STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal Case No. 2015 AP 001978-CR
Pierce County Case Number 2014CM000062

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. DURHAM,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

AN APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN THE PIERCE COUNTY CIRCUIT COURT,
THE HONORABLE JOSEPH D. BOLES PRESIDING

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STATEMENT OF THE ISSUES

I. **DOES THE COMMUNITY CARETAKER EXCEPTION TO THE WARRANT REQUIREMENT APPLY IN THIS CASE?**

The Circuit Court answered yes.

II. **DOES THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT APPLY IN THIS CASE?**

The Circuit Court answered yes.

III. **IS THE PATTERN JURY INSTRUCTION FOR RESISTING AN OFFICER UNCONSTITUTIONAL?**

The Circuit Court answered no.

IV. **WAS DURHAM ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON COUNT 2?**

The Circuit Court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. The case may be resolved by applying well-established legal principles to the facts of this case.

ARGUMENT

I. THE COMMUNITY CARETAKER EXCEPTION TO THE WARRANT REQUIREMENT APPLIES IN THIS CASE

For clarity, the State restates that the Prescott Police Department's entry into Durham's home was a warrantless Fourth Amendment search.

The controlling case on the community caretaker exception to the warrant requirement is *State v. Pinkard*, 2010 WI 81, 327 Wis.2d 346, 785 N.W.2d 592 (Wisconsin Supreme Court, 2010), approving *State v. Kramer*, 2009 WI 14, 315 Wis.2d 8, 759 N.W.2d 598 (Wisconsin Supreme Court, 2009), and providing the following three-part test in deciding whether the community caretaker doctrine applies at ¶ 29:

> *(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 a home*

The third part of that test is itself the following four-part test

> *(1) the 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.*

Ibid. at ¶ 42 quoting *Kramer* at ¶ 41, itself quoting *Kelsey C.R.*, 243 Wis.2d 422, ¶ 36, 626 N.W.2d 777 (Wisconsin Supreme Court, 2001).

In *Pinkard* a tipster had called the authorities to say that there was a pile of drugs and people unconscious next to those drugs in an apartment. On foot of that report the officers went to the apartment and, after announcing their

presence and waiting 30 to 45 seconds, let themselves into the apartment to check on the safety of the occupants (*Ibid*. at ¶ 4).

It is noteworthy that, in *Pinkard*, the officers were already in the apartment before they found the drugs and unconscious people, which corroborated the tipster's information and subsequently lead to Pinkard's arrest. The *Pinkard* court, therefore, held that the uncorroborated tip of an informant of an unconscious person was sufficient to allow officers to enter the apartment in their community caretaker function.

Durham now argues that the police had "*no evidence that any person inside Durham's house needed help*" (Appellant's brief pg. 15). This entirely ignores the original reason for the police's presence: the telephone call to dispatch made by Conroy, the next-door neighbor, in which she reported loud banging and yelling and the walls shaking (R.45:6-7; Appellant's appendix pg. 106-107). Conroy may not have seen a violent crime occurring, but she certainly heard it and reported it.

These facts are distinguished from *State v. Maddix*, 348 Wis.2d 179, 831 N.W.2d 778, 2013 WI App 64 (Court of Appeals, 2013), which Durham cites in support. In *Maddix* officers also responded to an apartment based on a report of screaming, which they also heard. The difference in *Maddix*, however, was that the officers then forced entry through a locked door (*Ibid*. at ¶ 4), had a fifteen to twenty minute conversation with the victim (*Ibid*. at ¶ 6), conferred for a further ten minutes (*Ibid*. at ¶ 7), performed a protective "sweep" lasting ten minutes (*Ibid*. at ¶ 7), and then, five minutes after the "sweep", checked another door and found drugs ((*Ibid*. at ¶ 8).

The total time elapsed in *Maddix* was, therefore, forty-five minutes after a forced entry through a locked door before the police carried out a

nonconsensual search (*Ibid*. at ¶ 7) and it was that subsequent search and not the police's initial entry, which the court in *Maddix* felt was not within the remit of their community caretaker function (*Ibid*. at ¶ 28-30). *Maddix* is of no guidance here.

Neither is *State v. Ultsch*, 331 Wis.2d 242, 793 N.W.2d 505, 2011 WI App 17 (Court of Appeals, 2010), another case in Durham's matrix[1] (Appellant's brief pg. 15). *Ultsch* is of no assistance in this matter because *Ultsch* was decided on its own facts and the community caretaker doctrine was held rightly not to apply.

In this case that the officers did not even make it up the flight of stairs next to the door before they were accosted by Durham (R.45:12; Appellant's appendix pg. 112). The intrusion in Durham's case was minimal compared with that in *Maddix* and *Ultsch*, both because no door was forced, the stay was shorted and the penetration into the house much shallow than in those cases. Accordingly, the officers were still carrying out their community caretaker function.

Finally, the State notes that Officer Neely may have also have thought that he was investigating a crime when he entered this house (R.45:176; Appellant's appendix pg. 176). However, this fact is of no concern, as an enduring suspicion is nevertheless acceptable under *Pinkard*, which:

> *rejected the argument that Cady's statement that community caretaker functions be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," Cady, 413 U.S. at 441, 93 S.Ct. 2523, means "that if the police officer has any subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function," Kramer, 315 Wis.2d 414, ¶ 30, 759 N.W.2d 598.11 [and instead] concluded that [a] court may consider an officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker; however, if the court*

[1] Durham also cites *State v. Matalonis*, 2015 WI App 13 in that same matrix but, as it is unpublished, the State does not propose to treat of it

> *concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions.*

Ibid. at ¶ 31 and *State v. Garcia*, 345 Wis.2d 488, 826 N.W.2d 87, 2013 WI 15 (Wisconsin Supreme Court, 2013), which stated (at ¶ 19):

> *In light of "the multifaceted nature of police work," in the totality of the circumstances, the officers' subjective intent does not invalidate an otherwise reasonable exercise of the community caretaker function*

That is, law enforcement do not have to turn off their innate suspicions merely because they are also attempting to render aid.

II. THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT APPLIES IN THIS CASE

The starting point for the exigent circumstances analysis is *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 137, 163 L.Ed.2d 639 (1980), in which the Court emphasized that law enforcement cannot enter a residence to make a routine felony arrest (Ibid. at pg. 603 and pg. 1388). The court, in so holding, however, was at pains to make clear that they were treating the case "*as involving routine arrests in which there was ample time to obtain a warrant*", so that there was "*no occasion to consider the sort of emergency or dangerous situation described in our cases as 'exigent circumstances', that would justify a warrantless entry into a home*".

Implicit in that holding, however, is the understanding that there must exist "emergency or dangerous situations", which would justify a warrantless entry. This exigent circumstances exception is best described in an oft-quoted opinion in *Wayne v. United States*, 318 F.2d 205 (D.C. Circuit, 1963) cited with approval by the United States Supreme Court in *Brigham*

City v. Stuart, 547 U.S. 398, 126 S.Ct. 943, 64 L.Ed. 2d. 650 (Supreme Court, 2006), in which the court stated that:

> *[The] business of policemen and fireman is to act, not to speculate or mediate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process.*

When the judicial process does calmly deliberate the existence of an emergency, the list of factors commonly cited (the so-called "*Dorman* factors") were espoused in *Dorman v. United States*, 435 F.2d 385 (D.C. Circuit 1970) in which the court said that, in determining the existence of exigent circumstances, consideration ought to be had to:

- the gravity of the offense,
- the possibility of the subject being armed,
- the existence or otherwise of "reasonably trustworthy information" corroborating the existing probable cause,
- the likelihood of the presence of the subject,
- the possibility of the escape of the subject if the police do not act,
- the forcibleness or otherwise of the entry, and
- the time of day, at which the entry occurs.

Dorman was subsequently mentioned (but not universally adopted or approved of) by the U.S. Supreme Court in *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.E.2d 732 (1984). The court in *Welsh* declined to approval all the factors given in Dorman and instead primarily focused on the nature, that is the seriousness, of the offense. *Welsh* was itself revisited by the U.S. Supreme Court in *Illinois v. McArthur*, 531 U.S. 326, 121 S.Ct

946, 48 L.Ed.2d 838 (2001), where the fact that the offense was a "jail-able" offense was held to be sufficiently serious to justify the police's actions.

The principal Wisconsin case on this question is *State v. Richter*, 2000 WI 58, 235 Wis. 2d 524, 612 N.W.2d 29, in which a Marinette County sheriff's deputy was informed by a victim of a burglary that she had seen the burglar enter a nearby trailer. Based on that information, the deputy approached, looked into and subsequently entered that second trailer. The deputy found no burglar but did find marijuana, which Richter was subsequently charged with possessing.

Holding that the test is an objective one (what a reasonable police officer would reasonably believe under the circumstances) the *Richter* court applied the exigent circumstances exception, stating (at ¶ 29, quoting *State v. Smith*, 131 Wis.2d 220, 228, 388 N.W.2d 601 (Wisconsin Supreme Court, 1986), which has since been abrogated) that:

> *[t]here are four well-recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a home: 1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee. The State bears the burden of proving the existence of exigent circumstances.*
>
> (citations omitted)

In Durham's case, the second of these *Richter* exigent circumstances (the threat to the suspect or others) exists. Given what the officers knew, (that this was a "possible domestic") they were entitled, if not obliged, to assume the worst. They knew that they were, at the minimum, investigating an offense, for which an arrest was not merely possible but mandated under Wis. Stat. § 968.075 and, therefore, the officers' decisions and judgments in the face of the ambiguity, which they were encountering, fall squarely

within the language of *Richter*, when the court addresses a similar ambiguity for the officers in that case, stating (at ¶ 40)

> *[…] This expects too much and puts too much at risk. In the course of investigating crimes in progress and pursuing fleeing suspects, police officers are often called upon to make judgments based upon incomplete information. The exigency at issue here is the threat to physical safety.*
>
> *To require a police officer in this situation to have affirmative evidence […] before acting to protect the safety of others is arbitrary and unrealistic and unreasonably handicaps the officer in the performance of one of his core responsibilities.*

Additionally, the facts in this case are closely analogous to those in *State v. Mielke*, 257 Wis.2d 876, 653 N.W.2d 316, 2002 WI App 251 (Court of Appeal, 2002). In that case, like here, a possible domestic disturbance was reported. Unlike in this case, however, upon the police's arrival, the victim of that assault specifically denied that anything had taken place (*Ibid*. at ¶ 3). Despite that denial, which ordinarily would serve to terminate the existence of any exigent circumstances, the court held that the officer in that case still had a reason to prevent the door from closing (*Ibid*. at ¶ 3), based on that officer's knowledge of the parties involved and her observations of the victim in that case. There is no such denial by anyone here, which might serve to terminate the police's involvement and they, accordingly, continued their investigation.

Finally, the State notes that the fact that the officer took steps to protect themselves by turning of their lights and sirens in order to conceal their approach (R:45:24-26; Appellant's appendix pp. 124-126) does not serve to invalidate their primary purpose in going to the residence. Officer Neely testified that a silent approach to a domestic is done in order to prevent the situation from getting worse, because sometimes the perpetrator gets more violent when the officers are there (R:45:75; Appellant's appendix pg. 75).

In the same way that firefighters might approach a house fire a certain way, in order to prevent a backdraft and a worsening of the conflagration, police officers are also permitted to take precautions in their handling of the public and, indeed, it would be extremely unwise to turn a blind eye to a known danger in these circumstances.

III. THE PATTERN JURY INSTRUCTION FOR RESISTING AN OFFICER IS CONSTITUTIONAL

The pattern jury instruction, which was given to the jury in this case, reads as follows in pertinent part:

> *To resist an officer means to oppose the officer by force or threat of force. The resistance must be directed to the officers personally.*

(R:46B:443; lines 4-7).

Durham argues that this instruction, as given, allows two theories of prosecution, as it charges one offense with multiple modes of commission, *viz.* resistance by force or resistance by threat of force, contrary to §§ 1, 5 & 7 Wis. Const. and *State v. Derango*, 236 Wis.2d 721, 613 N.W.2d 833, 2000 WI 89 (Wisconsin Supreme Court, 2000).

Durham accedes that resisting an officer is not the only offense involving this force or threat of force language and that, for those other offenses, that language is to be read in the disjunctive, allowing a single element of a single offense. He, however, offers no reason to deviate from that approach for this crime however.

Durham argues that, when sliced finely enough, each piece of the evidence, when taken in isolation, is insufficient to convict him. He then goes further and determines that the whole is less than the sum of its parts and, therefore, that the verdict in his case ought to be set aside.

To take Durham's example, he argues, that as none of stating "what the fuck" or "fuck you" nor flexing like a weightlifter nor fleeing up the stairs nor lunging at the officers is by itself sufficient to constitute resisting, that these acts cannot be resisting when they happened simultaneously or over a short period of time.

This incremental approach is wrongheaded, leading Durham astray into a Ship of Theseus[2]-esque paradox. The better analysis was performed by the trial court in denying Durham's request for a modification of the pattern instruction, however, when it stated that:

> *I do think it is a course of conduct that's – that is very short-lived that could contain both*

(R:46B:425; lines 7-9) and

> *On the landing, arguably the lunge, followed by the tasing, followed by the flight up the stairway away from the officers, followed by the tackling and the second tasing, I think that's all, in my view, one course of events, one continuous course of events that isn't really separated into two separate ones.*

(R:46B:426; lines 3-8).

When the evidence is taken in this holistic sense, it is apparent that everything that happened from when the officers encountered Durham until he was in handcuffs sixty seconds or so later are what constitute the elements of his crime.

IV. DURHAM WAS NOT ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON COUNT 2

Durham argues that he should have been granted judgment *non obstante veredicto* under Wis. Stat. § 805.14(5)(b) and *State v. Poellinger*, 153

[2] If you start with one ship and incrementally replace every plank on that ship over time, then, do you have a different ship at the end or is it the same ship?

Wis.2d 493, 451 N.W.2d 752 (Wisconsin Supreme Court, 1990), which states that:

> *[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.*

Accordingly, the question is, if the facts are resolved in such a manner as to be most favorable to the State and then assumed to be true, whether those facts are legally sufficient to permit recovery. This is necessary because the court, particularly the appeal court, should not weigh evidence or assess credibility.

Clearly the facts here are sufficient to sustain the verdict. Durham tacitly acknowledges in his brief (Appellant's brief pg. 23) that "*[wrestling] to get away once on the second floor*" could be the basis for a resisting charge by itself. Considering this to be the case and even if none of his other acts could possibly form the basis of such a charge, then the jury would have determined that and returned a unanimous verdict with respect to that "wrestling" only.

CONCLUSION

The officers were permitted to enter in Durham's house under both the community caretaker doctrine and the exigent circumstances exception.

At trial, the evidence and instructions given to the jury were appropriate and sufficient to allow the jury properly to conclude that Durham had committed the crime of resisting an officer.

The appeal should be denied.

Dated January 4th, 2016.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font.

The length of this brief is 2,852 words.

Dated January 4th, 2016.

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CERTIFICATION OF COMPLIANCE

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. § 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 January 4th, 2016.

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