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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2016AP1398- CR

Sheboygan County Case No. 2014CF67

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DORIAN M. TORRES,

Defendant-Appellant.

ON REVIEW OF THE DENIAL OF MOTION TO SUPPRESS FRUITS OF UNLAWFUL SEARCH, DECIDED JUNE 10, 2015; THE JUDGMENT OF CONVICTION FOR FIRST DEGREE INTENTIONAL HOMICIDE, ENTERED JULY 27, 2015, HON. TERENCE BOURKE PRESIDING, AND THE AMENDED JUDGEMENT OF CONVICTION ENTERED AUGUST 27, 2017.

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. May police enter and search a private residence in the middle of the night without a warrant and without consent of the lawful resident, to seek evidence of the whereabouts of a missing person, when police had no basis to believe that an individual was hurt and in need of assistance in that home at that time?

Trial court answered: YES. The trial court denied the motion to suppress evidence, finding that the police were exercising a valid community caretaker function when they entered and searched the residence.

2. May a non-resident friend who has a key for limited purposes and is not visiting at the time, give consent for police to search a home when a lawful resident of the home is present and has not been asked for consent?

Trial court did not answer this question, focusing exclusively on the community caretaker exception, but the State raised third-party consent at the trial level as justification for this search.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Torres is not specifically requesting oral argument, because the arguments of both parties can be presented sufficiently through written briefs. However, oral argument would be welcomed if this Court would find it useful.

This matter applies an existing rule of law to a set of facts significantly different from those stated in published opinions. It also involves legal issues of continuing public interest, and publication would make a significant contribution to the development of the law. Therefore, publication is requested.

STANDARD OF REVIEW

When reviewing the denial of a motion to suppress evidence, the Court applies a two-step analysis. State v. Robinson, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463. (Citations omitted).

First, the circuit court's findings of historical fact are reviewed under a deferential standard, upholding them unless they are clearly erroneous. Second, constitutional principles are independently applied to those facts. Id. (Citations omitted).

STATEMENT OF THE CASE

In Sheboygan County Case No. 14-CF-67, Dorian Torres was charged in a criminal complaint, dated February 3, 2014, with First Degree Intentional Homicide (R. 3., p.1.)

The complaint alleged that on or about January 24, 2014, Dorian, D.O.B. 2/15/96, intentionally caused the death of Emilio E. Torres, contrary to § 940.01(1)(a), Wis. Stats. Id. Emilio was Dorian's father, with whom he lived. Id.

The complaint stated that on January 29, 2014, Dorian's mother, Shelly, who was the ex-wife of Emilio, became concerned that she was unable to contact Emilio for several days. Id. She contacted her son Dorian, who lived with Emilio, and Dorian gave her information and details about Emilio's whereabouts and departure that seemed odd to her. Id. Shelly had a key to Emilio's apartment. (R. 3, p. 2.) Shelly and two police officers went to Emilio and Dorian's apartment where Shelly and the officers entered, using Shelly's key. Id. Dorian was sitting on the couch; one officer stayed with him while the other went to Emilio's bedroom with Shelly. Id. There, they noted a stain of some kind on Emilio's bed, which had not been there before. Id. They also noted a pile of clothes on the floor belonging to Emilio, as well as a pile of Emilio's mail and his empty wallet on the

floor. Id. They also noted that a shower curtain was missing from the bathroom. Id. According to the complaint, after noting all of these details, in which there is no mention of looking for Emilio himself, the officer noticed that there was a box spring leaning against a bedroom wall, "and when he pulled it away from the wall, saw it had hidden what appeared to be a body wrapped in a vinyl-type sheet." Id. The body was later identified as that of Emilio Torres, and the preliminary cause of death was listed as a depressed skull fracture. (R. 3, p. 3.)

On April 17, 2015, the attorney for Dorian filed the Defendant's Motion for an Order Suppressing Fruits of Premises (R. 70.) The motion asked for suppression of any evidence gathered in the searches of Dorian's home conducted on January 29, 2014, as well as any searches conducted subsequent to that date, and the fruits of any searches. (R. 70.)

On May 11, 2015, an evidentiary hearing was held on that and other motions. Shelly Torres and Officer Timothy Patton testified regarding the specifics of the search. Details of the testimony will be given in later sections of this brief as they become relevant.

At the hearing, the State, the Defense, and the Court all agreed that if the initial search involving Shelly Torres was a violation of Dorian's rights, then the subsequent searches pursuant to warrants would be tainted, because the information derived from that initial search was used to obtain the later search warrants. Specifically, the prosecutor, Mr. DeCecco, stated:

> "[W]hat we are looking at is: 1) that entry, the alleged search. I guess we are talking about the finding of the body in the bedroom…[b]ecause if the Court decides that initial entry and/or so-called search was not legal, then obviously

> everything that follows that is going to be tainted by that; I understand that…"
> (Tr. 5/11/15, pp. 65-66.)

The court agreed, stating, "That's how I view it." Id., at 66. The defense attorney, Mr. Singh, also agreed. Id.

The trial court did not decide on the motion at that time. Instead both parties were required to submit briefs by May 26, 2015. Id., at 64.

On May 15, 2015, both parties submitted briefs regarding the entry to Dorian's home. The Defendant's brief was titled, "Defendant's Memorandum on Defendant's Motion for an Order Suppressing Fruits of Premises and Defendant's Motion to Suppress Statements." (R. 77.) In relevant part, it argued that Shelly Torres performed as an agent of the police (R. 77, p. 7.), and that Shelly's alleged consent to enter the residence was limited in scope and went beyond the scope of her consent. (R. 77, p. 8.) The motion to suppress statements is not at issue on appeal; any statements would be automatically suppressed as derivative of the original unlawful search. The State's brief was titled, "State's Brief (Warrantless Entry)." (R. 78.) The State's brief included two justifications for the search: community caretaker and third party consent.

On June 8, 2015, the Defense filed a response, titled "1st Addendum to Defendant's Memorandum on Defendant's Motion for an Order Suppressing Fruits of Premises and Defendant's Motion to Suppress Statements." (R. 80.) It argued against application of the community caretaker exception to the warrant requirement for non-consensual home entry.

On June 10, 2015, the court held an Oral Ruling on these issues. The court briefly addressed the issue of consent to search, stating, "At the time that they entered the residence, they went in with Shelly, who had a key, and they had her

permission to enter. The search was something that I do not believe that Shelly gave consent to do." (Tr. 6/10/15, p. 12.)

The court also addressed the State's theory that the search was lawful under the community caretaker exception. Id., at 9. The court analyzed the circumstances under the three-part test in State v. Gracia, 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87, finding that the officer "did reasonably exercise a community caretaker authority," so the motion challenging the search was denied. Id., at 13.

On June 22, 2015, a four-day bench trial began. In rendering a verdict on the fifth day, the trial court explained that Dorian had admitted to killing Emilio. (Tr. 6/26/15, p. 3.) The court further stated that the intent element had been proven beyond a reasonable doubt because "the extensive head injuries created a reasonable inference that they were inflicted with the intent to be fatal." Id., at 4. After further explanation, the court pronounced Dorian guilty of first-degree intentional homicide. (Tr. 6/26/15, p. 14.)

Sentencing was held on July 24, 2015, at which time Dorian was sentenced to life in prison with eligibility for Extended Supervision after 28 years. (R. 104; App. 1.) The Judgment of Conviction was entered on July 27, 2015. Id. An Amended Judgment of Conviction, amended to specify that Dorian is not eligible for the Challenge Incarceration Program or the Substance Abuse Program, was entered on August 27, 2015. (R. 110; App. 2.) Dorian Torres now appeals, based upon the constitutional violation that occurred when his home was entered and searched without consent and without a warrant.

ARGUMENT

I. Warrantless search of Dorian Torres' home was not valid as a community caretaker exception because there was no basis to believe that anyone was hurt and in need of assistance, and the time and location of the intrusion made it unreasonable given the other available options.

This Court, in 2010, laid out a three-step test, to determine whether a valid community caretaker function had been exercised. State v. Pinkard, 2010 WI 81, ¶ 29, 327 Wis. 2d 346, 785 N.W.2d 592. The Gracia case referenced by the trial court for this analysis used the 3-part test found in Pinkard. Gracia, 2013 WI 15, ¶ 15. When a community caretaker function is asserted as the basis for a home entry, the relevant inquiries are: (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. Pinkard, at ¶ 29.

The court in Pinkard gave additional guidance on the third step of the test, determining that it is necessary to balance the public interest or need that is furthered by the officers' conduct against the degree and nature of the intrusion on the citizen's constitutional interest. Id. (Citations omitted.) The court explained that "[t]he stronger the public need, and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable." Id., ¶ 41. (citations omitted.)

This balancing of competing interests requires consideration of four factors: (1) the degree of the public

interest and the exigency of the situation; (2) the circumstances surrounding the search, including time, location, and the degree of authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility, and effectiveness of alternatives to the type of intrusion involved. Id., ¶42.

A. Relevant Facts

Here, the relevant facts are as follows, as found by the trial court at the Oral Ruling on the Defendant's motion to suppress evidence:

First, Shelly Torres, who is the ex-wife of Emilio Torres, called the Sheboygan Police Department to report that Emilio was missing, on January 29, 2014. (Tr. 6/10/15, p. 5.) She was concerned because Dorian had told her that Emilio was in Texas and had left his car and bank accounts for Dorian's use. Id. Shelly and Emilio had divorced in 2009, and Dorian lived primarily with Emilio, but Emilio had provided Shelly with a key to his apartment since 2013. Id., at 6. Shelly was also concerned because she and Emilio spoke frequently, but they had not had contact since the previous Friday, which she found unusual. Id. The officer with whom she spoke told her that he would get back in contact with her. Id. She then told him that she would go to Emilio's to see whether there was anything out of the ordinary, and the officer said they would accompany her to the apartment. Id., 6-7.

At the apartment, two officers and Shelly entered the apartment; Shelly used her key and opened the door. Id., at 7. One officer saw Dorian sitting on the couch when they entered, and talked to him about the whereabouts of Emilio, while the other officer accompanied Shelly to Emilio's bedroom. Id. They noted that the bedroom was in disarray with clothes and other items "tipped upside-down" and "everything was everywhere." Id. Shelly and the officer

moved a mattress that was up against a wall and found what appeared to be a body wrapped in plastic behind the mattress. Id.

B. These facts to do not support an exception to the warrant requirement under the three-part test set forth in State v. Pinkard, 2010 WI 81, ¶ 29, 327 Wis. 2d 346, 785 N.W.2d 592.

1. The first step in the Pinkard test IS MET because a search and seizure within the meaning of the Fourth Amendment occurred.

The first step in the Pinkard test requires that a search and seizure within the meaning of the Fourth Amendment has occurred. Pinkard, at ¶ 29. It had. The trial court found this, stating, "In looking at the first question, whether or not there was a search or a seizure, I say yes, when the mattress was moved, that was a search." (Tr. 6/10/15, p. 9.)

In addition, when the police entered the home, that was a search as well, under Pinkard and State v. Boggess, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983). In Pinkard, police responded to a tip by an anonymous caller indicating that two people were sleeping in a house with the door to the residence standing open, and that located next to them was cocaine, money, and a digital scale. Pinkard, at ¶ 2. Officers went to the residence and observed that there was in fact a main door to the residence that was standing open; officers knocked and announced their presence, but hearing no response after 30-45 seconds, they entered the residence to check the welfare of the residents. Pinkard, at ¶¶ 3-4. The Pinkard court found this to be a search, stating, "the officers' warrantless entry into Pinkard's home and their subsequent entry into his bedroom were searches within the meaning of the Fourth Amendment. See State v. Boggess, 115 Wis. 2d 443, 449, 340 N.W.2d 516

(1983)." Pinkard, at ¶ 30. In support of this conclusion, the court cited Wayne R. LaFave, Search and Seizure § 2.3(b) (4th ed. 2004), which states, "It is beyond question, therefore, that an unconsented police entry into a residential unit…constitutes a search…" Id.

In Boggess, a social worker received an anonymous telephone call around suppertime, indicating that children in Boggess' home may have been battered and were in need of medical attention. The caller additionally stated that he knew the Boggesses fairly well and that Mr. Boggess had a bad temper. Immediately after the call ended, the social worker telephoned a second social worker, who the met with police. The second social worker explained to police that she was going to the Boggess residence because the health, safety and welfare of two children were in question. She asked police to accompany her for her protection because of the caller's statement that Boggess had a bad temper. When the social worker and police arrived at the Boggess residence, they went to the door and the social worker knocked. When Boggess opened the door, the social worker identified herself and stated that she was an agent of the social services department and that the other individual was a police officer. The social worker informed Boggess that they were there was to ascertain the safety and welfare of the two children because her agency had received a telephone call concerning the children's safety. At that point, Boggess asked the social worker if she had a warrant, to which the social worker responded that she did not need one because "...by the Children's Code a warrant is not necessary for minor children." The social worker and police officer then entered the home. State v. Boggess, 115 Wis. 2d 443, 446-447, 340 N.W.2d 516 (1983). The Court of Appeals found that, "[i]n this case, [the] entry into the Boggess residence was a search within the meaning of the fourth amendment to the United States Constitution and article I, sec. 11 of the Wisconsin Constitution." Boggess, 115 Wis. 2d 443, at 449.

That the Pinkard and Boggess courts held these initial entries to the home to be a "search," is directly on point in the instant case. Officers at the home of Dorian Torres entered the home without consent, which is a search under Pinkard and Boggess. Thus, the first step in the Pinkard test is met; there was a search and seizure within the meaning of the Fourth Amendment.

2. The second step in the Pinkard test was NOT MET because police were not exercising a bona fide community caretaker function.

The second step in the Pinkard test requires that police were exercising a bona fide community caretaker function. Here, they were not. The community caretaker function is exercised when "the officers had an objectively reasonable basis to believe [someone] was hurt and in need of assistance." See State v. Gracia, 2013 WI 15, 345 Wis. 2d 488 (2013), 826 N.W.2d 87. In the instant case, police had a reason to believe that something was out of the ordinary with Emilio Torres, but there was nothing to point to the idea that Emilio was that the home, hurt and in need of assistance, for an entire week, while his son lived in the house and used his car and bank accounts. Certainly, anything is possible, but it would have been extremely unlikely. Indeed, this idea evidently did not occur to Shelly or the police, because their actions upon entering the house were not to frantically look for someone who was laying hurt and kept captive. Instead, Shelly testified that she was going there "to see if his clothes were there or see if there was anything out of the ordinary…" (Tr. 5/11/15, pp. 9-10.) She further stated, "I wanted that reassurance, you know, of what was going on." Id., at 10. Shelly said she decided to go into the bedroom to see if Emilio's suitcase was there. She explained, "His suitcase was always right where you would walk right in. So I would

know right away if his suitcase was gone, I would know that he had packed up." Id., at 11.

Officer Patton testified that he was "basically monitoring [Shelly] as she was looking around the apartment," and that once they got to Emilio's bedroom, he "stood in the threshold kind of observing what she was doing." Id., at 23. He went on to say, "And so then, she turned on the lights and started looking around that bedroom, and I stood observing. And she was making some observations to me while I'm standing there." Id.

These are not the actions of people who believe someone is hurt and in need of assistance in this home. These are the actions of people who are performing an investigation, one which could just as easily have been done in the daytime, with Dorian's consent or a search warrant. It is understood that the officers' and Shelly's subjective intent is not dispositive of whether or not there was a bona fide community caretaker function. However, they were the people in the thick of the situation; they are the ones who had first-hand and intimate knowledge of the totality of the circumstances as they existed at the time, and they were not acting with the haste and urgency that one would expect if they believed that Emilio was hurt and in need of assistance somewhere in that home. They did not hurriedly look into each room to see if Emilio was somewhere hurt. Instead, they went directly into Emilio's bedroom and started looking around at details like the pile of clothes on the floor, his mail, and his wallet. If these people, with the first-hand knowledge of the situation, did not urgently look from one room to another in search of Emilio, then, while not dispositive, that is very good evidence that there was not an objectively reasonable basis to believe that someone was hurt and in need of assistance in that home at that time. Therefore, a bona fide community caretaker function was not exercised here.

Public policy would also counsel in favor of a finding that this was not a bona fide community caretaker function.

All police had was the word of Emilio's ex-wife that she had not heard from him in days, and that Dorian was using his things and giving a strange story of Emilio's whereabouts. This would raise suspicion, but without verification such as talking to Dorian themselves or knocking on the door in an attempt to see whether Emilio was there, how would police know that Shelly was not lying? Clearly, she was not, but we know that only in hindsight. It would be most undesirable if all it takes for police to enter someone's home without permission is a phone call from an ex-spouse claiming to be concerned for the whereabouts of the person. This could be used as a ruse by enemies and jealous ex-lovers to harass someone in his or her home, particularly if the caller knows that something illegal would be seen by the police in the home. In a scenario such as the one in this case, if the parties had been dishonest and less upstanding, the situation could easily have been that an ex-wife is angry with her ex-husband for ignoring her, keeping her away from the children, or dating someone new. If the person had marijuana in his or her home, for example, this would be a perfect way for a jealous ex-wife to get even with the person: call the police with a story that she is worried for the safety of this person, and the police will go into the house to check on them. When drug evidence or other evidence of criminal activity is found, the police can then seize it and take the person to jail.

In this case, of course, Shelly was an honest and caring person, and Emilio was seemingly a law-abiding person. However, that will not always be the case with every person who calls the police with concerns about another person. If police are allowed to simply enter a person's home on nothing other than a concerning story told by a third-party, this will be tremendous erosion of the Fourth Amendment rights of all citizens, and the potential for abuse of this power by police and malicious citizens will be great. Not only does the entry in this case not fall into the community caretaker

exception from a legal standpoint, but it also should not, from a public policy standpoint.

3. This scenario also fails as a community caretaker exception because there was no exigency meriting a midnight surprise entry to the home, and there were alternative means to accomplish police objectives.

Even if some bona fide community caretaker function had been exercised, this scenario still fails as an exception to the warrant requirement, because it does not pass muster under the third step of the Pinkard test, which requires the court to determine whether the officers' exercise of a bona fide community caretaker function was reasonable. Pinkard, 2010 WI 81, at ¶ 41. As earlier discussed, in balancing the competing interests of the public need that is furthered by the officers' conduct, and the opposing interest of a citizen's constitutional right to be free from warrantless searches, four factors are considered: (1) the degree of the public interest and the exigency of the situation; (2) the circumstances surrounding the search, including time, location, and the degree of authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility, and effectiveness of alternatives to the type of intrusion involved. Id., ¶42.

(a) There was no exigency, so the first factor weighs in favor of citizen rights.

The first factor of the third step of the Pinkard test, the degree of the public interest and the exigency of the situation, weighs greatly in favor of Dorian's constitutional rights, because the degree of public interest in locating missing persons is high, but there was no exigency to enter the home at this time. Emilio had already been missing for a week, and

there were no information leading to great concern that he was presently in an emergency situation at that home. There was no blood that could be seen from outside, no concerning sounds noted by the neighbors, no emergency phone call from Emilio, no car accident, nothing whatsoever that would lead a reasonable person to say, "this is an emergency; we need to get into that house immediately to save this person." The fact that the police did not go to the house for two hours after Shelly called them, and that they only decided to go to the house at all when Shelly said she herself would go without them, can only lead to the conclusion that the exigency of the situation was non-existent.

(b) This was a surprise search of a home in the middle of the night, while an officer stood next to Dorian, so the second factor weighs in favor of citizen rights.

The second factor of the third step in the Pinkard test is the circumstances surrounding the search, including time, location, and the degree of authority and force displayed. This weighs highly in favor of Dorian's constitutional rights. The search occurred at midnight or a short time later. (Tr. 5/11/15, p. 30.) It was the middle of the night, then, and Dorian was sitting on his couch. Id., at 22. Suddenly without warning or even a knock, police officers entered his home. Id., at 16. The fact that his mother was with them decreases the shock value of this intrusion, but police entry into one's home in the middle of the night without warning is a substantial intrusion nonetheless. The location being his home certainly tips the balance toward Dorian's constitutional rights.

The authority displayed was overt but not extreme. One officer stayed by Dorian while his mother and the other officer went to Emilio's bedroom. Id., at 35. The fact that

Dorian was not left alone and an officer was stationed with him, was a show of authority, but that is of less import than the circumstance of police entering his home in the middle of the night without warning.

(c) There was no automobile involved, so the third factor weighs in favor of citizen rights.

The third factor of the third step in the Pinkard test is whether an automobile was involved. This factor weighs heavily toward Dorian's constitutional rights, in the balance of public interest vs. citizen rights, because no automobile was involved here. A private home was involved.

(d) The officers had the alternative options of asking for consent or obtaining a warrant, so the fourth factor weighs in favor of citizen rights.

The fourth factor – the availability, feasibility and effectiveness of alternatives to the types of intrusion involved – greatly favors Dorian's constitutional rights in this scenario, because officers had other reasonable options. First, the officers could have knocked on the door, asked Dorian where his father was, and asked him if they could look around. Most reasonable concerned family members would allow police to enter their home to look around when a loved one is missing. Police at that time did not know that Dorian was anything other than a reasonable concerned family member, so they had the duty to at least seek consent before entering his home in the middle of the night. Even though Dorian was not innocent in this situation and had much to hide, he still may have given consent to search, hoping that Emilio's body would not be found, or with the notion of denying knowledge of how it got there. Anyone who has worked in the criminal

justice system knows that even people who have something to hide will often consent to searches against their penal interest, to the chagrin of their defense lawyers. Asking for consent before walking into a private home was a reasonable option for police when they had no warrant.

Police also had the option to seek a warrant. This could have been done within a reasonable timeframe. This is evident by the fact that police did later obtain a warrant to search at 4:05 a.m., after the initial search uncovered Emilio's body. Police called the court commissioner at 3:50 a.m. to seek approval for a warrant. (App. 3.) It was authorized by the court commissioner 15 minutes later, at 4:05 a.m. (App. 4, P. 2.) Shelly called the police at approximately 10:00 p.m., but they did not go to Dorian's home until "around midnight or after midnight." (Tr. 5/11/15, p. 30.) That is a two-hour window. Given the availability of telephonic warrants in the middle of the night in Sheboygan County, it would have been quite feasible to obtain a warrant at that time had police attempted to do so. It would have been more reasonable to attempt the search during the day after knocking on the door and asking for consent from Dorian.

Based on the analysis above, the community caretaker exception does not apply here. The first step of the Pinkard test requires that in order to qualify as a community caretaker exception, there has to have been a search for purposes of the Fourth Amendment. Here, there was, but that is the only step of the test that is met here. The second factor requires that police were exercising a bona fide community caretaker function. Here, they were not. Their motives were honorable, but this does not qualify as a community caretaker exception. In other cases where the exception applies, notably the Pinkard and Boggess cases referenced previously, police entered homes upon concrete evidence that someone was in that home, at that moment, in need of aid. In Pinkard, the two people were sleeping with the door to the residence standing open and drugs all around them; in Boggess, there was a

report that children were in the home and had been battered and were injured. In the present case, police only knew that Emilio was missing, according to his ex-wife. There was nothing pointing to his being in the home at that time. He could have been anywhere. There was nothing pointing to his being injured. It was one possibility, but a "possibility" has never been used to justify warrantless entry to a private home under the community caretaker exception, and this Court is urged to refrain from extending the community caretaker exception to allow warrantless entry to a home on the mere possibility that someone might be there in need of assistance.

The third step of the Pinkard analysis requires that the public interest outweighs the intrusion upon the privacy of the individual, given the degree of public interest, the exigency of the situation, the circumstances surrounding the search, whether an automobile is involved, and the availability of alternatives to the type of intrusion. Because there was no exigency and a high level of intrusion, including a surprise entry to a home by police in the middle of the night, the privacy of the individual outweighs public interest in this case. Searching for missing persons in of extreme importance, but that does not justify any all types of intrusions and the trampling of the Fourth Amendment. Police should search for missing persons within the bounds of continuing to honor the constitutional rights of citizens.

II. Police did not have valid third-party consent to search, because Shelly Torres did not have common authority over the premises and thus did not have authority to grant consent.

The trial court did not make a finding as to third-party consent, only referencing it in passing during its analysis of the community caretaker function. The court was addressing the balancing test factors of the third step of the Pinkard test, specifically, the "attendant circumstances surrounding the

search." (Tr. 6/10/15, p. 11.) As part of that analysis, the court noted that the parties entered peacefully, and that "law enforcement was allowed in by Shelly, who had a key to the premises." Id., at 12. The court continued, noting, "Additionally, Shelly was acting in a – within the scope of the authority given to her by Emilio in that Emilio wanted her to assist in parenting Dorian." Id. This was not a specific finding that the search was valid as one with third-party consent, but instead, this discussion was in the context of a discussion of the overall circumstances of the search, within the community caretaker analysis. As the court stated directly after these remarks, "So overall, I believe the attendant circumstances were reasonable."

The trial court also briefly mentioned Shelly's consent in the context of the "alternatives to the intrusion" factor of the third-step in the Pinkard community caretaker analysis. The court stated, "Next the Court is to consider alternatives to the intrusion and to the residence. At the time that they entered the residence, they went in with Shelly, who had a key, and they had her permission to enter." Id.

While it is true that the police did in fact have Shelly's permission to enter Emilio's residence, this is irrelevant to the issue of third-party consent, because Shelly did not have the authority to give police consent to enter. Anyone can invite police to search someone else's home; that does not automatically give police valid consent to the search.

In its trial court brief on the topic of third party consent, the State relied on State v. Sobczak, 2013 WI 52, ¶ 19, 347 Wis. 2d 724, 740, 833 N.W.2d 59, 67. (R. 78, p. 4.) The State explained in said brief that third-party consent is not limited to a co-occupant or co-inhabitant. Id. This is true, however, in Sobczak, the person who gave third-party consent was a girlfriend of three-months who was staying for the weekend at Sobczak's home and had been left alone in the residence while he was at work. Sobczak, ¶ 2. This is illustrative as all of those factors were considered by the court

with favor in that case, and all of those factors are absent in the case of Shelly Torres' entry to the home of Dorian and Emilio Torres.

The Sobczak court listed three specific factors to be considered as to whether a person has the authority to give third-party consent for a search:

> "First, the relationship of the consenter to the defendant is important, not only in the familial sense, but also in terms of the social ties between the two. A romantic relationship, for example, gives rise to different expectations than does a passing acquaintance or a purely economic connection. Second, the duration of the consenter's stay in the premises can shed light on her authority to allow visitors in, though, as we have demonstrated, that alone does not settle the question. Third, a defendant's decision to leave an individual in his home alone helps support an inference that the individual has been given some choice in excluding some visitors and opening the door to others. *See, e.g., United States v. Sanchez,* 608 F.3d 685, 689 (10th Cir.2010) (noting that the consenter was regularly left alone in the home as one of the reasons supporting a finding of actual authority). Of course, the longer a person is left alone in the home, the more likely she will have authority to consent. *See, e.g., Davis v. State,* 262 Ga. 578, 422 S.E.2d 546, 549 (1992) (mentioning the limited time period for which the consenter was left alone in the home in finding a lack of authority to consent)."

State v. Sobczak, 2013 WI 52, ¶¶ 19-20, 347 Wis. 2d 724, 741–43, 833 N.W.2d 59, 67–68. (Some citations omitted.)

In this case, Shelly testified that Emilio had given her a key, "…[T]here would be times where he would want me to pick up mail, pick up cereal or whatever it might be, or come in and check on Dorian; do some errands in the house or clean up and stuff. So he had given me a key. So this way if he was at work, he would call and I could do that." (Tr. 5/11/15, p. 9., emphasis added.)

It is clear by this explanation that Emilio did not expect Shelly to simply come in when she wanted to do so, or when in her judgment it was necessary. She said he would call if he wanted her to do it. Further, none of the other factors from Sobczek apply. First, there was no familial or romantic relationship. Second, the duration of the consenter's (Shelly's) stay was non-existent in this case; she was not there by invitation to stay for any amount of time; she was there to search. Third, no one in this instance agreed or asked Shelly to remain or be in the house alone. Therefore, all of the specifically enumerated factors stated in Sobczek are lacking here.

There was, however, a final catch-all type of factor in Sobczek. After enumerating the first three factors, the Court there stated, "Finally, there are … other … facts that may illuminate the depth of an individual's relationship to the premises, such as whether she has been given a key, whether she keeps belongings in the home, whether her driver's license lists the residence as her address, and so on." Id., ¶ 20. Certainly, Shelly had a key, but that fact alone does not give rise to a valid third-party consent in the absence of all other important factors. Indeed, given the fact that the other factors were enumerated, while the possibility of a key was put into a catch-all sentence at the end, it is evident that this is a less important fact than the others.

Other third-party consent cases involve a guest that has given consent while the actual resident was away. There are no known cases in which a person who was not even a guest in the home at the time was held to have authority to give

consent to a search. Even more, in this case, one of the actual residents of the home was there at home at the time of the search. It is unheard of for a person who is not even a guest of a home, much less a joint-tenant or resident, to be held to have authority to give third-party consent when an actual resident of the home is present and has not been asked for consent at all. Shelly did not have authority to give third-party consent in this case.

CONCLUSION

The warrantless entry to Dorian Torres' home was a search under the Fourth Amendment, and it did not qualify as a community caretaker exception. Therefore, it was a violation of his rights under the Fourth Amendment, contrary to the findings of the trial court. The evidence obtained at that time – specifically, the body of Emilio Torres – should have been suppressed from use as evidence at trial. Furthermore, because the discovery of the body was the foundation for all later search warrants and interviews of Dorian and other witnesses, any and all evidence obtained subsequent to the discovery of Emilio Torres' body should also have been suppressed.

Dorian Torres hereby asks this Court to reverse and vacate his conviction in this case, on the basis that the evidence used to convict him was obtained in violation of his rights under the Fourth Amendment. Dorian Torres also asks this Court to remand the case for a new trial, at which any evidence obtained in violation of his Fourth Amendment rights – the body of Emilio Torres and all subsequently obtained evidence – would be suppressed.

Respectfully submitted this ____day of _____, 2017.

Angela D. Henderson
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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 6,598 words.

_____
Angela D. Henderson

ELECTRONIC CERTIFICATION

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

_____
Angela D. Henderson

CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve.

_____
Angela D. Henderson

TABLE OF THE APPENDIX