STATE OF WISCONSIN

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

DISTRICT II

Case No. 2016AP1061-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT TORRES,

Defendant-Appellant.

On Appeal from an Amended Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Michael J. Piontek, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Police Violated Mr. Torres' Constitutional Right to Be Free from Unreasonable Searches When They Entered His Home Without a Warrant. This Unlawful Entry Occurred When Police Stepped Into Mr. Torres' Private Stairwell.

A. Mr. Torres' private stairwell is afforded the same degree of protection under the Fourth Amendment as other parts of his residence.

"The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ***Payton v. New York***, 445 U.S. 573, 585 (1980). "The Fourth Amendment accords the highest degree of protection to a person's home." ***State v. Trecroci***, 2001 WI App 126, ¶ 41. An upper duplex's private stairwell which serves as access to the living quarters is considered "an essential adjunct" to the living quarters and falls under the purview of the Fourth Amendment. ***Id***. (resident of the upper level of a duplex has a reasonable expectation of privacy in an adjunct stairwell that leads to his unit when the exterior door is equipped with a lock and a doorbell, particularly when others cannot access the stairwell and the first-floor tenant does not have a key).

Here, "[t]he State does not dispute that [Mr.] Torres had a reasonable expectation of privacy in the stairway based on ***State v. Trecroci***[.]" (State's Brief, pg. 11). Nor does the State contest that a search occurred when "officers entered his private front stairway." (State's Brief, pg. 11). Yet, the State avers that Mr. Torres' "reasonable expectation of privacy" is not the same for his stairway as it is for the rest of his home: "it is only logical that any reasonable expectation of privacy in that type of area is not of the same degree as the reasonable

expectation of privacy we all hold in the living quarters of our homes." (State's Brief, pg. 18-19).

The State cites no authority for the proposition that certain portions of a residence warrant less protection than others. A private stairwell is afforded the same protection as other parts of the home. ***Trecoci,*** 2001 WI App 126, ¶ 41. To hold otherwise would result in an amorphous test whereby a resident's reasonable expectation of privacy would vary depending on the room—for example, a mudroom, a shed, or an enclosed foyer would be subject to a different standard than a bedroom, a bathroom, or a hallway closet. This is not the law, and as a practical matter, there is no reason it should be. Apartment residents rightfully treat their private stairways as part of their homes, and use them to store valuable (and private) pieces of property, such as art, mail, garments, and keys. Even curtilage, which is more easily invaded than a private stairwell, is afforded the same degree of protection as a home. ***Oliver v. United States***, 466 U.S. 170, 180 (1984); ***State v. Martwick***, 231 Wis. 2d 801, ¶26, 604 N.W.2d 552 (1990); ***Payton,*** 445 U.S. 573 (1980); ***State v. Davis***, 2011 WI App 74, ¶ 13, 333 Wis. 2d 490, 798 N.W.2d 902 (finding that "[a]s a general matter, it is unacceptable for a member of the public to enter a home's attached garage uninvited," and "[w]e do not think this premise is subject to reasonable disagreement."). This Court would have to overrule longstanding precedent to find otherwise.

Consequently, this Court's analysis in evaluating the entry into Mr. Torres' stairwell must be the same as any other entry into the home. A warrantless entry is per se unreasonable. If a warrantless entry occurred, the State bears the burden to prove that the fruits of that entry are admissible under an exception to the exclusionary rule. ***Cady v. Dombrowski***, 413 U.S. 433, 439 (1973); ***State v. Milashoski***,

159 Wis. 2d 99, 111, 464 N.W.2d 21 (Ct. App. 1990), *aff'd*, 163 Wis. 2d 72, 471 N.W.2d 42 (1991). Even one step into a protected space constitutes an entry for purposes of the Fourth Amendment. ***State v. Johnson***, 177 Wis. 2d 224, 231, 501 N.W.2d 876 (Ct. App. 1993).

B. The community caretaker exception to the warrant requirement does not justify the officers' entry into Mr. Torres' home.

As both parties agree, Wisconsin courts employ a three-part test to determine whether an officer's warrantless home entry falls under the community caretaker exception to the Fourth Amendment's warrant requirement. ***Pinkard***, 2010 WI 81, ¶ 29; (State's Brief, pg. 11). Courts evaluate:

> (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.

Id. The State agrees that a search occurred when officers entered Mr. Torres' private stairwell for purposes of the first step. (State Brief, pg. 11).

As to the second step, whether the police were exercising a bona fide community caretaker function, the State asserts that "[c]hecking on the welfare of juveniles known to be engaging in underage drinking and drug use is a bona fide community caretaker function." (State's Brief, pg. 14). Again, the State does not provide legal support for that proposition. Nor could it; there are no cases suggesting that underage consumption *alone* creates a bona fide community

caretaker concern, permitting police to enter a residence without a warrant.

Mr. Torres acknowledges that this Court, in ***State v. Ferguson***, recognized a bona fide community caretaker concern existed when officers encountered underage alcohol consumption *combined* with other contributing factors. In ***Ferguson,*** the officers personally observed minors who had been consuming "large amounts of alcohol,"[1] and entered a room, without a warrant, to make contact with known occupants who remained unresponsive. ***State v. Ferguson***, 2001 WI App 102, ¶ 15, 244 Wis. 2d 17, 629 N.W.2d 788.

Here, officers had a report from a neighbor that unsupervised underage drinking occurred upstairs. (40:14). The neighbor could also smell marijuana. (40:14). Officers had no information regarding how long the neighbor had been home, when she first smelled the marijuana, or when she saw the alcohol being consumed. (40:22). There was no evidence regarding how the neighbor knew the juveniles were unsupervised. While officers could smell marijuana in the neighbor's unit, officers could not tell how long the smell had been there or whether the smokers were still present. Further,

[1] The fact that alcohol use alone was suspected, and not drug use, is relevant to the question of whether the intrusion was pursuant to a community caretaker or criminal investigation. In ***Ferguson,*** this Court found that because underage consumption is not a crime and is only subject to a forfeiture action, it was less likely the search in ***Ferguson*** was a "criminal investigation." 2001 WI App 102, ¶ 13. Juxtapose that to Mr. Torres' case, where officers were present because of a "narcotics in progress" and the odor of cannabis was the only corroborated fact known to the officers. The alcohol consumption in ***Ferguson*** is a fundamental part of this Court's finding that the officers in ***Ferguson*** were acting pursuant to their community caretaker authority whereas the presence of an illegal substance in this case, combined with absolutely no evidence of an injury or intoxication suggests that the officers here were investigating a crime.

no one testified that the odor of marijuana was "emanating" from the upper unit prior to entry into the private stairwell, despite the State's assertions to the contrary. (*Contrast* 40:21 *with* State's Brief, pg. 13). There was no testimony that either officer personally observed someone from the upstairs unit consuming alcohol or drugs. Officers did not smell marijuana outside, nor is there any indication that they could smell marijuana on Mr. Sanchez-Morales' person. (40:21, 27-28). There is no indication in the record that Mr. Sanchez-Morales appeared to be under the influence of drugs or alcohol, thus the officers' immediate observation of Mr. Sanchez-Morales largely contradicts the neighbor's prior allegations.

So while the State asks that this Court establish a broad rule wherein there is a bona fide community caretaker function anytime "juveniles [are] known to be engaging in underage drinking and drug use," here they are really asking this Court to determine that a bona fide community caretaker function exists wherever juveniles are *suspected* of being unsupervised while drinking or using drugs, and there is no corresponding indication that any home occupant is at risk or in need of any assistance. (State's Brief, pg. 14). In doing so, the State asks this Court to ignore the required determination of "whether there is an 'objectively reasonable basis' to believe there is 'a member of the public who is in need of assistance.'" ***State v. Ultsch***, 2011 WI App 17, ¶ 15, 331 Wis. 2d 242, 251, 793 N.W.2d 505, 509, citing ***State v. Kramer***, 2009 WI 14, ¶¶ 30, 32, 315 Wis.2d 414, 759 N.W.2d.

Mr. Torres does not mean to propose that the neighbor in this specific case was in any way untruthful. It is, however, Mr. Torres' position that the neighbor's knowledge was not complete or comprehensive enough to justify a warrantless entry. The issue before the court is not whether the neighbor's

information plus the officer's observations provided the officers with enough evidence to obtain a warrant; the question is whether K.L.'s information plus the officer's observations was enough to justify an immediate warrantless entry. The answer must be "no." If not, the implications are immense. A disgruntled neighbor need only allege that they have witnessed an underage party for law enforcement to have a basis to "check on the welfare" of the supposedly unsupervised juvenile inside a private residence without ever asking whether an adult is present, or conducting any other investigation.

Mr. Torres is not proposing that law enforcement ignore suspected underage consumption. As the State explains, it is a significant problem, meaning law enforcement would be doing a disservice to the community if they left it unchecked. However, if the State seeks to rely on the community caretaker exception, there must be an "objectively reasonable basis" for officers to believe that there is "a member of the public who is in need of assistance." ***Ultsch***, 2011 WI App 17, ¶ 15. Whether it be by way of attempted corroboration of an independent witness' claim or through an officer's own observation, a warrantless entry must not occur, particularly when there are allegations of a crime, absent evidence that an entry cannot be delayed by the time it takes to obtain a warrant. In this case, officers encountered a seemingly sober juvenile leaving the upper unit. Moreover, that juvenile offered to fetch the resident of the unit. Without additional evidence, there is not a bona fide need to enter the residence.

Yet, even where law enforcement has a bona fide community caretaker basis to enter a private home, the principle "[o]veridding [the] entire process is the fundamental consideration that any warrantless intrusion [] be as limited as

is reasonably possible, consistent with the purpose justifying it in the first instance." ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). This idea is embodied in the third part of the community caretaker evaluation, which requires that an officer act reasonably. ***State v. Pinkard***, 2010 WI 81, ¶ 4.

The State ignores this prong entirely, arguing that '[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means. (State's Brief, pg. 18, citing ***Illinois v. Lafayette***, 462 U.S. 640, 647 (1983). But the State is wrong—alternatives must be considered when officers conduct a community caretaker entry, particularly if that community caretaker entry involves a home.[2] ***Pinkard,*** 2010 WI 81, ¶¶ 41-42 (the court is required to consider "the availability, feasibility, and effectiveness of alternatives to the type of intrusion actually accomplished"). Officers must consider options short of entry into a residence. *See* ***State v. Ziedonis,*** 2005 WI App 249, ¶ 27, 287 Wis. 2d 831, 707 N.W.2d 656 ("[i]t appears as though the officers did everything they could to avoid entering the house").[3]

[2] The State argues that "[t]he automobile factor is not relevant here, and thus, will not be addressed in any depth." (State's Brief, n. 8). To the contrary, this Court must factor in that this intrusion was into a private home, and not a vehicle, based on there being a "heightened privacy interest in preventing intrusions into one's home." ***Pinkard***, 2010 WI 81, ¶¶ 42, 56. This is a factor that is part and parcel of the reasonableness consideration. ***Id.,*** ¶ 42.

[3] *See also* ***Ferguson,*** 2001 WI App 102, ¶ 5, ***State v. Paterson***, 220 Wis.2d 526, 536, 583 N.W.2d 190 (Ct. App. 1998), and ***State v. Dull***, 211 Wis. 2d 652, 661, 565 N.W.2d 575 (Ct. App. 1997), all cases explored in the initial brief which show Wisconsin Courts' emphasis on an officer's need to explore alternatives to immediate warrantless entry.

The State acknowledges that the officers did not attempt to contact a resident prior to entering the home. (State's Brief, pg. 18). Further, it acknowledges that "it was not so late that it would be unreasonable to assume that the 15 or 16-year-old Torres would normally still be awake and able to respond to attempts to contact him." (State's Brief, pg. 17). Yet, there is no indication in the record that law enforcement asked about the presence of any adults. Further, Mr. Sanchez-Morales offered to go get the resident. (40:52). Nonetheless, law enforcement officers opted for the *most* intrusive means to dispel their concerns. Mr. Sanchez-Morales was detained[4]—specifically, he was prevented from moving past the officers (as the officer's own report reflected), and was instructed to go back upstairs with the officers in tow. (40:26, 30; 11). Again, Mr. Torres does not disagree that law enforcement officers should "try to make contact with a juvenile known to have engaged in underage drinking." (State's Motion, pg. 16). Mr. Torres only asserts that law enforcement officers must act reasonably when making said contact, which at the very least requires that officers give the occupant an opportunity to respond to the officers' inquiries, particularly where no one is in apparent need of assistance.

[4]The State argues that "officers did not detain Sanchez-Morales." (State's Brief, pg. 17). A seizure occurs where "a reasonable person would believe that he or she is not 'free to leave.'" ***Florida v. Bostick***, 501 U.S. 429, 435 (1991). Here, officers deliberately positioned themselves to prevent Mr. Sanchez-Morales from leaving when he first exited the residence, testifying "I didn't want him to be able to run past me." (40:26). They instructed him to go upstairs and informed him they would be following him. (40:30, 53). The tenor of the interaction is clear; no reasonable person would feel free to leave or terminate the interaction. Further, even if a reasonable person would believe that he could refuse the officers' instructions, there is no reason to believe a juvenile would have such a sophisticated understanding of his constitutional rights. Regardless, it need not have been a formal detention or seizure in order for the conduct to have been unreasonable in the context of a community caretaker entry.

C. The only entry this Court needs to evaluate is the entry into Mr. Torres' private stairwell.

There are not two separate entries requiring two separate evaluations, as the State suggests. (State's Brief, n. 7). There is only one entry into the residence—the entry that occurred when the officers stepped off the shared front porch and into the private stairwell of the upper duplex. The State and Mr. Torres agree that a search occurred at that point. (State's Brief, pg. 9).

The State argues that exigent circumstances developed once officers entered the stairwell and justified their entry into the upper apartment.[5] (State's Brief, pg. 19). Mr. Torres, recognizes that the circumstances observed by law enforcement after they entered the stairwell would have been sufficient to establish grounds for additional investigation *had law enforcement been inside the stairwell lawfully.* But they were not, and this Court must determine whether the warrantless entry into the home was warranted "under the circumstances as they existed at the time of the police conduct." *See* ***State v. Matalonis,*** 2016 WI 7, ¶ 35, 336 Wis. 2d 443, 875 N.W.2d 567 (in the context of community caretaker entrance).

Everything seized after the unlawful entry must be suppressed as "fruit of the poisonous tree." See ***Wong Sun v. United States***, 371 U.S. 471, 484–86, 83 S.Ct. 407, 9 L.Ed.2d

[5] The State did not argue that exigent circumstances were a basis to justify the entry into the protected stairwell, only arguing that exigent circumstances came into play once officers entered the stairwell pursuant to a community caretaker function. (State's Brief, Pg. 9). While Mr. Torres believes this constitutes waiver of the argument that exigent circumstances were the basis for the entry into the stairwell, please refer to "Section D" of Mr. Torres' brief for an analysis as to why exigent circumstances could not be a basis for entering the stairwell.

441 (1963), *see also* ***Davis***, 2011 WI App 74, ¶ 16 ("[t]he officer's right to be in the place where the view occurs is fundamental to the validity of what follows."). The State subtly proposes that the "substantial cost" of exclusion in this case permits this Court to ignore the exclusionary rule altogether. (State's Brief, pg. 9). However, the application of the exclusionary rules is not contingent on the aggravating or mitigating nature of the obtained evidence, nor is it contingent on the seriousness of a defendant's crime. Quite the opposite—courts time and time again recognize that application of the exclusionary rule results in the guilty going free—

> [T]here is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

Mapp v. Ohio, 367 U.S. 643, 659 (1961); ***State v. Hess***, 2010 WI 82, ¶ 41, 327 Wis. 2d 524, 785 N.W.2d 568.

The State has devoted a full page in their submission towards documenting Mr. Torres' guilt, in a thinly veiled effort to divert attention away from the real question of the constitutionality of the entry into the stairwell. (State's Brief, pg. 4-5). Mr. Torres cannot and will not deny the egregiousness of what was discovered pursuant to the officers' entry. But the Constitution requires an elevated analysis that is not informed by the depravity of what was found. Here, the Court is tasked with evaluating a simple warrantless entry into the home, the like of which formed the grounds for the exclusionary rule in the first place. *See* ***Mapp v. Ohio***, 367 U.S. 643 (1981). Officer Reigelman and Officer Nabors acted unreasonably by entering Mr. Torres' home

without a warrant. The exclusionary rule should apply for the same reason that it was established in ***Mapp v. Ohio***—to deter future police misconduct.

CONCLUSION

Officers entered Mr. Torres' home without a warrant and under a set of facts that do not implicate an exception to the exclusionary rule. Officers did not act within a community caretaker capacity, and even if they did, their swift entry was unreasonable. Officers were investigating what they believed to be an underage party. This Court should reverse the decision of the trial court, vacate Mr. Torres' conviction, and remand with instructions that the trial court suppress any evidence obtained pursuant to the warrantless entry.

Dated this 5th day of January, 2017.

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 3,282 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 5th day of January, 2017.

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