preclude a valid consent. "[I]t is necessary to examine the particular host-guest relationship with some care." 4 LAFAVE, SEARCH AND SEIZURE, § 8.5(e) at 234.

Here, Podella, an adult, had a romantic relationship with Sobczak; was at the Chestnut Court house at his express invitation; Sobczak left her charge of the house while he went to work; and Sobczak placed no restrictions on Podella's use of the house. She consented only to police entry at most thirty feet into the living room. Under these circumstances, she had actual authority to consent to Dorn's entry.

B. PODELLA HAD APPARENT AUTHORITY TO CONSENT TO ENTRY.

In *Matlock*, the Supreme Court did not address the question of whether police could obtain a valid consent to search from one they believed had authority to consent but who, in fact, did not. *Matlock*, 415 U.S. at 177 n.14.

In *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court addressed "[w]hether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so." *Id.* at 179. Illinois state courts convicted Rodriguez of possession of a controlled substance with intent to deliver after police discovered drugs in his apartment. *Id.* at 180. The police gained entry with the consent of Gail Fisher. *Id.* at 179. Fisher, who showed signs of a severe beating, told the officers that she had been assaulted by Rodriguez earlier that day in an apartment she repeatedly referred to as "our" apartment. She said that she had clothes and furniture there. *Id.* Fischer unlocked the door with her key and gave the officers permission to enter without a warrant. *Id.* at 180.

The Cook County Circuit Court granted a suppression motion. The Court held:

> that at the time she consented to the entry Fischer did not have common authority over the apartment. The Court concluded that Fischer was not a "usual resident" but rather an "infrequent visitor" at the apartment . . . based upon its findings that Fischer's name was not on the lease, that she did not contribute to the rent, that she was not allowed to invite others to the apartment on her own, that she did not have access to the apartment when respondent was away, and that she had moved some of her possessions from the apartment.

Id.

The Court concluded that:

> in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government-whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement-is not that they always be correct, but that they always be reasonable.

Id. at 185. The "determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" *Id.* at 188 (internal quotation marks omitted).

The Wisconsin Supreme Court recognized the *Rodriguez* Court's holding in *Kieffer*. *Kieffer*, 217 Wis. 2d at 548-49. The *Kieffer* court held the police had not made a sufficient inquiry there to render their belief reasonable that Kieffer's father-in-law, the property owner, had authority to consent. *Id.* at 550-55.

In *State v. Tomlinson*, 2002 WI 91, ¶ 33, 254 Wis. 2d 502, 648 N.W.2d 367, the Wisconsin Supreme Court found reasonable the police officer's belief that a high school-aged girl gave a valid consent. Officers sought to arrest Tomlinson at his house. *Id.* ¶ 20. Before coming to the house, the police officers knew that Tomlinson had two teenaged daughters. The police had descriptions of the two daughters from witnesses to the crime. A 15 or 16 year old African-American girl answered the door. Tomlinson was standing near the door

and he did not object to the girl's letting the officers into the house. Under these circumstances the Court concluded "it was more than reasonable for the officers to conclude that the girl who answered the door was one of Tomlinson's daughters." *Id.* ¶ 28.

The Court also had to determine if a minor child could give the consent. Of particular note to the decision in the present case, the *Tomlinson* Court recognized that a child has a lesser interest in the house than the parent. *Id.* ¶ 30. And the Court drew a distinction between consent to enter and consent to search. *Id.* ¶ 32. The Court observed:

> The scope of the consent is also particularly important because there are parts of a family's home where the parents have an increased privacy interest, and where the child could not reasonably give consent to a search, even though a parent could. In some situations, however, a child might reasonably be able to give consent for police to enter or search a common area of the home where the parents and the child share a greater mutual use and a similar expectation of privacy.

Id.

The same considerations apply to an overnight guest such as Podella. While the guest's lesser interest may make a complete search of the house unreasonable, a guest left in charge of the house can reasonably consent to the police entry to an area where guests would be received and in which the guest has a similar privacy interest. *See Minnesota v. Olson*, 495 U.S. 91, 99-100 (1990) (Overnight guest has a reasonable expectation of privacy in host's premises.)

Cases from other jurisdictions reach a result consistent with the circuit court here. In *Nix v. State*, 621 P.2d 1347 (Alaska 1981), a plain clothed police officer went with Miller to Miller's brother's (Long) apartment where police believed items of a burglary might be. Lawyer, one of Long's friends who occasionally spent the night at the apartment, allowed Miller and the police officer in. Long was asleep. Miller explained to Lawyer that she had come to leave some money for her brother. While in the apartment, the officer observed the stolen items. *Id.* at 1348. The Court concluded, "[w]e think that there can be little question that apparent authority existed here. The [o]fficer . . . reasonably believed that Lawyer had the authority to allow Miller, the sister of his host, and her companion, to enter the premises." *Id.* at 1350.

In *State v. Thompson*, 578 N.W.2d 734 (Minn. 1998), the Minnesota Supreme Court also found apparent authority for a valid limited consent to entry. Police observed Thompson with one DiLaura. When officers made eye contact Thompson ran from them. DiLaura told officers Thompson ran because of outstanding warrants. *Id.* at 736. DiLaura also told officers that he, his girl friend and Thompson were staying together in an apartment. *Id.* at 736-37.

> When [the officers and DiLaura] arrived at [the apartment], the officers knocked on the exterior door to the stairway leading to the upstairs apartment unit and a young man of approximately 18 years of age answered. To the officer's question whether the young man lived there, he replied that he did not. The officer told him that he needed to speak to the renter and to Kerry Cronin. The young man let the officers in and led them up the stairs.

Id. at 737. Police arrested Thompson and eventually obtained a search warrant for the apartment which uncovered evidence tying Thompson to a double homicide. *Id.*

In concluding that there was a sufficient objective basis for the officers to believe the person admitting them to the apartment had authority to consent to their entry, the court observed:

> The officers did not ask the young man if they could enter the apartment to search for or arrest appellant, or to search for evidence of a crime; they simply stated that they needed to speak to the renter, Lopez, and to a guest of the renter, Cronin. With no words spoken they were led inside up the stairs and into the kitchen of the Lopez apartment. When the police inquired as to where they could find Lopez, the young man directed them to her bedroom. Even though the young man acknowledged he did not live there, he obviously was there in the early hours of the morning with the permission of someone in the building, he knew that Lopez was the renter and where she lived, and he appeared to be of sufficient age to appreciate the seriousness of the officers' presence and their request. Under the totality of the circumstances it was reasonable for the officers to believe that the young man who answered the door had the apparent authority to give them limited consent to enter the apartment for the purpose of talking with the occupants therein.

Id. at 740.

In *People v. Ledesma*, 140 P.3d 657 (Cal. 2006), Ledesma was convicted of first-degree murder and other crimes arising out of the robbery and later death of Gabriel Flores. During a robbery in which Flores was the victim, he obtained a license number of a motorcycle used in the robbery. The motorcycle was registered to Ledesma so police went to the address listed. When the officers

arrived at Ledesma's apartment, two visitors, one of whom was Millie Dominguez, let them in. While the officers were in the apartment, the phone rang. One of the officers answered and identified herself as Dominguez. The caller was Ledesma, who told the officer that he was "hot," that the police were looking for him, and that she should lock the apartment and Ledesma's car and take a walk. *Id.* at 672. Flores later disappeared; his body was discovered three days after his disappearance with gunshot and stab wounds. *Id.* at 673.

The State used the intercepted phone call in his murder trial. Ledesma challenged the authority of the two visitors to allow the police into the apartment. *Id.* at 703. The California Supreme Court recited the facts as:

> The door was answered by Lawrence Santiago, who stated when asked that he was not defendant and that defendant was not in the house. Officer Webster asked Santiago whether he would mind if the officers entered and looked around. Santiago said he was just visiting but that he did not mind, and stepped back to let the officers in. Millie Dominguez also was present.

Id. at 702.

The court found apparent authority:

> Although Santiago was just visiting, he and Dominguez were present in the apartment in the early evening when defendant was not at home. Cases from a number of jurisdictions have recognized that a guest who has the run of the house in the occupant's absence has the apparent authority to give consent to enter an area where a visitor normally would be received.

Id. at 704.

Dorn testified he believed Podella had authority to consent to his entry into the living room because she was at the residence legally, had been invited to the house by a resident, and she had unrestricted access to all parts of the home (8:24). In addition to those facts, Dorn's belief was a reasonable one because Dorn knew Sobczak had left Podella in complete charge of the house while he was at work. Podella had apparent authority to consent to Dorn's entry into the living room.

II. PODELLA HAD ACTUAL OR APPARENT AUTHORITY TO CONSENT TO DORN'S SEARCH OF SOBCZAK'S COMPUTER.

Sobczak also argues that even if Podella had authority to consent to Dorn's entry into the Chestnut Court house, she did not have authority to consent to the search of his computer. He relies on *State v. Pickens,* 2010 WI App 5, ¶ 9, 323 Wis. 2d 226, 779 N.W.2d 1.

The third-party consent principles set out in Argument, Section I, apply equally to computers. *See State v. Ramage*, 2010 WI App 77, ¶ 7, 325 Wis. 2d 483, 784 N.W.2d 746. As noted, third-party consent rests on common authority over the items searched or seized. *Kieffer*, 217 Wis. 2d at 541; *Matlock*, 417 U.S. at 171. Common authority over personal property may exist when one allows another to use the property. In *Frazier v. Cupp*, 394 U.S. 731, 740 (1969), the Supreme Court held that Rawls validly consented to a search of a duffel bag Frazier and Rawls used jointly which Frazier left in Rawls' home.

The South Dakota Supreme Court relied on *Frazier* to analyze consent to search a computer. After his arrest, Guthrie asked his daughter and son-in-law, Suzanne and Les Hewitt, to store some of his household belongings, including a home computer. Les Hewitt consented to the warrantless search of this computer. *State v. Guthrie*, 627 N.W.2d 401, 412 (S.D. 2001). The Court held the consent valid. *Id.* at 423. *See also Walsh v. State*, 512 S.E.2d 408, 412 (Ga. Ct. App. 1999) (Wife who resided with defendant and had purchased a computer available to entire family, had authority to consent to the computer's seizure); *Ramage*, 325 Wis. 2d 483, ¶¶ 2, 7 (Ramage conceded Folger, his apartment-mate, had authority to consent to a search of a computer Folger used occasionally but argued he could not consent to its seizure.) Here Sobczak gave Podella permission to use the computer while he was at work. He admitted as much to Dorn later that night (8:21).

Sobczak's reliance on *Pickens* is misplaced. The *Pickens* Court held that an overnight guest in Pickens' motel room could consent to search of the room. *Pickens*, 323 Wis. 2d 226, ¶¶ 40-41. But she did not have either actual or apparent authority to consent to the search of a locked safe in the room. *Id.* ¶¶ 44-47. The guest did not have a key to the safe and could not open the safe without it. *Id.* ¶ 44. But Podella had Sobczak's permission to use his computer. And she did in fact use it. There is no evidence he restricted her use in any way; no evidence he had password protection activated for his computer generally; no evidence any files were password protected or encrypted. Such password protection or encryption may have presented a different question. *See Trulock v. Freeh*, 275 F.3d

391, 403 (4th Cir. 2001); *United States v. Buckner*, 473 F.3d 551, 554 (4th Cir. 2007).

Nor did Dorn have any reason to question that Podella had complete and unrestricted access to Sobczak's computer. The surrounding circumstances did not present ambiguous circumstances demanding further inquiry. *See Kieffer*, 217 Wis. 2d at 549; *see also United States v. DiPrima*, 472 F.2d 550, 552 (1st Cir. 1973) ("[t]o some extent the police must be allowed to rely upon the word of the householder and general appearances").

As a general proposition, the Michigan Court of Appeals has said:

> [T]his Court decline[s] to impose an obligation on the police to make a further inquiry regarding a third party's ability to validly consent to a search unless the circumstances are such as to cause a reasonable person to question the consenting party's power or control over the premises or property.

People v. Goforth, 564 N.W.2d 526, 530 (Mich. Ct. App. 1997). Podella told Dorn she was using the computer when the "error message came up" revealing the illegal video (8:12). Podella searched for the video after Dorn entered the house, found it again and got it up for Dorn to view (8:15). Podella pressed "play" and Dorn viewed the video (8:16). In addition, Dorn testified he also observed a picture of Sobczak and Podella on the computer's wallpaper when he closed the video (8:19).

Under the totality of the circumstances presented here, Podella had both actual and apparent authority to consent to a search of the computer.

CONCLUSION

For the reasons given above, this court should affirm the circuit court's denial of Sobczak's motion to suppress.

Dated at Madison, Wisconsin, this 7th day of July, 2011.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,037 words.

Dated this 7th day of July, 2011.

_____
Warren D. Weinstein
Assistant Attorney General

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 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 filed with the court and served on all opposing parties.

Dated this 7th day of July, 2011.

_____
Warren D. Weinstein
Assistant Attorney General