STATE OF WISCONSIN

C O U R T OF APPEALS

DISTRICT II

Case No. 2015AP1969-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SANDRA D. NOREN,

Defendant-Appellant.

On Appeal From the Judgment of Conviction Entered in the Walworth County Circuit Court, the Honorable David M. Reddy, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Neither the Emergency Doctrine, nor the Community Caretaker Exception to the Fourth Amendment's Warrant Requirement Justify Officer Nettesheim's Search of Ms. Noren's Purse and Bedroom Wardrobe.

A. The application of the emergency exception to the warrant requirement dissipated when emergency medical services were treating Ms. Noren and were aware that the likely cause of her condition was a heroin overdose.

In its contention that the record confirms that the search of Ms. Noren's wardrobe and purse was reasonable, the state merely reiterates facts and the circuit court's findings, while ignoring facts that are significant to this court's determination of whether the search was objectively reasonable. Without any legal analysis or citation to precedent, the state simply makes the conclusory assertion that "[u]der the objective test in *Prober*, Officer Nettesheim behaved as a reasonable person would have when he searched Noren's bedroom and purse for the cause of her condition." (State's Brief at 15).

The state does not attempt to respond to the arguments Ms. Noren presented at pages 8-14 of her brief-in-chief, which explained why under the totality of the circumstances, it was unreasonable for the officer to have believed that there was a need to provide immediate assistance, and that immediate intrusion into Ms. Noren's wardrobe and purse was necessary to provide that assistance. Nor does the state attempt to discuss the cases the Ms. Noren cited in support of her argument at pages 9-14 of her brief.

The state's recitation of a few facts and the circuit court's findings fail to explain *why* the search was objectively reasonable. Contrary to the state's assertion, the record does not belie Ms. Noren's contention that there was no immediate need to provide assistance and that searching was necessary to provide that assistance.

First, the state notes that Officer Nettesheim testified that he did not have adequate medical training to be able to definitively conclude that Ms. Noren's condition was the result of a heroin overdose. (State's Brief, at 14). It fails, however, to explain why his inability to determine definitively that it was a heroin overdose demonstrates that there was an immediate need to provide assistance requiring a search. It is worth emphasizing the following facts that were omitted from the state's discussion: (1) Neither Officer Nettesheim, nor any other officer was providing Ms. Noren any medical assistance at the time of the search. It was only *after* EMS was on the scene and attending to Ms. Noren that he began searching. No officer on scene initiated any search prior to the arrival of EMS. (23:11, 15, 17). Both Officer Nettesheim and EMS were aware that the likely cause of Ms. Noren's condition was a heroin overdose. (23:10, 29). When Officer Nettesheim located the items, Ms. Noren was already in the ambulance being prepared for transport to the hospital. (23:17, 29).

Moreover, nothing in the record indicates that EMS believed that something other than heroin was causing Ms. Noren's condition, or that it needed Officer Nettesheim locate the potential source of her medical condition in order to provide her medical care. Officer Nettesheim testified that he did not recall any incident in which EMS specifically asked him to search the area of a suspected overdose, and only knew that having some information was better than having

none. (23:27) Here, EMS had some information about the source of Ms. Noren's condition from the time it arrived. (23:10). Therefore, while Ms. Noren was still in need of medical attention, any emergency component requiring a search dissipated because EMS was attending to her and had sufficient information to provide her appropriate medical treatment.

The state next notes that Officer Nettesheim's "sole motivation" for searching the bedroom was to find out what was causing the overdose and to provide that information to EMS. (State's Brief at 14). As already argued, both Officer Nettesheim and EMS knew that it was likely that Ms. Noren had ingested heroin, therefore the search was unnecessary because it was not going to reveal any new information to Moreover, Officer Nettesheim's subjective motivation for searching is not relevant to the objective portion of the two-part test that must be met for the emergency doctrine to justify a warrantless search. *See* ***State v. Prober***, 98 Wis. 2d 345, 365, 297 N.W.2d 1 (1980); ***State v. Boggess***, 115 Wis. 2d 449, 452, 340 N.W.2d 516 (1983). (The officer must have had a reasonable belief that under the circumstances there was an immediate need to assist a person for an actual or threatened injury.).

Finally, the state notes that the circuit court found that the search was reasonable because the emergency was ongoing and the bedroom was a logical place to look for drugs. (State's Brief at 14-15). The circuit court's findings are not binding on this court because, as the parties agree, the objective portion of the emergency doctrine test is reviewed de novo. ***State v. Larsen***, 2007 WI App 147, ¶ 14, 302 Wis. 2d 718, 736 N.W. 2d 211; (State's Brief at 10).

As already argued above and in Ms. Noren's brief-in-chief, it was unreasonable in this case for the officer to search because a search would not have provided any additional information than what the officers and EMS already had: Ms. Noren had likely taken heroin. There was no ambiguity in the information and no additional information was requested by EMS. The mere fact that Ms. Noren was in continued need of medical treatment did not mean that a search was needed to abate an emergency, and therefore the ongoing need for medical attention did not justify the search.

This point is illustrated in ***State v. Pires***, 55 Wis. 2d 597, 201 N.W.2d 153 (1972). There, an officer entered a home when there was report that possibly a deceased infant and an unconscious woman. ***Id***. A group of officers responded to the home, and despite knowing that the individuals were no longer in the home, conducted a search. ***Id***. at 601. The Court suppressed the evidence because the emergency dissipated. ***Id***. at 606-607. In that case, the victims may have very well needed ongoing medical treatment, but that need did not justify the search. Similarly, in the instant case, although Ms. Noren needed continued medical care, there was no immediate need to search because the EMS had all the information available, and no additional information was needed. Would a search then be permitted anytime there is a medical emergency, even when the likely cause of the medical condition is known and no additional information is requested, in order for the police to confirm it?

The state did not address the whole of Ms. Noren's argument in relation to the scope of the search. However, by noting the circuit court's finding that the bedroom was a logical place to believe drugs could be kept, the state seems to suggest that this court expand the emergency doctrine to allow for broad searches. (23:14-15). Adopting the circuit

court's logic that the scope here was reasonable because the bedroom can be a place to store drugs, would justify a broad search without limitation because drugs can be kept in any container and in any part of a home. Moreover, adopting the circuit court's conclusion would permit police to search anytime there is a medical emergency, even if the likely cause of that emergency is known. Doing so would contravene what is supposed to be a well-delineated, and limited scope exception to the warrant requirement. ***Prober***, 98 Wis. 2d at 362; *citing* ***Pires***, 55, Wis. 2d at 606; ***LaFournier v. State***, 91 Wis.2d 61, 68, 280 N.W.2d 746 (1979).

B. Public interest in providing assistance to individuals experiencing a medical emergency does not outweigh the intrusion upon Ms. Noren's privacy because officers would not have been able to gather any additional information.

For the first time on appeal the state claims that the community caretaker exception to the Fourth Amendment justifies the search in this case.[1] (State's Brief at 10-12). The state's repackaging of the search under the community caretaker exception, however, yields the same result as examining it under the emergency doctrine: the search was overly broad and not objectively reasonable as it would not have provided EMS with any more information or certainty than it already had regarding the source of Ms. Noren's overdose.

[1] The state's response to the defendant's motion to suppress (8) is in relation to another case in Walworth County that the circuit court incorporated into this case. (23:32). The state's brief in that case did not argue that the community caretaker exception applied. Nor did it argue as such at the hearing on January 6, 2015.

To support its assertion that the search in this case was justified under the community caretaker exception to the warrant requirement, the state relies on ***State v. Matalonis***, 2016 WI 7, 366 Wis. 2d 443 , 875 N.W.2d 567. The state concludes that Officer Nettesheim was acting in a bona fide community caretaker role because, like the officers in ***Matalonis***, he had an "objectively reasonable basis for believing an injured individual needed their help." ***Id***. ¶49, (State's Brief at 11). It asserts that searching Ms. Noren's bedroom wardrobe and purse was necessary to "help determine the cause of Noren's apparent overdose[,]" and to then relay that information to EMS." (State's Brief at 11). It seems to conclude that Officer Nettersheim was acting in a bona fide community caretaker role because he was not looking for evidence, "but instead had the sole motivation of looking for the cause of [Ms.] Noren being unconscious[.]" (State's Brief at 11).

The state's analysis of whether Officer Nettesheim was exercising a bona fide community caretaker function fails to recognize that the officer's motivation is not the driving force for determining whether there was an *objectively* reasonable basis to believe someone was in need of assistance. Moreover, the state fails to consider and address the totality of the circumstances, which is the test by which this court determines whether the need to provide assistance was objectively reasonable. ***State v. Garcia***, 2013 WI 15, ¶17, 345 Wis. 488, 826 N.W.2d 87. Accordingly, whether or not Officer Nettesheim's search was an exercise of a bona fide community care function taker rests on whether or not its belief that Ms. Noren was in need of assistance was *objectively* reasonable under the circumstances. ***Garcia***, 345 Wis. 488, ¶ 17. (emphasis added).

Absent from the state's analysis, but critical to this court's determination, is a discussion of all of the facts and circumstances known to Officer Nettesheim at the time of the search. Therefore, it is worth again emphasizing the following facts:

1) Mr. Harris, who lived with Ms. Noren, informed the police upon their arrival that he believed that Ms. Noren was suffering from a heroin overdose. (23:10, 29). Mr. Harris told officers that he had observed Ms. Noren snort heroin, that she takes prescriptions for depression and anxiety, and that she had no other medical conditions. (10:S1:1)[2].

2) The search of Ms. Noren's bedroom wardrobe and purse did not start until *after* EMS arrived. (23:11, 15, 17); (10:S2:1).[3]

3) EMS was told upon their arrival that Ms. Noren had likely taken heroin. (10:S2:1).

4) Nothing in the record indicates that EMS did not think it was heroin, or that it needed any further information to provide treatment.

5) Officer Nettesheim knew Ms. Noren as he had responded to her for an overdose on a previous occasion. (23:18).

6) Officer Nettesheim could not confirm that what the substance he found was or what the pills were until he took them back to the station. (23:24).

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[2] Officer Spotz's report at 1.

[3] Officer Nettesheim's report at 1.

These facts demonstrate that there was not an objectively reasonable basis to believe that searching the bedroom was *necessary* to assisting Ms. Noren. It is notable that not one officer on scene began searching until after EMS arrived. This is likely because they were provided sufficiently helpful information about what she took, why it was believed she took heroin, and other medical information. There is no indication that EMS expressed concern that her condition was inconsistent with the information provided. There were no pills, drugs, other paraphernalia found in the kitchen where Ms. Noren was found. Finding such items near the person would be a strong indicator that is what the person consumed. Here, however, the items were located in a different room, in a closed wardrobe and purse; thereby providing neither the EMS nor Officer Nettesheim with any assurance or certainty about what Ms. Noren consumed.

Accordingly, under the totality of the circumstances, it was not objectively reasonable to believe that the search was necessary to assisting Ms. Noren because doing so was not going to reveal anything that was not already known at the time. Therefore, Officer Nettesheim's search was not an exercise of a community caretaker function.

Finally, the state asserts that the public's interest in finding the cause of Ms. Noren's "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." (State's Brief at 11). Determination of whether the public's interest outweighs the intrusion in this case requires more than just a mere conclusory statement. Rather, there is a balancing test that considers the following:

> (1)[T]he degree of the public interest and the exigency of the situation; (2) the attendant circumstances

> surrounding the search, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Matalonis, 366 Wis. 2d 443, ¶58 (***Garcia***, 345 Wis. 488, ¶15).

Most significant in this case is the degree of exigency and the availability, feasibility, and effectiveness of alternatives to the intrusion. As already argued, the exigency in this case is minimal because EMS was already on the scene and attending to Ms. Noren at the time of the search. There is no evidence that EMS was concerned that it was something other than a heroin overdose causing Ms. Noren's condition, thereby requiring a search for additional information. Likewise, there is no indication that her medical treatment was being impeded because EMS did not have any physical evidence about what she may have taken.

To the contrary, as much information as could be given had already been provided to both police and EMS: Ms. Noren's roommate believed it was heroin, he had seen her use it on other occasions, she had prescriptions for depression and anxiety and had no other medical conditions. (23:10, 29); (10:S1:1). Moreover, the search would not provide any additional information than what was already available.

While there is a public interest in saving people from overdosing, it does not outweigh the significant intrusion in this case because the exigency was minimal, and the alternatives to the significant intrusion such as having received all of the background information from Mr. Harris, had been just as effective in providing Ms. Noren with assistance.

The state's attempt to sell the search by repackaging it under the community caretaker exception fails because underneath the new wrapping is the same facts that demonstrate that the need to search in order to provide assistance was objectively unreasonable when all information was readily available, Ms. Noren was being treated, and nothing more could be gained from searching. Therefore, the search of the bedroom wardrobe and purse was illegal and the fruit of that search must be suppressed. ***Wong Sun v. United States***, 371 U.S. 471, (1963).

CONCLUSION

For the reasons argued above and in her brief-in-chief, Ms. Noren respectfully requests that this court reverse the decision of the circuit court and suppress the evidence obtained as a result of the warrantless search.

Dated this 19th day of April, 2016.

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 2,644 words.

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 19th day of April, 2016.

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