STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP000276-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES RAY STEWART,

Defendant-Appellant.

ON APPEAL TO REVIEW THE JUDGMENT OF
CONVICTION AND SENTENCE ENTERED ON
DECEMBER 14, 2012,
IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, WISCONSIN,
THE HONORABLE ELLEN R. BROSTROM,
CIRCUIT COURT JUDGE, PRESIDING,

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the trial court erroneously decide to not suppress the items found by the police in Stewart's residence because the plain view doctrine applied?

   Trial Court answered: No.

2. Did the trial court erroneously decide to not suppress the items found by the police in Stewart's residence because the community caretaker—emergency doctrine applied?

   Trial Court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Stewart contends that oral argument is not necessary as the issue raised in this appeal can be adequately addressed in the briefs. Publication will be necessary to provide guidance to the circuit courts and law enforcement as to whether the police can use the plain view doctrine where there is no probable cause and where there was no consent to search and whether the emergency doctrine can be used even if there is no danger to losing evidence.

STATEMENT OF THE CASE

This case began when the state filed a criminal complaint against Stewart on December 3, 2011, in Milwaukee County Case No. 2011CF005786, alleging in count 1 that, between 2007 and November, 2011, Stewart had committed repeated sexual assault of a child, contrary to secs. 948.02(1) and 948.025(1)(b), Wis. Stats., and alleging in count 2 that, between 2007 and November, 2011, Stewart had committed physical abuse of

a child, contrary to sec. 948.03(2)(b), Wis. Statutes. (2: 1)

An initial appearance occurred on December 3, 2011. (41: 1-6). On December 12, 2011, a preliminary hearing occurred and Stewart was ordered bound over for trial. (42: 1-13) The State filed an information on December 12, 2011, that alleged the same offenses as in the criminal complaint. (4: 1) Stewart entered a not guilty plea to that charge on December 12, 2011. (42: 12)

On March 2, 2012, Stewart's counsel filed a motion to suppress the search of his residence and a brief in support of the motion. (13: 1-2) (14: 1-8) The State filed a response on October 3, 2012, to that motion to suppress. (24: 1-5) On September 7 and 21, 2012, and October 5, 2012, the circuit court held motion hearings on Stewart's motion to suppress the evidence seized by the police at his home. (50, 51, 52) The circuit court denied the motion on October 5, 2012. (52: 36-37)

On October 22, 2014, Stewart entered a guilty plea. (53: 1-39) On December 13, 2012, the sentencing hearing occurred. (54: 1-46) The court sentenced Stewart to a total of 15 years initial confinement in prison and 10 years extended supervision. (54: 41)

On February 3, 2014, a notice of appeal was filed with the trial court. (39: 1-3)

STATEMENT OF THE FACTS

Stewart's minor daughter informed the Milwaukee police that Stewart had been allegedly sexually assaulting her. (50: 40) Milwaukee police officer Daniel Keller ("Keller") testified that he and other officers went, on November 28, 2011, to 4043 North 24th place in Milwaukee, Wisconsin, to arrest Stewart at his residence. (50: 13-14) Stewart was arrested outside of his home in the front yard. (50: 14) The police placed Stewart in handcuffs and the police officers escorted Stewart into his home at his request because he did not want his neighbors to see what was happening and because he needed to place his dog into his bedroom. (50: 17)

Keller testified that Stewart wanted to put his dog inside of his bedroom so that the dog would not be aggressive with the police officers. (50: 17) The police allowed Stewart to open his bedroom door, place the dog in

his room and then close the door. (50: 18) MADACC arrived at Stewart's home and they removed the dog form Stewart's home. (50: 19)

Detective Tammy Trammel-McClain ("Trammel-McClain") testified that Stewart's bedroom was off the living room as soon as a person came up the stairs from the front door. (51: 4) There was a small hallway where there is a second door to his bedroom. (51: 4) That second door to his bedroom goes into the small hallway and his daughter's bedroom was across from that hallway. (51: 5) She had called MADACC out of concern for Stewart's dog. (51: 5) The dog was in Stewart's bedroom. (51: 5) The bedroom door was closed. (51: 5-6)

Trammel-McClain testified that she did a "cursory" search of Stewart's residence and that she "was just there for bedding." (51: 7) She took bedding from Stewart's bed and bedding from his daughter's bedding. (51: 8) She was aware that his daughter described the bedding was on each bed where the alleged sexual assaults took place. (51: 15) She admitted that she believed that there may be DNA on the bedding and it may be of evidentiary value and could

also be evidence since his daughter had stated that the bedding was what she had laid on the alleged sexual assaults took place. (51: 15)

Trammel-McClain admitted that no person told her that she could walk through Stewart's residence to each residence. (51: 16) She went into the bedroom after the dog was gone. (51: 17) She admitted that she went through the residence with a photographer and collected evidence after Stewart had been arrested and was gone. (51: 18) She also admitted that she went there to collect evidence to corroborate the alleged victim's story. (51: 19-20)

The circuit court, at an evidentiary hearing on October 5, 2012, decided not to suppress the police search of Stewart's residence. (52: 36-37)

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED STEWART'S MOTION TO SUPPRESS THE ILLEGAL SEARCH OF STEWART'S APARTMENT.

A. STEWART SHOULD BE ALLOWED TO WITHDRAW HIS GUILTY PLEA BECAUSE THE PLAIN VIEW DOCTRINE DOES NOT APPLY.

The appellate court upholds a trial court's findings of evidentiary and historical facts unless they are clearly erroneous. State v. Angiolo, 186 Wis.2d 488, 494, 520 N.W. 2d 923 (Ct.App. 1994). However, the validity of a search and seizure involves constitutional questions subject to independent appellate review and requires an independent application of the constitutional principles. Id.

Three motion hearings occurred to determine if the search of Stewart's apartment should be suppressed. Stewart's motion to suppress was denied by the Circuit Court. (52: 36-37) The Circuit Court held that the plain view doctrine and community caretaker-emergency doctrine allowed the police to take possession of the two bed sheets and comforter in this case. (52: 36-37)

The exclusionary rule applies to evidence that is seized as the result of an illegal search or seizure. Segura v. United States, 468 U.S. 796, 804-06 (1984). First, the court must determine if there was a search within the meaning of the Fourth Amendment. State v. Whitrock, 161 Wis.2d 960, 970-71, 468 N.W.2d 696, 700 (1991).

A search occurs when the police infringe on an expectation of privacy that society considers reasonable. If there is no infringement, there is no search. United States v. Jacobsen, 463 U.S. 109, 113 (1984).

Under the plain view doctrine, an "object falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced as evidence." State v. Bell, 62 Wis.2d 534, 540, 215 N.W.2d 535, 539 (1974) (emphasis added.) A person has no reasonable expectation of privacy in an item that is in plain view. Horton v. California, 496 U.S. 128, 133 (1990). A seizure following plain view is not the product of a search. Bell, supra, 62 Wis.2d at 540, 215 N.W.2d at 539.

It is a fundamental principal of 4th Amendment law that searches and seizures that are made inside a home

without a warrant are presumptively unreasonable. State v. Faust, 274 Wis.2d 183, 682N.W.2d 371.

Stewart was the lawful tenant and occupant of the upper duplex that was searched by the police and had been living there for about a year. It should be noted, therefore, that Stewart had standing the raise the suppression issue.

In State v. Angiolo, 186 Wis.2d 488, 520 N.W.2d 923 (Ct.App. 1993), the Wisconsin Court of Appeals held that four criteria must be met for the plain view doctrine to apply: (1) The officer must have a prior justification for being in the position from which the "plain view" discovery was made; (2) the evidence must be in plain view of the discovering officer; (3) the discovery must be inadvertent; and (4) the item seized, in itself or in itself with facts known to the officer, at the time of the seizure, provides probable cause to believe there is a connection between the evidence and criminal activity. 520 W.W. 2d at 929.

In Angiolo, the police lawfully questioned a suspect and happened to look into his nearby garage with the garage door open. 520 N.W.2d at 926. They observed a professional welding unit that they suspected was probably

stolen, even though they did not have any specific information.

The Court of Appeals held that the evidence had to be suppressed because the police had no basis or information to indicate that the welding unit was in fact stolen property. 520 N.W.2d at 930. The court held that the plain view doctrine does not permit the police to seize evidence without probable cause. Id. at 930-931. The mere possibility that the police thought that the property might be evidence did not justify the seizure without probable cause. Id. at 930.

Here, the State cannot meet two of the last four criteria. The police were in Stewart's residence to arrest him and seize evidence. Tranmmell-McClain admitted in her testimony that she was there to seize the bedding to corroborate the alleged victim's story and to obtain DNA. (51: 19-20) She intentionally went into other rooms in Stewart's residence to look for evidence and it was an intentional search and was not inadvertent. This factor, therefore, has not been satisfied.

Regarding the fourth factor, this factor is also not

satisfied. There is no connection between the bed sheets, a comforter and the alleged sexual assault in this case. It would be very speculative to assert that there is a connection. It would be possible for the police to guess that various bodily fluids had touched or fallen on the sheets or comforter and that there might be DNA in the fabric. But such an argument would be speculative and would not have be easily apparent and would be insufficient to support probable cause.

A final reason why the plain view doctrine does not apply here is that the police did not have a right to go into the bedrooms of Stewart's residence. An officer must have the right to be present where the plain view of the item occurred. State v. Bell, 62 Wis.2d 534, 540. Moreover, Stewart never consented to the police going down the hall and into the bedroom where the alleged victim's bed sheets and comforter were located. The trial court decided, without any legal authority, that the police could go into both bedrooms without Stewart's consent. (52: 36-37) This is an erroneous conclusion of law and should be revered.

B. STEWART SHOULD BE ALLOWED TO WITHDRAW HIS GUILTY PLEA SINCE THE COMMUNITY CARETAKER\ EMERGENCY DOCTRINE DOES NOT APPLY HERE.

The State argued in the trial court that the community caretaker—emergency doctrine applies to this case. The State argued that this case involved a valid exigency that did not require a warrant. State v. Ferguson, 629 N.W.2d 788, 792 (Ct. App. 2001).

The emergency doctrine has been defined in Wisconsin as follows:

> Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. State v. Bauer, 127 Wis.2d 401, 379 N.W.2d 895, 898 (Ct. App. 1985).

There is a two-step analysis for determining when the emergency doctrine justifies a warrantless search or seizure. First, the searching officer must be motivated by a perceived need to

render aid or assistance. Second, it must be found that a reasonable person under the circumstances would have thought an emergency existed. State v. Boggess, 115 Wis.2d 443, 340 N.W.2d 516, 521 (1983).

The State argued in this case that the police were concerned that, after Stewart was arrested, there would be no person available to care for his dog and that this issue justified the search. (24: 2-3) This argument has no merit.

The police called MADACC to come and care for the dog. There is no connection, however, between the need for assistance for the dog and the search that the police conducted and the taking of the bed sheets. There was no emergency regarding the bed sheets—only the dog. Therefore, the second factor of the emergency doctrine is not satisfied here.

Further, Trammel-McClain admitted in her testimony that she was there to seize the bedding to corroborate the alleged victim's story and to obtain possible DNA. (51: 19-20) State v. Bauer, however, makes it clear that the emergency doctrine exception only applies where there was no intent to search by the police. 379 N.W. 2d at 898. Therefore, this doctrine is inapplicable to this case.

Further, the police had arrested Stewart and there was

plenty of time for the police to obtain a search warrant before Stewart could have returned to his residence and destroyed of any evidence. Stewart could not, therefore, have disposed of any evidence. The community caretaker--emergency doctrine clearly is inapplicable to the search that occurred in this case.

CONCLUSION

For all the reasons set forth above, undersigned counsel respectfully requests that this court enter an order vacating the judgment of conviction and reversing the order denying the motion to suppress in this case and order that Stewart be allowed to withdraw his guilty plea.

Dated this 19th day of January, 2015.

Respectfully submitted,

_____

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CERTIFICATION

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 sec. 809.19(2)(a), and that contains, at a minimum:

1. a table of contents;
2. the findings or opinion of the trial 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 or fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that of 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 or persons, specifically including juveniles and parents of juveniles, with a notations that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Date: 1/19/2015 _____

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CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Date: January 19, 2015

_____
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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8) and (c) for a brief produced with a proportional font. The length of this brief is 14 pages and 3084 words.

Dated this 19th day of January, 2015.

_____
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