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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No.: 16 AP 490 CR

JOHN D. MYER,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
NOVEMBER 30, 2015 IN THE CIRCUIT COURT
FOR DANE COUNTY, BRANCH II,
THE HON. JOSANN M. REYNOLDS PRESIDING.

Respectfully submitted,

JOHN D. MYER,
Defendant-Appellant

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ARGUMENT

I. THE SEIZURE OF MYER WAS NOT JUSTIFIED UNDER THE COMMUNITY CARETAKER THEORY.

The State has conceded that Myer was seized. Thus, the parties agree that there needs to be an exception to the warrant requirement under the Fourth Amendment to the United States Constitution for this seizure to be justified. State's brief pp.7;9. The remaining two issues for this Court to review are whether the police conduct here was "bona fide community caretaker activity" "and, if so, whether the public need and interest outweigh the intrusion upon the privacy" of Myer. *See:* ***State v. Kramer***, 315 Wis. 2d 414, ¶21, 759 N.W.2d 598 (2009), quoting ***State v. Anderson***, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct.App.1987) (***Anderson I***). As the Wisconsin Supreme Court noted, these two issues can be also viewed as whether police exercised a bona fide community caretaker function and, if so, whether it was conducted in a constitutionally reasonable manner. *See:* ***State v. Matalonis***, 366 Wis. 2d 443, ¶33, 875 N.W.2d 567 (2016).

A. Officer Wilke's conduct was not in pursuit of a bona fide community caretaker activity.

The question for this Court is whether this officer's actions were "totally divorced from the detection, investigation, or

acquisition of evidence relating to the violation of a criminal statute." *See:* ***State v. Gracia,*** 345 Wis. 2d 488, ¶16, 826 N.W.2d 87 (2013), quoting ***Cady v. Dombrowski***, 413 U.S. 433 (1973). Law enforcement motives may co-exist in the framework of a legitimate community caretaker seizure, but the facts elicited both through stipulation at the first motion hearing and to which the officer testified at the second are simple. The discrete issue is whether an officer can open the door of a parked running car to see if an occupant is sleeping or having a medical emergency without first trying to announce the officer's presence and attempting to awaken the occupant.

There were two motion hearings in this case. In the first, the defense and State stipulated to certain facts, and the Court made a decision based upon those facts alone. No testimony was taken at that hearing. (31) The defense later moved for reconsideration of the court's ruling, and an evidentiary hearing was held where testimony was taken to supplement the record as to the officer's motivation. (32)

One of those facts stipulated to in the first hearing was that "An individual (Myer) appeared to be asleep in the front seat of the vehicle." (14:2)(31:5-7) The other facts are that "Officer Wilke

opened the vehicle door and Mr. Myer woke up, as he had been leaning on the door and fell over as it opened." (14:2)(31:5-7) Furthermore, the facts in the original motion to which both parties stipulated included the fact that Officer Wilke "could not have been motivated by a desire to help because he had no reason to believe Mr. Myer needed help." (14:2-3)(31) The State's brief fails to respond to Myer's argument that those facts must also be considered in determining whether this was a bona fide community caretaker function and failed to respond to the notion that there is no intent to assist when the intent is simply to wake someone up. Based solely upon the initial stipulated facts, there could be no finding that Officer Wilke was trying to help, as the parties agreed Myer simply appeared to be sleeping. Moreover, an officer does not act with the intent to help an individual by waking that person up by opening the car door upon which the individual is lying and causing him to fall over.

In the second motion hearing, Officer Wilke explained some other reasons for a person's head to be back in a car—such as a medical emergency. In that hearing, Officer Wilke stated other possibilities for someone to be unconscious in a car. It is for this Court to decide whether police need more than mere speculation of a

medical problem to make a warrantless entry into a vehicle where a person looks to be doing nothing more than sleeping. The State's brief curiously fails to even mention one fact from the first hearing. That brief does not attempt to argue that this Court should not consider the facts from the first hearing to which the parties stipulated, and upon which the trial court relied. The trial court denied the suppression motion based upon the stipulated facts first and then denied the motion again after the record was supplemented at the second hearing. The State's failure to respond to Myer's argument in the first brief that the stipulated facts belie any true community caretaker intent, even when considered with the testimony taken later, should be deemed a concession. [1]

The State does argue that, based upon Officer Wilke's testimony that Myer was unconscious in a parked vehicle for three to four minutes, it was possible that Myer could be deprived of oxygen and be dying or at risk of brain damage. The State notes the officer had dealt with narcotics overdoses and recognized the need for immediate action if Myer turned out to not be breathing. State's brief pp.9-10. The problem is that even if the stipulated facts that Officer

[1] *See:* ***Charolais Breeding Ranches, Ltd., v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct.App.1979), citing ***State ex. rel. Blank v. Gramling***, 219 Wis. 196, 262 N.W. 614, 615 (1935).

Wilke thought Myer appeared to be sleeping are not considered at all, Officer Wilke's own testimony was that it was only a possibility that Myer could have overdosed. He admitted Myer could have just been sleeping. (32:8)

Importantly, Officer Wilke had no specific reason to believe that this was anything more than a sleeping individual. Furthermore, when asked why he did not just knock and wait for a response from Myer, Officer Wilke said "I tried to get control of the vehicle and because I want that vehicle shut off." (32:9) That is an admission that the intent was to control the situation and shut the car off—not to investigate whether Myer overdosed. (32:9)[2] The fact the officer knocked only at the same time he opened the door when he admitted he could have waited for a response belies any true intent to help. (31)(14)(32) This testimony of the officer at the second evidentiary hearing on this issue is as follows:

> Q. And you stated here that you had no indication that this was an overdose of a narcotic such as you've described, right?
>
> A. I didn't know what it was at that point.

---

[2] There was an indication the officer was investigating because there was a sign prohibiting vehicles from parking in the lot after hours. The initial stipulated fact was that no signs prohibited vehicles from parking in this lot after hours, but the officer then stated at the second hearing there was a sign. He admitted in cross-examination he did not see that sign though until some time after this arrest. (31)(32:8-9) What he observed after the arrest is irrelevant.

> Q. It could have just been someone sleeping?
>
> A. As I said, yes, it could have been, but I don't know that until I make contact.
>
> Q. And you could have made contact, could you not, by knocking on the window and waiting for the person to respond to that knock?
>
> A. I could have stood there and waited, yes.
>
> Q. And even a short period of waiting would have told you whether that person responded to your knock or did not respond to your knock?
>
> A. Possibly.

(32:11) Notably, those facts are not addressed by the State even after being argued in the original defense brief, and the State's brief does not attach page eleven of the transcript from the motion hearing held on August 15, 2015 to the appendix given to this Court. The missing pages (11 and 12) from the State's appendix will be appended to this brief.

In ***State v. Ultsch,*** 331 Wis. 2d 242, 793 N.W.2d 505 (Ct.App.2010), the Court of Appeals held that the police did not have an objectively reasonable belief that Ultsch was in need of assistance. They knew her car had been in an accident, but the damage was minimal. No one told the police she was in a vulnerable position, and they were told she was possibly sleeping. They still entered her residence on a community caretaker theory. The Court of Appeals reversed the trial court finding that this was a bona fide

community caretaker function. Similarly, in the case at bar, Myer was apparently sleeping. At most there was a possibility of an overdose or a medical problem, but there was no more reason to believe those things were occurring than the obvious conclusion one draws when seeing a person laying back with his eyes closed—he was sleeping. There was no objectively reasonable belief he needed assistance.

The State also failed to address Myer's argument in his first brief that the fact this officer opened Myer's car door, causing the same person the officer was supposedly concerned about to fall partially out of the car, belies any true desire to help. Myer also noted this was very different from ***Kramer,*** where there was a car parked on the side of the road with its hazards on. There were no hazards on in the case at bar, the car was lawfully parked, and even the officer admitted to the fact the occupant (Myer) appeared to be asleep. Again, the failure to respond to the argument about the opening of the car door showing that the true intent was not to help and to the argument distinguishing this case from ***Kramer*** is yet another concession from the State. *See:* ***Charolais Breeding Ranches, Ltd., supra,*** citing ***State ex. rel. Blank, supra***.

B. The public need and interest did not outweigh the intrusion here; thus, the conduct of the officer was unreasonable.

Should this Court determine that Officer Wilke was acting in a bona fide community caretaker function, the next step is to determine whether the public need and interest outweighed the intrusion into the privacy of Myer. This is a reasonableness analysis. To do so requires a balancing test considering four factors:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, 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.

Kramer at ¶41.

The State only addresses the two of the factors—the degree of public interest and exigency of the situation and the fact this occurred in an automobile. The State's brief did note that the public has a substantial need and interest in preventing the death of individuals due to emergencies. That is true. However, there needs to be some sign of an emergency and not just speculation as to possibilities. As agreed by the parties, Myer appeared to be sleeping. There was nothing to indicate an emergency. Thus, unless this Court would hold community caretaker theory allows any officer the right

to open the door of any running but lawfully parked car because someone is sleeping, this was impermissible. Furthermore, unless this Court holds that entry to such vehicles may be accomplished by giving no verbal notice and by opening the same door upon which the occupant is resting in a way which causes the occupant to fall, there is just not enough to justify the officer's actions here. The State's brief did not address Myer's original brief distinguishing ***Kramer, supra*** because there were no hazards here, and this was not a stranded car on the side of a highway. Moreover, the officer in ***Kramer*** simply walked up to Kramer and asked if he needed assistance. He didn't open Kramer's door without giving him a chance to respond to his question. Here, there was a knock and immediate opening of the door. Officer Wilke did not try to get Myer's attention first. The first thing Officer Wilke said was an order to turn off the vehicle. 32:7

The State also noted that there is less privacy in an automobile than a home. That is also true. The State did not respond to the argument that this car was parked in a parking lot and not moving. Moreover, no case has ever held that community caretaker justifies an entrance to a vehicle when the other factors are not met. The ***Kramer*** Court discussed this factor as:

> Under the third factor, we consider whether the involvement of an automobile has an effect on whether the community caretaker function was reasonably performed. Here, the officer simply walked up to Kramer's driver-side window and asked if he needed assistance. As we explained in discussing the second factor, that was the only reasonable approach that Wagner could take in performing this community caretaker function.

Kramer, supra at ¶44. Myer agrees that walking up to the window and asking him whether he needed assistance would have been appropriate here. That was not what was done, however.

Again, failure of the State to respond to Myer's original brief as to why the second factor—the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; and the fourth factor, the availability of alternatives to the intrusion, should be deemed a concession. ***Charolais Breeding Ranches, Ltd., supra.*** As noted in the original brief, the degree of overt authority and force displayed by Officer Wilke—opening the door, causing Myer to fall, and directing Myer to turn off the ignition- far surpass the window knock-and-inquiry settings of ***Kramer*** and ***Cty. of Grant v. Vogt***, 356 Wis. 2d 343, 850 N.W.2d 253 (2014) and cases from other jurisdictions reviewed in ***Vogt***: ***State v. Randle***, 152 Idaho 860, 276 P.3d 732 (Idaho.App.2012), ***State v. Steffes***, 791 N.W.2d 633 (N.D.2010) and

State v. Bryant, 161 S.W.3d 758 (Tex.App.2005). Officer Wilke himself acknowledged he could have knocked and waited for a response. He did not indicate that doing so would have endangered Myer. (32:11)

Furthermore, as to time, the failure to wait even one second weighs heavily against the State in this equation. A quick review of Wisconsin Court decisions as to this factor is helpful here. In ***State v. Pinkard,*** 327 Wis. 2d 346, 785 N.W.2d 592 (2010), the Wisconsin Supreme Court noted that sometimes quick action is necessary, but there is still some time requirement before entry, even in a case where there is obvious exigency (a possibility of a drug overdose in that case, given there was a tip the occupants were sleeping next to cocaine, a situation not present in the instant case):

> In considering the second reasonableness factor, we assess whether the "'time, location, the degree of overt authority and force displayed'" were appropriate under the circumstances. *Kramer*, 315 Wis.2d 414, ¶ 41, 759 N.W.2d 598 (quoting *Kelsey C.R.*, 243 Wis.2d 422, ¶ 36, 626 N.W.2d 777).
>
> …
>
> We recognize that in in *Shane Ferguson* and *Ziedonis* the amount of time that passed prior to entry was significant. *See Shane Ferguson*, 244 Wis.2d 17, ¶ 5, 629 N.W.2d 788 (waiting about 30 minutes prior to entering); *Ziedonis*, 287 Wis.2d 831, ¶ 28, 707 N.W.2d 565 (waiting about 90 minutes prior to entering).
>
> …
>
> However, in light of a more severe medical *374 concern at issue here, that is, a possible drug overdose, waiting 30 minutes was not feasible.

> The officers believed that the occupants of Pinkard's residence were "in danger of death or physical harm"; therefore, it was not unreasonable for them to wait only 30-45 **607 seconds prior to entering.

Pinkard, ***supra*** at 374.

In ***Pinkard***; therefore, the officers went in when the occupants could not be awakened after loudly knocking and announcing the police presence. There was an actual allegation of a possible drug overdose, an opened door, and the police there still waited a bit after trying to awaken the occupants before entering. Here, there is no allegation of an overdose, there was no attempt to awaken Myer, and there was no attempt at waiting even one second before entry was made.

As to the fourth factor not addressed by the State, our courts must consider the availability, feasibility and effectiveness of alternatives to the intrusion here. As noted in Myer's first brief, a simple knock on the window and a wait of a couple seconds would have been feasible. Officer Wilke admitted he did not need to proceed in the way he did, requiring that Officer Wilke position himself to catch Myer, as Myer was lying on the door and not waiting for a response to his knock. As Officer Wilke said "I could have stood there and waited, yes." (32:11) He did not continue that

sentence by saying that waiting would endanger Myer. (32:11) This argument was not responded to by the State at all.

The importance of considering less intrusive alternatives was discussed in Ultsch:

> The primary alternative available to the officers in this case was to rely on the representation of Ultsch's boyfriend that Ultsch was sleeping in the light of the **511 limited damage to the vehicle, the absence of evidence of injury to the driver, and the exigent circumstances discussed above, and do nothing. ***Ultsch, supra*** at 510.

Here, the primary alternative available to Officer Wilke was to knock on the window and announce his presence. If Myer did not respond, entry may then have been permissible. If Myer did respond, the officer could have asked him if he was in need of assistance. The availability of other alternatives and the failure to use them establishes this seizure to be unreasonable.

CONCLUSION

Because Myer would not have entered a plea had his suppression motion been granted, as all evidence related to intoxication would have been suppressed, based upon this and his original Brief, he respectfully requests this Court reverse with instructions the suppression motion be granted.

Dated at Madison, Wisconsin, November 22, 2016.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2996 words.

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

Dated: November 22, 2016

Signed,

BY: _____
TRACEY A. WOOD
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CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: November 22, 2016.

Signed,

_____

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