STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 17 AP 490, 17 AP 491

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SIERRA ANN DESING,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
MARCH 8, 2017, IN THE CIRCUIT COURT
FOR WALWORTH COUNTY, BRANCH I,
THE HONORABLE PHILLIP A. KOSS PRESIDING.

Respectfully submitted,

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STATEMENT OF THE ISSUES

I. THE WARRANTLESS ENTRY INTO DESING'S HOME BY LAW ENFORCEMENT OFFICERS CANNOT BE JUSTIFIED UNDER THE COMMUNITY CARETAKER EXCEPTION TO THE WARRANT REQUIREMENT.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

At approximately 7:26 AM on Saturday, May 28th, 2016, a 911 call was placed in Walworth County, Wisconsin. (26:1.)[1] The 911 caller stated that he was headed west on Highway 20 when he observed a white Chevy Impala stopped by the side of the road. (Id.) He stated: "We stopped, there was a woman on the side of the road in her car and she was hanging out of the side of the door and, uhh, she said she was ok and we took off." (Id.) The caller left the scene, but then observed that the Impala had pulled back onto the highway and was traveling westbound, behind the 911 caller. (Id.) The caller described the Impala as being "all over the road" and travelling at a high rate of speed. (26:1-2.) The Impala was initially behind the caller, but the caller allowed the Impala to pass. (26:1.) The caller then followed the Impala to a house on Lafayette Lane in Elkhorn, Wisconsin. (26:4.)

Walworth County Sheriff's Deputies Alex Torres (Torres) and Gerald Post (Post) were dispatched to the address on Lafayette Lane. (23:1, 24:1.) The dispatcher advised the deputies that the driver of the Impala "looked like she was getting sick on the side of the road."

[1] All record citations refer to the Notice of Compilation of Record filed by the Circuit Court in case number 2016TR003046, appeal number 2017AP000490.

(26:2). Torres wrote in his report that he was "dispatched to a possible drunk driver…Caller also stated that the driver had pulled over and was vomiting on the side of the road." (23:1.) Post wrote in his report that he was dispatched to a "reckless driver" who had "pulled over onto the side of the roadway and the driver was sick." (24:1.) In fact, the 911 caller had never mentioned that the driver of the Impala was sick or vomiting—merely that she was "hanging out of the side of the door" and then "said she was ok." (26:1-2.)

Torres and Post entered the home on Lafayette Lane, without a warrant, and searched the home until they located Defendant-Appellant Sierra Ann Desing (Desing) in her bed on the lower level of the house. (46:10-11.) Desing was subsequently arrested and cited for operating a motor vehicle while intoxicated, contrary to Wis. Stat. § 346.63(1)(a), and operating with a prohibited alcohol concentration, contrary to Wis. Stat. § 346.63(1)(b). (23:2.)

Desing filed a motion to suppress "all evidence obtained, directly or indirectly, as a consequence of the unlawful entry of the defendant's home[.]" (5:1.) An evidentiary hearing on this motion was held on December 13, 2016. (49:1.) The issue at the hearing was whether the warrantless entry into Desing's home was justified under the community caretaker doctrine. (49:47.)

At the hearing, Post testified that he had himself listened to the 911 call that was made regarding this incident. (49:28.) He testified that the 911 caller had stated to dispatch that the driver of the vehicle "had the door open and she was, I think it was, in his words, getting sick."[2] (49:29.) He clarified that the word "vomiting" was never used by dispatch, but that he was told that she had been "getting sick." (49:35.) Post testified that the driver had told the 911 caller that she was OK. (Id.) He testified that the 911 caller had described that the suspect vehicle was "driving recklessly." (Id.)

Post testified that he was the first law enforcement officer to arrive at Desing's residence on Lafayette Lane. (49:30.) He noticed the vehicle described by the 911 caller parked in the driveway. (Id.) He did not notice anything about the way the Impala was parked to indicate that the person who had been driving it was experiencing medical distress. (49:35-36.) He did not notice any "puke on the side of the car or anything like that[.]" (49:36.) He did not hear anything or see any other people. (49:30.)

Post testified that he began knocking "pretty hard" on the front door of the house. (49:31.) He testified that while knocking, he said "Sheriff's department" in a voice that "progressively got louder." (Id.)

[2] Post's testimony about what the 911 caller said is contradicted by the dispatch transcript, *see infra*.

While Post was knocking on the front door, he looked through the front window and saw that Torres was inside the house, having gained entry through the back door. (49:31-32.)

Post testified that he then went around to the back door and entered the house as well. (49:32.) He testified that Torres told him that the back door had been open when he arrived there. (Id.) He and Torres searched the main level of the house, then Torres checked the basement where he located Desing. (49:33.)

Torres testified that he had been dispatched to a report of a reckless driver. (49:6.) He testified that what "caught [his] attention" was that a witness had reported that the vehicle had been pulled over and that the driver had been vomiting. (Id.) Torres also testified that the witness told the dispatcher, and the dispatcher told him, that the driver was intoxicated.[3] (49:15.) Torres went to the address of the registered owner of the vehicle, on Lafayette Lane. (49:7.) He arrived four or five minutes after receiving the call from dispatch. (49:9.)

Upon arriving at the house, Torres saw that Post had already arrived. (49:7.) Post was knocking on the front door. (Id.) Torres felt that the hood of the Impala was still warm. (49:8.) He did not observe

[3] As set forth above, neither the 911 caller nor the dispatcher had described the driver of the Impala as intoxicated or as vomiting, as shown by both the dispatch transcript (26:1-2) and Post's testimony (49:35.)

anything amiss about the way the vehicle was parked. (49:17.) He did not see any vomit or anything unusual inside the car. (49:16.) He was aware that the 911 caller had followed the Impala all the way to the house and that the caller had not observed anything about the way the driver exited the vehicle that would lead him to believe that she was "in medical trouble." (49:17.)

Torres "immediately proceeded to the rear of the house." (49:18.) He testified that he saw the back patio door of the house standing open and a small dog running around on the deck. (Id.) He then made a decision to enter the home. (Id.) Torres testified that he did not knock prior to entering the home, and that he called out and identified himself "while entering" the home. (49:18-19.)[4]

Torres' testimony on the entry of the home conflicted with Post's. Post had testified that, while still knocking at the front door, he saw Torres inside the house. (49:31-32.) Torres initially testified that he "made the call," entered the house and looked around, and then "at that point in time Deputy Post arrived…and we started searching the house[.]" (49:10-11.) However, Torres later changed his testimony and said that he did not go into the house "until [Post] came around

[4] While Torres initially testified that he had knocked and yelled into the house prior to entering, on cross examination he agreed that he had not knocked prior to entering, and only yelled *as* he was entering. (49:10, 18-19.)

back to go in together" because "[w]e don't go in a house by ourselves." (49:20.)

Post's described his thoughts about the decision to enter the house as follows:

> [W]e were told the person was sick. So by that, my thought process was they were throwing up on the side of the highway. Now, I've had a situation where I've been to—I've actually been involved in a situation where someone was aspirating on their vomit and they couldn't breathe. …[W]e needed to make contact with whoever was operating the vehicle because it was reported to us that they were getting sick and we wanted to make sure that they were in healthy enough condition to take care of themselves. (49:32-33.)

Torres's subjective thoughts on the situation were similar:

> The concern is if I get a call of somebody vomiting and sick and I don't check on it, and this person vomits in her sleep and dies and it was my responsibility to go in and check, then it's on me. (49:12.)

Torres agreed that "besides the report of the vomiting on the side of the road, there was no other indications that this person was in medical distress[.]" (49:22, *sic*.)

After oral argument, the circuit court made factual findings. The court found that dispatch had indicated to the deputies that the driver was "possibl[y] vomiting…or getting sick." (49:52.) It found that Post was knocking and yelling at the front door, with no response. (49:53.) The court noted that it was "not clear" if Torres announced himself before entering the back door. (Id.)

The court addressed the legal issues, finding (1) that a search within the meaning of the Fourth Amendment had occurred; (2) that the police were exercising a bona fide community caretaker function; and (3) that the public interest outweighed the intrusion upon Desing's privacy. (49:52-59.) The court therefore denied Desing's motion to suppress. (49:59.)

The case proceeded to stipulated trial on February 28, 2017. (22.) The trial court found Desing guilty of both citations, and, in case number 2016-TR-3046, imposed and stayed a forfeiture of $150.00 plus court costs, a six-month revocation of operating privileges, and a mandatory alcohol assessment. (47:1.) In case number 2016-TR-3047, no additional penalty was imposed. (47:2.) As part of the stipulation, the parties agreed that Desing preserved her right to appeal the trial court's denial of her suppression motion. (22:2.) Desing now appeals.

ARGUMENT

Desing respectfully requests that this Court reverse the circuit court's order, as well as her convictions, and remand for further proceedings.

I.

THE WARRANTLESS ENTRY INTO DESING'S HOME BY LAW ENFORCEMENT OFFICERS CANNOT BE JUSTIFIED UNDER THE COMMUNITY CARETAKER EXCEPTION TO THE WARRANT REQUIREMENT.

A. Standard of review.

"When reviewing the denial of a motion to suppress evidence, this Court should uphold the circuit court's findings of fact unless clearly erroneous." ***State v. Maddix***, 2013 WI App 64, ¶12, 348 Wis. 2d 179, 831 N.W.2d 778 (internal citations omitted). "[T]he application of constitutional principles to facts is a question of law that we review de novo." ***Id.*** (internal citations omitted). Accordingly, this Court should "independently review whether an officer's community caretaker function satisfies the requirements of the Fourth Amendment and Article I, Section 11 of the federal and state Constitutions." ***Id.*** (internal citations omitted).

Our courts have adopted a three-part test for determining whether a law enforcement officer's conduct is properly within the scope of the community caretaker exception:

> (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.[5]

If the third part of the test is reached, the court must consider four factors in balancing the public interest against the privacy of the individual:

> (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 was involved; and
> (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.[6]

The burden of proof is on the State. ***State v. Pinkard***, 2010 WI 81, ¶29, 327 Wis. 2d 346, 785 N.W.2d 592.

B. The entry into Desing's home was a search.

"[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed[.]" ***State v. Ferguson***, 2009 WI 50, ¶17, 317 Wis.2d 586, 767 N.W.2d 187

[5] ***State v. Pinkard***, 2010 WI 81, ¶29, 327 Wis. 2d 346, 785 N.W.2d 592.
[6] ***Id.***, 2010 WI 81, ¶42.

(internal quotations omitted). In community caretaker cases, the entry of a home has consistently been found to be a search for Fourth Amendment purposes. *See e.g.* ***State v. Matalonis***, 2016 WI 7, ¶34, 366 Wis. 2d 443, 875 N.W.2d 567, ***State v. Pinkard***, 2010 WI 81, ¶30; ***State v. Ultsch***, 2010 WI App 17, ¶14, 331 Wis. 2d 242, 793 N.W.2d 505; ***State v. Ziedonis***, 2005 WI App 249, ¶16, 287 Wis. 2d 831, 707 N.W.2d 565.

Here, the circuit court concluded that Torres and Post's entry into Desing's home constituted a search under the Fourth Amendment. (49:53.) That finding is consistent with the well-established caselaw and should not be disturbed.

C. Deputies Torres and Post were not exercising a bona fide community caretaker function.

Community caretaker and investigative motives may co-exist in the framework of a legitimate community caretaker activity. ***State v. Kramer***, 2009 WI 14 ¶¶30-33, 39, 315 Wis. 2d 414, 759 N.W.2d 598. For a search to be considered a bona fide exercise of the community caretaker function, the official action must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***State v. Gracia***, 2013 WI 15, ¶16, 345 Wis. 2d 488, 826 N.W.2d 87 (2013), *quoting* ***Cady v. Dombrowski***, 413 U.S. 433 (1973). Law enforcement officers must

have an "objectively reasonable basis" to believe that a person was in need of assistance. ***Gracia***, 2013 WI 15, ¶19. "Although it is only one factor to be taken into consideration in judging the objective beliefs of police, the subjective intent of the officers is relevant." ***Gracia,*** ¶21.

In assessing whether the law enforcement officers here had an objectively reasonable basis to believe that Desing was in need of medical assistance, the Court must consider the facts as known to law enforcement at the time of the search. ***State v. Matalonis***, 2016 WI 7, ¶35. The factual record is complicated by inconsistent testimony about what was said by the 911 caller to dispatch, and, in turn, what was relayed by dispatch to Post and Torres. However, under the collective knowledge doctrine, the police force—including dispatchers—is "considered as a unit." ***State v. Rissley***, 2012 WI App 112, ¶19, 344 Wis. 2d 422, 824 N.W.2d 853, *citing* ***State v. Mabra***, 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974). Thus, the facts in possession of any officer or dispatcher must be imputed to the law enforcement agency *en bloc* in determining whether, under the totality of the circumstances, an objectively reasonable basis existed for the exercise of the community caretaker function.

In this case, we have access to the firsthand account of the eye witness, in the form of a transcript of the 911 call. The 911 caller stated: "We stopped, there was a woman on the side of the road in her

car and she was hanging out of the side of the door and, uhh, she said she was ok and we took off." (26:1.) The caller never said that Desing was vomiting or even that she appeared sick. (Id.) To the extent that individual officers were under the impression that a witness had observed Desing to be sick or vomiting, those subjective impressions must be disregarded—the question is whether, under the totality of the circumstances, and considering the law enforcement agency *en bloc*, an objectively reasonable basis existed for the exercise of the community caretaker function. An objectively reasonable basis cannot be based on information known to the law enforcement agency to be false.

Based on the information reported by the 911 caller, the law enforcement agency had reason to believe that Desing had been leaning out of the side of her car, said she was OK, and drove away. (Id.) The agency also would have reason to believe that Desing drove away in a reckless manner and at a high rate of speed, but that upon arriving home, she parked and entered the home without any evidence of medical distress. (26:1-2, 49:17.) Upon arriving at Desing's home, Torres and Post ascertained that Desing's car was parked appropriately, and they observed no indicia of a medical emergency outside of the home. (49:17, 22, 35-36.) They saw the back door to be open. (49:18.)

A factually similar case can be found in ***State v. Ultsch***, 2010 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505. In ***Ultsch***, the defendant's vehicle had collided with a brick building, causing damage "substantial enough that the occupant of the building was concerned about the structural integrity of the building." ***Id.***, ¶2. The defendant left the scene and abandoned her vehicle in deep snow at the bottom of a one-quarter mile long driveway. ***Id***., ¶¶2-3. The owner of the home, who identified Ultsch as his girlfriend, said that she was in the house and "possibly in bed or asleep." ***Id.***, ¶3. No evidence of specific injuries to Ultsch, such as blood, was found along the driveway. ***Id***. The law enforcement officer knocked on the door and announced his presence. ***Id.***, ¶4. Upon receiving no answer, he entered the home. ***Id***.

The Court of Appeals found that the officer did not have an objectively reasonable basis to believe that Ultsch was in need of assistance. ***Id.***, ¶22. In reaching that conclusion, the Court emphasized (1) the lack of blood or any other indications of injury; and (2) the encounter with Ultsch's boyfriend, who had had recent contact with her and did not say anything indicating that she needed help. ***Id.***, ¶¶19-21.

In ***Ultsch***, law enforcement had no concrete evidence that the defendant needed assistance, merely a guess based on the serious

collision she had been in. ***Id.***, ¶19. Likewise, the deputies here had no more than a guess that Desing might need assistance. They knew she had pulled over to the side of the road, leaned out the window, proceeded to drive home in a reckless fashion, but was able to park appropriately and get inside without any indication that she was in distress. Although the 911 caller was apparently close enough to speak with Desing, he did not describe Desing as appearing sick or distressed. She was not observed vomiting. Upon arrival at the house, neither Post nor Torres saw blood, vomit, or anything else indicating a medical emergency.

The reasonableness of law enforcement officers' (already speculative) concern for Ultsch's safety was undercut by their encounter with Ultsch's boyfriend, who had been in recent contact with her, was leaving the residence, said Ultsch was possibly asleep, and did not mention anything about Ultsch needing assistance. ***Id.***, ¶3. Here, the 911 caller had an analogous encounter with Desing herself who told the caller that she was OK. The caller presumably stopped to aid Desing, and, had Desing been in need of any assistance, Desing could have simply taken the caller up on his offer.

When the 911 caller spoke with the dispatcher, he did not make any statements such as "she said she was OK *but I don't think she is*," or "she needs help," or "she needs an ambulance." The 911 caller's

clear concern was not with Desing's well-being, but with her ability to operate a motor vehicle. He describes her as being "all over the road," "all over the place," "doing 85 miles an hour," and ultimately says "she was gonna hurt somebody[.]" (26:1-4.) Likewise, the radio traffic from the dispatcher to the deputies repeatedly described the situation as a report of a "reckless driver," not as a person in need of medical assistance. (*see* Call 2, Call 4, Call 6, *at* 26:2, 4.) No ambulance was dispatched to Desing's home, which, had anyone involved viewed this as a bona fide medical emergency, surely would have occurred. (26:1-6.)[7]

While it is not dispositive, a court "may consider a law enforcement officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker." ***State v. Kramer***, 2009 WI 14, ¶36. Torres and Post were not dispatched, along with an ambulance, to deal with a medical emergency. They were dispatched to investigate a reckless driver. (26:2, 4.) Both Torres and Post wrote reports characterizing the report they had received from dispatch as being for "a possible drunk driver," and "a reckless

[7] It is also worth noting that, upon finding Desing in her bed, Torres' first action was not to check her well-being, but to order her to get out of bed and follow him upstairs. (49:21-22.) He only asked about her well-being after she volunteered the information that she was sick—after the seizure had already occurred. (49:22.)

driver," respectively, before going on to comment about the driver potentially being sick. (23:1; 24:1.)

Both deputies wrote about their entry of the house in terms that acknowledge how little evidence they had of an ongoing medical emergency. Torres wrote that he "entered the house to make sure that the driver was ok and not in need of medical attention." (23:1.) Post indicated that he entered the house "to determine if there was a medical emergency." (24:1.) These justifications do not meet the standard of an objectively reasonable basis to believe that a person was in need of assistance; the mere desire to rule out any possibility of a medical emergency is not an objectively reasonable excuse to conduct a warrantless entry of a home.

Finally, in their testimony at the motion hearing, both deputies placed great weight on the report that Desing had been described as vomiting. Post described "a situation where I've been to…where someone was aspirating on their vomit and they couldn't breathe" as his subjective motivation for wanting to enter the home. (49:32-33.) Torres described his concern about feeling responsible if "somebody [is] vomiting and sick…and this person vomits in her sleep[.]" (49:12.) Torres further opined that "besides the report of the vomiting on the side of the road, there was no other indications that this person was in medical distress[.]" (49:22, *sic*.)

The heart of both Post and Torres' subjective rationales for entering the home was the report of Desing vomiting. Yet this Court is required to consider the law enforcement agency "as a unit," ***State v. Rissley***, ***supra***, meaning the Court must consider that Desing "vomiting" or even being "sick" was never reported to law enforcement by the 911 caller.[8] The deputies' subjective rationales, even if facially reasonable, completely fall apart upon consideration of the department's collective knowledge that Desing was never reported as vomiting or being sick, that no vomit was located in or on the car, and that there were no other indications at the house that there was a medical emergency.

Any concern the deputies possessed about Desing's well-being was extremely speculative, ignored Desing's failure to ask for aid and her affirmative statement that she was OK, and was grounded in a false belief that Desing had been vomiting on the side of the road. The most reasonable interpretation of the facts is that two deputies (without an ambulance) were not dispatched to a medical emergency, but were dispatched to investigate a report of a reckless, and potentially drunk, driver. Having no other legal justification to enter

[8] To the extent that the circuit court may have made factual findings to the contrary, those findings are clearly erroneous.

the home,[9] and choosing not to apply for a warrant, the deputies attempted to justify their actions under the community caretaker doctrine.

In 2010, Justice Ann Walsh Bradley discussed the dangers of allowing the speculative invocation of the community caretaker doctrine to justify a *de facto* investigatory intrusion into a home. She wrote:

> [A]n unarticulated concern about the possibility of an overdose can always be later invoked by a court when officers arrive at what they think is a "drug house" and the inhabitants fail to respond to the officers' knock. If that unarticulated concern now permits officers to enter the home without a warrant and without probable cause, then it is unclear what constraints remain on warrantless home searches when there is a suspicion of drug activity.

State v. Pinkard, 2010 WI 81, ¶92 (A. W. Bradley, J., dissenting). Here, the mere possibility—the desire to rule out—a medical emergency is used to justify entry into a home to search for a potential drunk driver. It would not be difficult for the police to create similar speculative scenarios to justify a home entry every time that a person believed to be impaired by the consumption of alcohol chooses to retreat into his or her home. This "broad, ever-expanding version of the exception risks transforming a shield for evidence encountered

[9] *See* ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), holding that neither hot pursuit nor exigent circumstances justify the warrantless entry of a person's home for a nonjailable traffic offense.

incidental to community caretaking into an investigatory sword." ***State v. Matalonis***, 2016 WI 7, ¶112 (Prosser, J., dissenting.)

D. If Deputies Torres and Post were exercising a bona fide community caretaker function, the public interest in investigating Desing's welfare did not outweigh Desing's right to privacy and security within her own home.

Even if Torres and Post were acting as bona fide community caretakers, this does not in itself justify an entry into Desing's home. "Although a multitude of activities fall within the community caretaker *function*, not every intrusion that results from the exercise of a community caretaker function will fall within the community caretaker *exception* to permit a warrantless entry into a home." ***State v. Pinkard***, 2010 WI 81, ¶20 (emphasis in original). Put another way, an officer's desire to aid a member of the public—even if bona fide—does not itself authorize the violation of that citizen's constitutional right to be free from unwarranted searches and seizures. The community caretaker exception only applies when the public need and interest outweigh the violation of the citizen's liberty. ***State v. Kramer***, 2009 WI 14, ¶40.

As described above, the court must consider four factors in balancing the public interest against the privacy of the individual:

> (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 was involved; and
> (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.[10]

The stronger the public need and the more minimal the intrusion on an individual's liberty, the more likely the police conduct will be held to be reasonable. ***State v. Kramer***, ¶41.

When applying this balancing test, the courts have advised a "cautious approach" when dealing with intrusions into a home: "a warrantless entry into a home is 'more suspect' than when a community caretaker function is involved in the search of an automobile." ***Pinkard***, ¶20, *citing* ***South Dakota v. Deneui***, 775 N.W.2d 221, 239 (S.D.2009) *and* ***United States v. Gillespie***, 332 F.Supp.2d 923, 929 (W.D.Va.2004).

1. The degree of public interest and the exigency of the situation.

The courts have recognized that "[t]he public has a substantial interest in ensuring the safety of drivers in serious traffic accidents." ***State v. Gracia***, 2013 WI 15, ¶25, *citing* ***State v. Ziedonis***, 2005 WI App 249, ¶29. The courts have also recognized an interest in ensuring the well-being of "citizens who may be suffering from a drug

[10] ***State v. Pinkard***, 2010 WI 81, ¶42.

overdose or were the victims of a crime[.]" ***State v. Pinkard***, 2010 WI 81, ¶48.

There is no evidence that Desing was injured or involved in an accident, the victim of a crime, or in any type of acute medical distress. Rather, the case is similar to ***Ultsch***, where the court observed that "[t]here was good reason to believe she was intoxicated and almost no reason to think that she was in distress." ***State v. Ultsch***, 2010 WI App 17, ¶25. The ***Ultsch*** court noted that the defendant had driven home, walked a quarter-mile, and that her boyfriend had not expressed concern for her safety. ***Id.*** Likewise, Desing had disclaimed any need for assistance, driven home, parked appropriately, and entered the house without any sign of ongoing medical distress.

The ***Pinkard*** court found a high degree of exigency when the defendant was reported to be passed out or sleeping next to apparent drugs and paraphernalia, the back door to the house was open, and the defendant was unresponsive. ***State v. Pinkard***, 2010 WI 81, ¶2. Although Desing's back door was also open, the cases are distinguishable. First, the defendant in ***Pinkard*** was known to be unresponsive before the police were even called, while Desing was known to have arrived home, parked safely, and walked into the house without any indication of ongoing distress. Second, the presence of illegal drugs in ***Pinkard***, coupled with the defendant being

unresponsive, was good reason to suspect a drug overdose. There was no information here to suggest that Desing had suddenly become unconscious after safely parking her car and walking into the house. Finally, while both cases involve a back door being open, the factual record in Desing supports a reasonable explanation for the door being open that does not involve any emergency—that Desing had let her dog out. (46:20-21.)[11]

The information known to law enforcement at the time of the deputies' entry into Desing's home was suggestive of reckless driving and possibly intoxication, but not of injury or an ongoing medical emergency. That Desing had indicated she did not need help, drove home, parked appropriately, and entered the home without any additional signs of medical distress all diminish the public interest in a home entry. Accordingly, this factor weighs against a conclusion that the community caretaker function was reasonably exercised.

2. The attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed.

In ***Ultsch***, although no force was used, the court found that the degree of overt authority displayed was "considerable" given that

[11] *See also* the testimony of James Desing at 49:44— "it is also common practice in our house in the spring, summer if it's a nice day, we do leave that back patio open. We're at the end of a cul-de-sac. It's a very safe location."

"Ultsch was at home, asleep in her bedroom at 9:00 a.m. and [the officer] entered her bedroom and awakened her." ***State v. Ultsch***, 2010 WI App 17, ¶26. The court in ***Gracia***, discussing ***Ultsch***, highlighted that the police "entered the house without permission and then walked around unattended until they found Ultsch sleeping in bed." ***Gracia***, 2013 WI 15, ¶26.

As in ***Ultsch***, Torres and Post entered Desing's home without permission. They proceeded to conduct a "full search" of the entire main level, finding no signs of distress, and then Torres entered the basement, finding Desing in her bed. (49:20-21.) Upon locating Desing in bed, Torres' first action was not to check Desing's well-being, but to ask her to step out of bed and follow him upstairs. (49:21-22.) The deputies displayed a considerable degree of overt authority by entering the home without permission, searching the entire first floor, unaccompanied by any lawful occupants of the house, entering Desing's bedroom, and ordering her to come upstairs. The second factor must also weigh against a conclusion that the community caretaker function was reasonably exercised.

3. Whether an automobile was involved.

When the search is of a home rather than an automobile, "[t]his is not a relevant factor…except to recognize that one has a heightened privacy interest in preventing intrusions into one's home." ***State v.***

Pinkard, 2010 WI 81, ¶56. There is a "constitutional difference" between homes and automobiles, and "a warrantless search of a car deemed reasonable may be unreasonable in the context of a search of a home." ***Cady v. Dombrowski***, 413 U.S. 433, 439 (1973), *citing* ***Chambers v. Maroney***, 399 U.S. 42, 52 (1970).

4. The availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

When evaluating what alternatives law enforcement officers had at their disposal, it must first be remarked that the narrow issue in this case is not whether the deputies could have entered Desing's home without a warrant to respond to what they believed to be a medical emergency, but whether the evidence derived from their entry into Desing's home should be admissible in a subsequent prosecution. As Justice Ann Walsh Bradley explained in ***Pinkard***:

> The question in this case is not whether officers could have entered Pinkard's residence without a warrant if they believed that medical assistance was needed. Of course they could have.
>
> Rather, the question is whether the evidence they seized during this warrantless entry can be used in court to secure a criminal conviction.[12]

The specter of a citizen dying while an officer stands by doing nothing is frequently invoked to justify a warrantless search or seizure—*see, e.g.*, ***Pinkard***, 2010 WI 81, ¶59, ***State v. Ferguson***, 2001 WI App 102,

[12] ***State v. Pinkard***, 2010 WI 81, ¶¶64-65 (A.W. Bradley, J., dissenting).

¶24, 244 Wis. 2d 17, 629 N.W.2d 788 (Fine, J., concurring.) The circuit court here also invoked this specter—"I would be upset if they didn't go in if that was my child or if that was me…that's what we want police to do." (49:58.)

It is a false dilemma to suggest that if the police are unable to conduct a constitutionally reasonable search, they must therefore do nothing. The law is clear that not every bona fide exercise of the community caretaker *function* will fall within the community caretaker *exception* to the warrant requirement. ***State v. Pinkard***, 2010 WI 81, ¶20. This does not mean that police may *only* act as community caretakers when they have determined that their conduct satisfies the community caretaker exception to the warrant requirement. It means that police must accept that there are times when they are permitted to save a life, but not permitted to use evidence derived during that process in a subsequent prosecution. If it were otherwise, then any distinction between the community caretaker *function* and the community caretaker *exception* would collapse.

There was no testimony provided in this case as to anything that the police attempted other than knocking and announcing their presence. Although the record does not establish an exact timeline, it appears that Post had been there for a matter of minutes when Torres arrived and "immediately proceeded to the rear of the house." (49:18.)

Torres only called out and identified himself "while entering" the home. (49:18-19.)

This is in sharp contrast to the efforts made by law enforcement officers in similar cases before they resorted to a warrantless home entry. In ***State v. Ziedonis***, the officers responded to a house in a high-crime area, where the back door was open and the owner's "vicious" dogs were running loose in the street. 2005 WI App 249, ¶¶2-5. The officers spent approximately an hour and a half taking extraordinary measures to contact the occupant of the home, including "having the sirens and air horns on, and using a loud speaker to identify themselves[.]" ***Id.***, ¶4.

In ***State v. Ferguson***, the officers responded to a home where they encountered empty liquor bottles and highly intoxicated teenagers, including one who had been vomiting. 2001 WI App 17, ¶4. The officers had reason to suspect that additional highly intoxicated teenagers may be behind a locked bedroom door. ***Id***., ¶5. The police made phone calls to the defendant's place of work and spent approximately 30 minutes knocking on the door and yelling before eventually entering the bedroom. ***Id.***

The ***Ferguson*** case is particularly on point, given that the concerns of the deputies here were similar to those of the police in ***Ferguson***—namely, that Desing could be highly intoxicated,

vomiting, and in need of medical assistance. Yet Post spent little to no time waiting for a response to his knocks, while Torres did not knock at all prior to entering Desing's home. Neither deputy attempted to reach Desing or her family by telephone.

The failure to take alternative measures short of a home entry was excused in ***Pinkard*** under the theory that, since the defendant was known to be unresponsive, a telephone call or other methods of contacting him "would have been a fruitless exercise[.]" ***Pinkard***, 2010 WI 81, ¶58. Here, Desing was known to have parked her car and walked into the house mere minutes before the deputies' arrival, displaying no signs of distress in the process. There was no reason for the deputies to believe that a telephone call or other method of contacting Desing would have been fruitless.

It must also be noted that, once Torres had descended the stairs and saw Desing in her bed, he still had alternative courses of conduct. He could have engaged her in conversation from the hallway where he was standing, and ascertained whether she needed medical assistance. Instead, he chose to order Desing to get out of bed and follow him upstairs. (49:21-22.) There is no reason to believe that simply speaking to Desing would not have been an effective way to address whether any further invasion of her privacy was appropriate.

Finally, as in ***Ultsch***, the deputies had the alternative of relying on Desing's previous representation to the 911 caller that she was "OK" and did not need any assistance whatsoever. ***Ultsch***, 2010 WI App 17, ¶28. Given that Desing was apparently uninjured, that she had parked at home appropriately, and that the officers had themselves observed no evidence of a medical emergency, it would have been perfectly reasonable for the deputies to take Desing at her word and leave her alone.

For these reasons, the fourth factor also weighs against a conclusion that the community caretaker function was reasonably exercised here.

In total, considering each of the four factors, the public's interest in allowing the deputies to enter Desing's home was minimal, and the intrusion on Desing's privacy—an unauthorized entry into her bedroom—was substantial. Reasonable alternatives were available. Therefore, even if the deputies were exercising a bona fide community caretaker function, it was not exercised in a constitutionally reasonable manner such that the evidence derived from the search can be properly used against Desing in a subsequent prosecution.

CONCLUSION

Torres and Post were conducting an investigation into reckless or drunk driving, not acting as bona fide community caretakers. Any community caretaker function being exercised by Torres and Post was not exercised in a reasonable manner, and Desing's right to privacy and security within her home outweighs any public interest that might have warranted an intrusion. Had the evidence as a result of the unlawful entry been suppressed, Desing would have not been convicted. Desing respectfully requests that this Court reverse the circuit court's order denying her suppression motion, and remand the matter for further proceedings.

Dated at Madison, Wisconsin, June 20, 2017.

Respectfully submitted,

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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:

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