STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1969-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SANDRA D. NOREN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN WALWORTH COUNTY CIRCUIT COURT,
THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

Cases

Page

Other Authorities

STATE OF WISCONSIN

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

DISTRICT II

Case No. 2015AP1969-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SANDRA D. NOREN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN WALWORTH COUNTY CIRCUIT COURT,
THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented can be resolved by applying established legal principles to the facts; therefore, the State does not request either oral argument or publication.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Noren with one count of possession of narcotic drugs and one count of possession of drug paraphernalia (1; 4). When the police responded to a report of a possible overdose by Noren, one of the responding officers, Officer Nettesheim, attempted to determine the cause of the overdose. In so doing, he discovered a clear plastic baggie containing what appeared to be heroin inside Noren's purse located in a cabinet in Noren's bedroom (1:2).

According to the police report filed by Officer Nettesheim, after he responded to the scene of the reported overdose and while he was tending to Noren,

> her nephew Arthur Harris advised that she may have used heroin. This information was relayed to responding EMS units. EMS arrived on scene and tended to [Noren]. I responded to Noren's room and attempted to locate her identification and cause of the overdose. In a brown cabinet inside of Noren's room, I located Noren's purse. Inside of her purse, I observed a prescription pill bottle, with Noren's name on it, containing pills and a clear plastic baggie with a brown rock like substance, which through my training and experience, I believed to be heroin. I located a second bag inside of the cabinet that contained several prescription bottles and loose pills. One pill bottle contained approximately 20 large white oval shaped pills. One pill bottle contained approximately 15 small white round pills. One pill bottle contained two small blue/green round pills. On[e] pill bottle contained an assortment of pill types and shapes. Also inside the second bag was an approximately 3-4 in[ch] straw with a powder substance inside of the straw also located was a hollow pen shaft with both ends removed. Inside one of the pill bottle[s], I also located a second straw that was approximately 3-4 in[ches] long and had a powdery substance inside of it. The pill information was relayed to EMS along with the possible use of heroin.

(10:4-5). Subsequently, the rock like substance tested positive for heroin. The heroin and the pills were logged into evidence (10:5).

Noren filed a motion to suppress, seeking to exclude as evidence the drugs found by Officer Nettesheim that were in her purse in the cabinet (7). At the hearing on the motion to suppress, Officer Nettesheim testified that when he arrived at Noren's residence and was let in by Noren's nephew, he saw Noren laying on the floor "not responsive, turning blue in color" (23:13). At that point, Officer Nettesheim stated that he thought it was a "[p]ossible overdose," but because he was not certain, after EMS arrived he "conducted a search to find out the reason for the possible overdose" in Noren's bedroom, where he found the heroin and pills in a brown cabinet (23:15). Officer Nettesheim reiterated that he conducted the search "[t]o find out why she was overdosing" and that approximately a week prior he had been on the scene when Noren "was referred up for an emergency detention because of a pill overdose" (23:16). After searching for approximately five minutes, he located the suspected heroin and pills and then went directly to EMS to inform them about what he had found (23:17). The officer testified that his "sole motivation" when he conducted the search was "[t]o find out why she was overdosing, to relay it to EMS, so she could get better" (23:18).

On redirect examination, Officer Nettesheim testified further about why he searched to determine the cause of Noren's potential overdose:

> Q Officer, did you pass along the information of all of the substances you found to EMS?
>
> A Correct.
>
> Q You ever responded to potential overdose before?
>
> A Yes.

Q Do you know if telling EMS about drugs that you find is helpful to them?

A Absolutely.

Q You they told you that before?

A Them and medical staff.

Q Okay. You know if telling them about that sort of thing changes – potentially changes their course of treatment?

A Yes.

Q So you've searched around the area of a potential overdose before?

A Yes.

Q Has EMS every asked you to do that?

A I can't recall a specific incident.

Q Okay. Have they ever thanked you later for doing that?

A They've expressed that having additional information about what was taken is helpful and is definitely better than not having any information at all.

(23:26-27). The prosecutor asked Officer Nettesheim if at any time during this process he was "absolutely sure" that Noren was suffering from a heroin overdose and the officer replied that no, he was never a hundred percent sure that she was suffering from an overdose (23:30-31).

After hearing the testimony and argument, the circuit court found that the warrantless search of Noren's bedroom and purse was justified, concluding that the search for any remaining drugs was "reasonable for the officers in this case, because a reasonable person would search in the area that

would provide them an answer as to why this person is blue faced, lying on the kitchen floor" (23:43). The court further concluded that it was "reasonable to believe that EMS would want that information," that it was "reasonable to believe that . . . there were additional drugs present which were consumed by the person who was overdosing," and that "the scope in this case was limited to the emergency" because Officer Nettesheim searched only where it was "reasonable to believe that that's where drugs would be kept": in the bedroom (23:43-44). Therefore, the court found that "the search was justified under the emergency doctrine, and the police did what was necessary to try to abate that emergency" (23:44).

Noren entered a guilty plea to count one of possession of narcotic drugs and count two was dismissed and read-in (26:2, 7). The court adopted the joint recommendation of the parties and sentenced Noren to three years of probation and ninety days of jail time, with all but thirty days stayed and with Huber privileges (27:12-13; 14). The judgment of conviction was entered, finding Noren guilty of one count of possession of narcotic drugs (14). Noren appeals from the judgment of conviction (18).

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED NOREN'S MOTION TO SUPPRESS BECAUSE THE WARRANTLESS SEARCH OF NOREN'S BEDROOM FOR THE CAUSE OF HER POTENTIAL OVERDOSE WAS JUSTIFIED UNDER THE COMMUNITY CARETAKER OR, IN THE ALTERNATIVE, UNDER THE EMERGENCY RULE EXCEPTION TO THE WARRANT REQUIREMENT.

A. Relevant law and standard of review.

Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact which this court reviews under two different standards. A circuit court's findings of fact will be upheld unless they are clearly erroneous. *See State v. Hughes*, 2000 WI 24, 233 Wis. 2d 280, ¶ 15, 607 N.W.2d 621. This court then independently applies the law to those facts *de novo*. *Id.*

While both the state and federal constitutions express a preference for searches and seizures conducted pursuant to warrants, especially concerning searches inside private dwellings, exceptions to the warrant requirement have been well established in the law. *See generally State v. Milashoski*, 159 Wis. 2d 99, 111-12, 464 N.W.2d 21 (Ct. App. 1990), *aff'd* 163 Wis. 2d 72, 471 N.W.2d 42 (1991) (cataloguing exceptions).

One such exception recently discussed by the Wisconsin Supreme Court in *State v. Matalonis*, 2016 WI 7, ___ Wis. 2d ___, ___ N.W.2d ___ is the "community caretaker exception." In *Matalonis*, the supreme court reversed the court of appeals' decision invalidating the search of a house and a locked room and found "that 'a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and

seizures'" of a residence "if the search was conducted pursuant to a police officer's reasonable exercise of a bona fide community caretaker function." *Matalonis,* 2016 WI 7, ¶ 30 (quoting *State v. Pinkard*, 2010 WI 81, ¶¶ 14, 28-29, 327 Wis. 2d 346, 785 N.W.2d 592). The court must analyze the reasonableness of a residential search under the community caretaker doctrine using a three step test:

> "(1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of the home."

Matalonis, 2016 WI 7, ¶ 31 (citing *Pinkard*, 327 Wis. 2d 346, ¶ 29).

In *Matalonis*, the supreme court clarified that the court must determine what the officers' knowledge about the situation was "at the time they conducted the search, not after." *Matalonis,* 2016 WI 7, ¶ 35. Under the circumstances, the court had "no difficulty concluding that the officers in this case were engaged in a bona fide community caretaker function at the time they searched the house and the locked room" where they responded to a medical call and found a "beaten, bloody and 'highly intoxicated' man, injured to an extent sufficient to justify an ambulance ride to the hospital," and based on their observations of further blood and loud noises from within, as well as inconsistent stories about the events, they feared that further injured persons were inside the home. *Id.* ¶¶ 36-38. Once inside the home, "the officers were not searching for evidence, but for injured parties." *Id.* ¶ 41. Therefore, they were performing their community caretaker function when they searched the home because "[t]he evidence in this case sufficiently provides an objectively reasonable *basis* for the police to believe an injured individual needed their help" *Id.* ¶¶ 43, 49.

Another related and well-recognized exception to the warrant requirement, which was relied on in the circuit court's decision denying Noren's motion to suppress, is the emergency doctrine (23:44). "[N]either the fourth amendment to the United States Constitution nor the Wisconsin Constitution bars a governmental official from making a warrantless intrusion into a home when the official reasonably believes that a person within is in need of immediate aid or assistance." *State v. Boggess,* 115 Wis. 2d 443, 450, 340 N.W.2d 516 (1983); *see also Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978) ("[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency").

Wisconsin courts have cited with favor the following definition of the scope of the emergency doctrine:

> "Law enforcement officials 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. Kraimer, 99 Wis. 2d 306, 314, 298 N.W.2d 568 (1980), *cert. denied*, 451 U.S. 973 (1981) (emphasis added) (quoting Moscolo, The Emergency Exception to the Warrant Requirement Under the Fourth Amendment, 22 Buff. L. Rev. 419, 426 (1972)); *see also State v. Bauer*, 127 Wis. 2d 401, 407-08, 379 N.W.2d 895 (Ct. App. 1985). The element of reasonableness with regard to the emergency doctrine "is supplied by the compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection." *Kraimer*, 99 Wis. 2d at 315 (footnotes omitted).

In *State v. Pires*, 55 Wis. 2d 597, 604, 201 N.W.2d 153 (1972), the Wisconsin Supreme Court recognized that neither the Fourth Amendment nor the Wisconsin Constitution bars police officers from making warrantless entries and searches when they reasonably believe that a person is in distress and in need of immediate assistance. *Id.* at 604. The emergency doctrine applies where police conduct a search to ascertain the cause of a person's unconscious or semiconscious state in order to protect the person's health or to identify persons found in such a state. *La Fournier v. State*, 91 Wis. 2d 61, 71, 280 N.W.2d 746 (1979) (warrantless entry into home justified to assist victim of drug overdose). The Wisconsin Supreme Court has held that the emergency doctrine can, in the appropriate circumstances, apply to the search of a person's purse or wallet to assist in a medical emergency of a potential drug overdose. *See State v. Prober*, 98 Wis. 2d 345, 360-66, 297 N.W.2d 1 (1980), *reversed in part by State v. Weide,* 155 Wis. 2d 537, 455 N.W.2d 899 (1990) (overruling *Prober* not on medical emergency exception but on whether the search of a purse in an automobile was justified as an inventory search).

In *Prober*, the manager of a motel found the defendant unconscious on the bathroom floor and observed a "spoon and a plastic container with white powder in it" but, when the manager left to call police, the defendant regained consciousness and put the heroin and syringes into a purse in the trunk of his car. *Prober*, 98 Wis. 2d at 347. The police arrived and arrested the defendant for trespassing and noted he was incoherent at times and had needle marks on his arm. *Id.* The police conducted an "inventory search" of the defendant's car, and found the purse containing the heroin and syringes. *Id.* at 348-49. The circuit court denied the defendant's motion to suppress, and the court of appeals upheld the warrantless search under the emergency exception on the ground that a reasonable person "could believe that the defendant had overdosed on a drug, and might be in danger of losing his life" *Id*. at 350 (citing *State v. Prober*, 87 Wis. 2d 423, 435-36, 275

N.W.2d 123 (Ct. App. 1978)). The court of appeals further found that "the police officer had a right to open the purse in order to determine whether the defendant had injected something potentially fatal into his body." *Prober*, 87 Wis. 2d at 436.

In reversing the court of appeals, the supreme court found that unless the search was motivated by the need to act in the face of an emergency, the emergency doctrine exception does not apply and, because here the police officer testified that the reason for searching the purse was to inventory the contents of the car, the warrantless search of the purse was not covered by the emergency exception to the warrant requirement. *Prober*, 98 Wis. 2d at 366. The supreme court adopted a two-step analysis for determining when a warrantless search is justified under the emergency doctrine. Under this analysis, the exigency of the situation confronting the police is tested both objectively and subjectively. First, the searching officer must have been "motivated by a perceived need to render aid or assistance" and second, the court must also find that "a reasonable person under the circumstances would have thought an emergency existed." *Prober*, 98 Wis. 2d at 365. The subjective prong of this test "is a finding of fact," which will be upheld on review unless clearly erroneous. *State v. York* , 159 Wis. 2d 215, 220, 464 N.W.2d 36 (Ct. App. 1990). The objective prong is ultimately a question of law, subject to independent review. *Id.* at 221-22.

B. Officer Nettesheim was performing a community caretaker function when he searched Noren's bedroom for the cause of her potential overdose and therefore, the search was valid.

In its decision denying the suppression motion, the circuit court did not rely on the community caretaker exception because it determined that "one of the factors in a community caretaker is whether an automobile is involved" (23:36).

However, under the supreme court's February 2016 decision in *Matalonis*, the community caretaker exception clearly applies to the search of a private area in a residence when the police are acting in a "bona fide community caretaker function" and if "the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home" *Matalonis*, 2016 WI 7, ¶ 31.

In this case, the officers entered Noren's residence with consent (23:13), so the issue is not whether they had consent to enter the home but whether an exception to the warrant requirement allowed Officer Nettesheim to search her bedroom cabinet and purse. Here, as in *Matalonis*, where the court found that the police were performing their community caretaker function when they searched the home and locked room because "[t]he evidence in this case sufficiently provides an objectively reasonable *basis* for the police to believe an injured individual needed their help" *id.* ¶ 49, the continued search of Noren's home into her bedroom by Officer Nettesheim had an objectively reasonable basis: to help determine the cause of Noren's apparent overdose. Officer Nettesheim testified that his "sole motivation" when he conducted the search was "[t]o find out why she was overdosing, to relay it to EMS, so she could get better" (23:18). Like in *Matalonis*, where the officers conducting the search were looking for other potentially injured individuals, and not for evidence of a crime, here Officer Nettesheim was clearly not looking for evidence of a crime but instead had the sole motivation of looking for the cause of Noren being unconscious in order to provide assistance to her.

Further, the public interest in assisting Noren by finding out the cause of her apparent overdose, in order to relay this information to EMS to further assist her and try to save her life, far outweighs any intrusion on her privacy by entering her bedroom to search for the possible source of her dire condition.

Because Officer Nettesheim was acting in a bona fide community caretaker capacity and the public interest in assisting Noren outweighs her privacy interests, the search of her bedroom was valid under the community caretaker exception to the warrant requirement.

C. Alternatively, the circuit court correctly denied Noren's motion to suppress because Officer Nettesheim's search of Noren's bedroom and inside her purse was justified under the emergency exception to the warrant requirement.

For similar reasons as the community caretaker exception, the circuit court denied Noren's motion to suppress the evidence found in her bedroom and her purse under the medical emergency exception to the requirement for a search warrant. In *Prober*, the supreme court found that this doctrine applies

> in situations where police conduct searches to ascertain the cause of a person's unconscious or semiconscious state in order to protect the person's health or to identify persons found in such a state. The court of appeals similarly held that, in the medical emergency situation presented, "the police officer had a right to open the purse in order to determine whether the defendant had injected something potentially fatal into his body." *State v. Prober*, 87 Wis. 2d at 436, 275 N.W. 2d at 128.

Prober, 98 Wis. 2d at 360-61.

In this case, in its oral decision denying Noren's motion to suppress, the circuit court found that the analysis in *Prober* is "directly on point to this case," because it applies to "[o]pening a purse" (23:38). Therefore, the circuit court applied *Prober's* two-part analysis, first addressing the subjective test – whether the search was actually motivated by Officer Nettesheim's perceived need to render aid or assistance – finding that the subjective test was met, which was not disputed by Noren

(23:38). The circuit court found that the testimony of Officer Spotz and Nettesheim "was credible," and that the testimony established their subjective intent: "the reason for the search particularly of Officer Nettesheim, who conducted the search for the reason for the possible overdose was motivated by the need or perceived need to render aid or assistance to the defendant in this case" (23:38-39).

With respect to the second prong – whether a reasonable person under the circumstances would have thought an emergency existed – the circuit court rejected Noren's argument that a reasonable person would not believe that an emergency existed because "they already know that this may be a heroin overdose" and once "EMS arrives and is providing care to the person that needs the care, there's no longer an emergency" because "all you're going to do is find out things that were not consumed" (23:39-40). The circuit court found that "the flaw in [Noren's] argument is that you have to assume that overdosing people consume everything that is available to them, and I don't believe that's the case. In fact, in this situation, there was testimony that Ms. Noren had previously overdosed on pills, and there were pills strewn about her. So I think that's probably more of the normal circumstance than what you're attempting to argue" (23:42-43). Therefore, the circuit court found that a reasonable person would search the area including the bedroom and in a purse where the source of the potential overdose was likely to be found, in order to assist EMS in finding out why Noren was "blue faced, lying on the kitchen floor" (23:43).

The court continued:

> There was also testimony from Officer Nettesheim that he has told EMS in the past about what drugs he's found and has been told by both EMS and medical staff that that's been helpful. Specifically in this case, he actually showed the pills to the EMS. I think it's reasonable to believe that EMS would want that information, medical personnel would want that

> information, and that it's reasonable to believe that the – there are additional drugs present which were consumed by the person who was overdosing.
>
> I believe the scope in this case was limited to the emergency. Officer Nettesheim said he did a search of the bed, the nightstand, and the wardrobe. It wasn't like he was looking in . . . any other area of the house. . . . It's reasonable to believe that that's where drugs would be kept, it would be in a person's bedroom I believe. I believe that – therefore . . . the search was justified under the emergency doctrine, and the police did what was necessary to try to abate that emergency. For those reasons, I'll deny the motion.

(23:43-44).

The circuit court was correct. In her brief, Noren does not dispute that Officer Nettesheim's belief that she needed assistance motivated his search for the cause of her condition and therefore is only contesting the circuit court's finding that objectively, the search was reasonable (Noren's brief at 6). Noren's arguments that Officer Nettesheim's search of her bedroom to determine why she was unconscious was "unreasonable because there was not an immediate need to provide assistance" (Noren's brief at 8) is belied by the record. Officer Nettesheim testified that he did not have the medical training to determine definitively that Noren was suffering from a heroin overdose (23:15) and that his "sole motivation" when he searched her bedroom for the cause was "[t]o find out why she was overdosing, to relay it to EMS, so she could get better" (23:18). The circuit court found that "it is reasonable for the officers in this case [to search for the cause of the overdose] because a reasonable person would search in the area that would provide them an answer as to why this person is blue faced, lying on the kitchen floor" (23:43). Further, the circuit court found that the search was limited in scope to where a reasonable person would think they might find what caused Noren's condition: "it's reasonable to believe that that's where drugs would be kept, it would be in a person's bedroom"

(23:44). Therefore, the circuit court determined that the emergency was ongoing and that Officer Nettesheim acted as a reasonable person in searching in a logical place to try to determine why Noren was unconscious and to relay that information to EMS to assist them in their efforts to save her, and denied Noren's motion to suppress (23:44).

Under the objective test in *Prober*, Officer Nettesheim behaved as a reasonable person would when he searched Noren's bedroom and purse for the cause of her condition. The circuit court properly denied Noren's motion to suppress on the basis that the search was valid under the medical emergency doctrine.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's denial of Noren's suppression motion and the judgment of conviction.

Dated this 10th day of March, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@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 4,091 words.

Dated this 10th day of March, 2016.

_____

Anne C. Murphy
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 10th day of March, 2016.

_____

Anne C. Murphy
Assistant Attorney General