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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

APPEAL NOS. 2017AP000490, 2017AP000491

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SIERRA ANN DESING,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE DECISION OF
THE HONORABLE PHILLIP A. KOSS, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH I

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STATEMENT OF THE ISSUES

Were the deputies justified in entering the defendant's residence without a warrant under the community caretaker function?

The trial court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication of this court's opinions nor oral argument is necessary in this case. The issues presented are adequately addressed in the brief and under the rules of appellant procedure, publication of this decision is not appropriate because it is a one-judge appeal. See Wis. Stat. § 809.23(1)(b)4, Wis. Court Rules and Procedures, 2013-2014.

STATEMENT OF FACTS RELEVANT TO THE SUPPRESSION HEARING

On Saturday May 28, 2016 at approximately 7:32 a.m. Walworth County Sheriff's Deputies Alex Torres and Gerald Post, who have been in law enforcement for twenty years and thirty-one years respectively, were on routine patrol when they were dispatched to a residence on Lafayette Lane in Elkhorn, Walworth County, Wisconsin. R53:5-6, 28-30. Dispatch advised Deputies that there was a reckless driver on I-43 southbound from Highway 20. R53:6, 29. Dispatch advised that the identified complainant provided a description of the vehicle. R53:6-7, 29. Dispatch advised

that complainant was westbound on Highway 20 approaching I-43 when he observed a female driver of the suspect vehicle pulled over on the side of the roadway, hanging outside her vehicle possibly getting sick or vomiting. R53:6, 23-24, 29, 34-35. The complainant asked the female driver if she was okay and the female driver stated, "Yes". R53:29, 16, 35. The complainant continued to watch the female driver pull out onto the roadway and continue west on Highway 20. R53:16, 29. The complainant eventually followed the female driver and advised dispatch that the female was now southbound on I-43 from Highway 20 and was driving recklessly. R53:29-30. The complainant described the female's vehicle as being all over the roadway and driving erratically. R53:6, 24, 29-30. Dispatch further advised that the registered owner of the suspect vehicle had an address on Lafayette Lane in Lafayette Township, Walworth County, Wisconsin and the complainant followed the vehicle to an address of Lafayette Lane and observed the driver enter the residence. R53:16, 17, 30. The complainant then left the scene.

Deputies Post and Torres proceeded to that address and observed the suspect vehicle parked in the driveway with no one around. R:53:7, 16, 30. The deputies arrived approximately four to five minutes after being dispatched

to the scene. R53:9. Deputy Post arrived on scene first and went to the front door, knocked loudly and attempted to make contact with any individual inside the residence. R53:7-8, 30. Deputy Post could not hear anything inside the residence, and did not see anyone until Deputy Post arrived in his squad car moments later. R53:30-31. Deputy Post continued to knock loudly on the front door and announced himself by saying in an extremely loud voice, "Sheriff's department." R53:30-31. No one answered the door. R53:31.

Upon Deputy Torres' arrival, he touched the suspect vehicle and observed that it was warm to the touch, indicating it had just been driven. R53:8. As Deputy Post attempted to make contact at the front door, Deputy Torres proceeded to the back of the residence. R53:7-8. Deputy Torres observed the back screen and glass patio door slid wide open and that there was a small dog running loose in the driveway and in the back area. R53:8-10. Deputy Torres, who is familiar with this upscale neighborhood, found this to be unusual, particularly for this time of day. R53:8-9. Deputy Torres yelled loudly into the house identifying himself as a Sheriff's deputy, but got no response. R53:10, 18, 25. The dog was also barking at Deputy Torres, making a lot of noise. R53:10. Due to the call and the report of the

driver vomiting along with the circumstances at the residence - door wide open, loose dog and no response from inside, Deputy Torres entered the residence to check on the condition of the person inside. R53:9-10, 12. While entering the residence Deputy Torres called out and identified himself as a Walworth County Sheriff's Deputy. R53:10, 25.

After no one answered the front door of the residence, Deputy Post, who was still at the front door, through the front window observed Deputy Torres inside the residence and could hear Deputy Torres from the outside announcing his presence. R53:31-32, 35. After observing Deputy Torres inside the residence, Deputy Post went to the back of the residence to assist Deputy Torres. R53:32. Deputy Post heard Deputy Torres loudly announcing that he was from the Sheriff's Department and asking if anyone was home. R53:32. Deputy Post then also entered the residence through the open patio door and spoke to Deputy Torres. R53:32. Deputy Torres informed Deputy Post that the patio door was wide open when he arrived. R53:32. Upon hearing these details, Deputy Post was concerned about the safety of the person inside based on the report that the individual had been getting sick. R53:32-33. Deputy Post was also concerned because the silence and lack of response from in the

residence after deputies attempts to contact someone indicated to him possible distress. R53:35.

Deputy Post and Deputy Torres searched to first floor and did not locate anyone. R53:11. Deputy Torres then went downstairs and located one female subject in the lower level of the residence, who was later identified as the defendant, Sierra A. Desing. R53:11, 33-34. No one else was located inside the residence. R53:37. The first thing Deputy Torres asked Desing upon finding her was if she was okay. R53:13. Design replied that she thought she had food poisoning, but refused medical attention. R53:22, 25-26.

Desing was subsequently arrested for operating a motor vehicle while intoxicated. R1.

**THE TRIAL COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Based upon the evidence adduced at the suppression hearing, the trial court found that police properly entered the residence under the community caretaker exception to the warrant requirement. R53:52-59. Specifically, the Court made the following findings:

[S]o I'll make some findings here that the officers get a dispatch that was precipitated by a known caller, who identified themselves, gave identifiers regarding the vehicle, the location, describing the behavior of the vehicle, getting off on Highway 20, apparently getting back on, proceeding south on 43 again. At some point, stopping the car - and I assume this is no 20, of

I recall. Leaning outside, halfway outside the vehicle. And as Exhibit 1 says, Highway 20 and Hillburn Mill, possible vomiting per caller, or getting sick.

So she's driving on 43, towards Elkhorn, somewhere northeast of East Troy apparently. Gets off. Appears to - at least consistent with getting sick. Gets back on. All over the roadway.

And the officers go to the home. They get there. They knock. They increase the loudness of the knocks and the yelling, and there is no response.

Officer Torres apparently arrives as Post is doing that at the front door. Goes to the back door. It's open. Now, I understand people can leave their doors open. Nothing illegal about that. But it is odd that at 7:30 in the morning, a door is open there that also has a screen door. I guess you can leave the screen door open when there's no bugs. I don't know, it looks like they back up to a field. But most people don't. Most people leave the screen door shut.

He goes in. You're right counsel, it's not clear if he announces before he goes in, as he's walking in, after he's in. But we've already got Post at the front door yelling and knocking and nobody answers.

So they go in without a warrant.

R53:52-53. The Court continued,

[T]he next issue is whether the police were exercising a bonafide community caretaker function.

...

[W]e've got somebody who for some reason is all over the road, needs to pull to the side. Whether they're possibly vomiting or not, I assume the average person, you hear that description: Hey, somebody pulled out and they're leaning outside their vehicle, and then closes the door and takes off again, we would all assume, especially coupled with the driving behavior, that person is sick. Sick enough that she can't maintain control of her vehicle. Sick enough that she can't make

it to wherever she needs to be to not pull over and throw up there.¹

Because I do think that's a reasonable inference. You don't have to prove beyond a reasonable doubt that she was sick, just that it's reasonable.

So they go to the home. And I've gone through what happens when they get to the home. That they search, and they find her. And they didn't have a warrant. And it's they argue, under community caretaker.

So if it is community caretaker, we need to analyze, as counsel points out, whether the public interest outweighs the intrusion upon the privacy of the individual; that the community caretaker function was reasonably exercised within the context of a home. And I believe in this case, that it was.

I look at the exigency. I don't know what their alternatives would have been. They don't know who to get a hold of. She had just gotten there; there would be no reason to go to the neighbors' home to say: Is she okay? They wouldn't know. There's nobody else in the house. They're not rummaging through drawers; they're not going through the refrigerator; they're not looking for drugs or weapons. They're wondering where this person is.

Because as both officers testified - and I realize there was some differences in the testimony. I don't believe that they are germane or materially relevant to my determination. Both are very concerned that this person is sick. It may be by alcohol. It may be, as Ms. Desing said, by food poisoning. But they are going in because that is their concern.

So they do the minimal type of intrusion to determine whether or not this person is ill and needs help.

¹ Desing's brief makes much of the fact that the complainant never actually told dispatch that the driver was sick or vomiting. However, as the trial court properly concluded, that conclusion was certainly reasonable based upon the description and circumstances described by the complainant.

R53:54-56. The Court acknowledged that even though Desing told the 911 caller that she was okay, the Court did not find that persuasive. The Court stated:

She did say "I'm okay" to the caller...Still, the caller didn't go: Oh, you're okay. And then not call in. They still were concerned enough that they called in after she says that she's okay. They're obviously not accepting of that explanation.

And the world is full of people who get sick who say: I'm okay. Given that her behavior still continued erratically, whether it's from illness or alcohol or both, I think it is proper to go on.

And I agree completely with Deputy Post; there were many questions of: Did you notice any evidence of distress? Unlike *Matalonis*, there's not blood, there's not that sort of thing. But I agree with Post that the absence of those things is what is alarming in this case. They're trying to get somebody's attention. They believe somebody is in there because a car is warm. It's the same vehicle that was out on the roadway minutes later. They're there within I think three to four minutes, something like that, and nobody's responding.

...

In this case, the absence of answer is distressing. This isn't the kind of case where you're going to find a blood trail. You're going to have a person who's passed out, aspirating in their vomit.

...

And in this case I don't even think it's close. This is a person who needed checking on. She even admits - and I know that comes in after so...it can't justify their entrance...I'm sick; I may have food poisoning. She didn't want rescue. But when asked, "Are you okay," which is one of the reasons she went in there, she says: I may

have food poisoning. So that implies to me that the officers were credible in their belief to go in.

So applying those standards, that it was valid community caretaker.

R53:56-58. The Court concluded:

Clearly I will also add that the public has significant interest in ensuring the safety of homes, homeowners, occupants, making sure that they are okay and assistance is provided. I think when officers have a reasonable belief that somebody is in distress - and I'm somewhat repeating but I'm going to tailor it into the public policy - that they had no other choice. There's nobody else to check with; she's it. She's the only one they can ask if anybody's okay, and she's the only one in the residence. So to write a warrant in that time period and let her lay in there, nonresponsive, I think would be reckless behavior by the officers. So for that reason I think this is an easy case to decide under community caretaker, and deny the motion.

R53:59.

ARGUMENT

I. THE DEPUTIES' CONDUCT WAS REASONABLE UNDER THE COMMUNITY CARETAKER FUNCTION.

A. Legal Principles.

1. Standard of Review.

When a suppression motion is reviewed, the circuit court's finding of fact will be sustained unless they are clearly erroneous. *State v. Roberts*, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, the Appellate Court will independently examine the totality of the

circumstances at the time of the complained of conduct to determine whether the officer's acts were reasonable. *Id.*

2. Community Caretaker Function.

Warrantless searches of private residences are presumptively unreasonable. *State v. Horngren*, 2000 WI App 177, ¶8, 238 Wis.2d 347, 617 N.W.2d 508. However, "a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures" of private homes. See *State v. Pinkard*, 2010 WI 81, ¶¶14, 22, 327 Wis.2d 346, 785 N.W.2d 592. "An officer exercises a community caretaker function 'when the officer discovers a member of the public who is in need of assistance.'" *Id.* ¶18 (citation omitted). This exception is the same under both the state and federal constitutions. *Id.* ¶14.

To determine whether a warrantless home entry is permissible under the community-caretaker exception, the reviewing court asks:

(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, 327 Wis.2d 346, ¶29.

The third, "reasonable exercise" question, examines

(1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the [search], including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Id. ¶42 (citation, footnote, and quotations omitted). No single factor is determinative. *State v. Gracia*, 2013 WI 15, ¶23, 345 Wis.2d 488, 826 N.W.2d 87. "The 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." *Pinkard*, 327 Wis.2d 346, ¶41 (citation omitted).

The outcomes of the community-caretaker cases are very fact-dependent, so review of those facts is warranted.

In *Gracia*, police investigation of a hit-and-run accident in which a traffic signal had been completely ripped from the ground led to the trailer home of Juan and Jaime Gracia. 345 Wis.2d 488, ¶¶6-8. A car in the Gracias' driveway "had clearly been in an accident," was missing its front license plate, and matched the description of the vehicle corresponding to the license plate found at the scene. *Id.* ¶7.

The officers knocked on the door, but the trailer

appeared to be unoccupied. As the officers started to leave, Jaime arrived and said Juan was probably home. *Id.* ¶8. The officers wanted to go inside because they "were worried about Gracia's potential injuries" and "needed to make sure he was okay." *Id.* Jaime entered the trailer alone and emerged several minutes later. He invited the officers inside; telling them Juan "had locked himself in his bedroom." *Id.* From his bedroom, Juan yelled "'go away.'" *Id.* Jaime forced the door open. The officers entered and found Juan, whose obvious intoxication and eventual admission to driving the car led to his arrest for operating a motor vehicle while intoxicated. *Id.*

Gracia moved to suppress the intoxication evidence. The circuit court found that the officers' entry into the bedroom was authorized by the community-caretaker exception to the warrant requirement. The supreme court affirmed.

Gracia argued that the officers were not performing a "bona fide community caretaker function" because they "did not have an objectively reasonable basis to believe Gracia needed assistance." *Id.* ¶18. First, Gracia reasoned that the officers' interest in him was not "'totally divorced from'" their law enforcement interests. *Id.* (citation omitted). The court explained that valid law enforcement concerns could co-exist with sincere concerns for a

person's well-being without negating the bona fide community-caretaker function. *Id.* ¶19. Second, Gracia argued that the officers had no objectively reasonable basis to believe he was hurt. The court was unconvinced because of the damage to the traffic signal and Gracia's car. *Id.* ¶¶21-22. Moreover, the officers were clearly and genuinely concerned about Gracia's safety. Their "subjective intent," though not dispositive, was highly relevant. *Id.* ¶21. The officers were exercising a bona fide community-caretaker function.

The court went on to explain that the officers' exercise of the function was reasonable. First:

The public has a substantial interest in ensuring the safety of drivers in serious traffic accidents. There was also some exigency in this situation. The police promptly began investigating the accident and were at Gracia's home within about 45 minutes of the accident being reported. If Gracia had been seriously injured in the accident, quick medical assistance would have been necessary.

Id. ¶25 (citation omitted). Second, the intrusion on Juan's privacy interests was "minimized by the facts of this situation." *Id.* ¶26. The officers were accompanied the entire time by "concerned co-tenant" Jaime, and only Jaime employed force. *Id.* Finally, the one possible alternative to the officers' intervention, leaving Juan's care to Jaime, seemed neither feasible nor effective. It was

unclear whether Jaime could have provided the needed assistance, whereas the "police officers are trained to deal with situations like this, they were already there, and they believed that Gracia might be injured." *Id.* ¶27. The court concluded that, under the totality of the circumstances, the officers reasonably exercised their community-caretaker function.

In *Pinkard*, a police officer received an anonymous tip that two people were asleep in a residence next to cocaine, money, and a digital scale, and that the rear door to the residence was open. He "was concerned" about the sleeping occupants. *Pinkard*, 327 Wis.2d 346, ¶2.

Several officers went to the scene, announced their presence, and knocked on the open rear door. Receiving no answer after forty seconds, they entered to ensure that the occupants "were not the victims of any type of crime; that they weren't injured; ... that they were okay, and to safeguard any life or property in the residence.'" *Id.* ¶4. From the rear entrance they could see the sleeping occupants through an open bedroom door. Before entering the bedroom, the officers again loudly announced their presence to no avail. *Id.* ¶5. After entering the bedroom, they had to shake Pinkard awake. *Id.* The officers saw various drugs and drug paraphernalia in plain view. They arrested

Pinkard, who was charged with several felonies. *Id.* ¶¶5-6. Pinkard moved to suppress the evidence against him arguing that the officers' entry to his residence was illegal. *Id.* ¶6. The circuit court denied the motion as to the drug evidence. *Id.* ¶7.²

The supreme court, conceding it was "a close case," concluded that the officers were engaged in a bona fide community-caretaker function. *Id.* ¶33. The circuit court implicitly found the officers' testimony—that they acted to safeguard the health of the sleeping persons and to protect the property in the residence—credible. That finding was not clearly erroneous. *Id.* ¶34. The open rear door was doubly significant, because it (1) suggested that "something untoward may have occurred inside the house and that the occupants may require assistance," and (2) reduced the occupants' "expectations of privacy." *Id.* ¶37. The sleepers' failure to respond to the officers' knocking "could indicate an overdose of drugs." *Id.* ¶35. That non-responsiveness coupled with the open door "reasonably warranted the officers entering the residence to ensure the occupants' health and safety." *Id.* ¶38. The officers were

²The circuit court suppressed the gun found beneath Pinkard's mattress because the search revealing it "went beyond the reasonable exercise of the officers' community caretaker function." *State v. Pinkard*, 2010 WI 81, ¶7, 327 Wis.2d 346, 785 N.W.2d 592.

exercising a bona fide community-caretaker function.

And the function was reasonably exercised. First, the officers did not know what the sleepers' physical condition was, and their inference that the pair might have overdosed was reasonable. *Id.* ¶46. "[T]he public has a substantial interest in police ensuring the well-being and safety of citizens who may be suffering from a drug overdose or were the victims of a crime." *Id.* ¶48. Second, the time of the officers' entry was beyond their control, as they "were responding to an anonymous tip." *Id.* ¶49. Their entry after less than a minute of knocking was reasonable because the sleepers' non-responsiveness and the open door possibly "indicate[d] [their] inability to look after" themselves. *Id.* ¶¶51-52. The officers made no show of force. *Id.* ¶55.

Finally, the court dismissed several suggested alternatives to the warrantless entry. Because the officers reasonably perceived the situation as exigent, no alternative was feasible. *Id.* ¶¶57-58.

Principles of reasonableness demand that we ask ourselves whether the officers would have been derelict in their duty had they acted otherwise. Indeed, if the officers had done otherwise, perhaps by leaving the scene to obtain a warrant or waiting for an ambulance to arrive, we are convinced the citizens of the community would have understandably viewed the officers' actions as poor police work.

Id. ¶59 (citations and internal quotation marks omitted).

State v. Ultsch, 2011 WI App 17, 331 Wis.2d 242, 793 N.W.2d 505, began with an SUV's hit-and-run crash into the side of a building. The SUV, its left fender damaged, was found a couple of miles away at the foot of a quarter-mile long driveway of a private home. *Id.* ¶2. The driveway was "covered in 'deep snow.'" *Id.* ¶3. The SUV's driver had not attempted to drive up to the house; instead, she walked the quarter-mile. *Id.* The officers called for a four-wheel-drive vehicle to take them up the driveway. While they were waiting, a man drove down from the house, identified himself as the homeowner, and told the officers that the SUV's driver was his girlfriend who was in the house "'possibly in bed or asleep.'" *Id.* He expressed no concern about her well-being. *Id.* ¶20. Driving up to the house, the officers saw no blood on the quarter-mile stretch of driveway. *Id.* ¶3.

Arriving at the front door, one officer knocked, got no response, tried the doorknob, found the door unlocked, and entered the house. *Id.* ¶4. The officer went to a rear bedroom, found the sleeping Ultsch, woke and questioned her, transported her to the Sheriff's Department to determine whether she was intoxicated, found that she was, and placed her under arrest. *Id.* ¶5.

Ultsch moved to suppress all evidence obtained "'as a

result of the illegal entry, detention, and arrest.'" *Id.* ¶6. The circuit court found that the officers' entry was justified under the community-caretaker doctrine. *Id.*

The court of appeals reversed, concluding that the officers were not exercising a bona fide community-caretaker function. "[T]he condition of the vehicle, viewed alone, was not such as to give rise to concern for Ultsch's safety. The damage, though significant, was limited to the vehicle's left front fender. The airbags had not deployed, the windshield was intact, there was no damage to the passenger compartment or to the driver's side door, and there was no blood or other indication of injury." *Id.* ¶19. Added to that, Ultsch's boyfriend described her as "possibly asleep" and expressed no concern about her condition. *Id.* ¶20. She managed to walk a quarter-mile in deep snow without incident, leaving no blood behind. *Id.* ¶21. Significantly, the officers expressed no subjective concern about Ultsch's well-being. *Id.* ¶¶3, 19.

Even if the officers had been exercising a bona fide community-caretaker function, they did not exercise it reasonably. First, with no objective evidence "to think that [Ultsch] was in distress," the public interest in the officer's warrantless entry was low. *Id.* ¶25. Second, although there was no use of force, "the degree of overt

authority displayed was considerable." *Id.* ¶26. Finally, there was a feasible and effective alternative, *i.e.*, "to rely on the representation of Ultsch's boyfriend that Ultsch was sleeping in the light of the limited damage to the vehicle, the absence of evidence of injury to the driver, and the exigent circumstances discussed above, and do nothing." *Id.* ¶28.

State v. Ziedonis, 2005 WI App 249, 287 Wis.2d 831, 707 N.W.2d 565, began with a complaint about Rottweilers on the loose in a Milwaukee neighborhood. Investigating officers were told the dogs belonged to the man "who lived in the back portion of the house at 2621 South 6th Street." *Id.* ¶4. The house lights were on and the officers learned that the occupant was inside. The officers made repeated attempts to contact him, using sirens, air horns, and "a loud speaker to identify themselves as Milwaukee police." *Id.* The dogs prevented them from knocking on the front door or ringing the doorbell. *Id.* After ninety minutes, one officer went to the back door without the dogs noticing. He saw that the storm door was unlocked and the inside door ajar. *Id.* ¶5. Fearing for the safety of the occupant, the officer opened the storm door and stood in the doorway calling out and knocking on the door frame with his metal baton. Still no answer. *Id.* ¶5.

The officer entered the house. He saw a handgun on the kitchen table. *Id.* ¶6. With his weapon "unholstered," he resumed looking for a person in need. *Id.* He continued to announce his presence. *Id.* He saw an assault rifle and ammunition. *Id.* At that point, two other officers came to assist. *Id.* Announcing their presence, they went upstairs. They saw drug paraphernalia in a living room area. *Id.* ¶7. In one bedroom, they found several marijuana plants, grow lights, and more paraphernalia. *Id.* In a second bedroom, they found Ziedonis, prescription drugs, and a pot pipe. *Id.*

Ziedonis moved to suppress the drugs and guns. On appeal, he conceded that the officers were exercising a bona fide community-caretaker function. *Id.* ¶17. The court concluded that the officers exercised that function reasonably. The public interest was high and the circumstances exigent. The officers were simultaneously trying "to corral two vicious dogs" and contact the person "they believed to be the owner of the dogs and who they had been told was present in the residence." *Id.* ¶27. From the first, they made a great deal of noise in order to get the dog-owner's attention and waited a long time before entering the house. *Id.* ¶28. The officers were reasonably and legitimately concerned about the dog-owner's well-being

because he lived in a high-crime neighborhood, he did not respond to the officers' calls, his door was open, his lights were on, and his dogs were running wild. *Id.* ¶29. These attendant circumstances reinforced the high public interest and exigency of the situation. *Id.* ¶30. Finally, the officers had no reasonable alternative to their chosen course of action. *Id.* ¶33.

In *State v. Ferguson*, 2001 WI App 102, 244 Wis.2d 17, 629 N.W.2d 788, the police answered a 911 complaint about a fight in an apartment building. They encountered eighteen-year-old Deidre Foster, who "was irate, angry and intoxicated." *Id.* ¶2. Foster unlocked the door to the apartment which prompted the complaint, and brought the officers in. They saw two underage drinkers and "numerous open beer bottles and several empty gallon bottles of hard liquor." *Id.* ¶4. In the bathroom they found a minor so intoxicated he could not stand up without assistance; "[h]e was sick and had been vomiting." *Id.*

Next, the officers came to a locked bedroom door. They were concerned that another highly intoxicated person in need of assistance might be in there. Someone in the living room "volunteered that three people were in the bedroom." *Id.* ¶5. "Fearing that additional underage persons were in the bedroom, either ill or passed out from consuming

intoxicants," the officers knocked loudly on the door and yelled for the people in the room to come out. *Id.* Thirty minutes later, the officers "jimmied the door open." *Id.* Multiple people, including Ferguson, were in the bed. "Thinking that someone could have been hidden in the closet and passed out, one of the officers opened the closet door and discovered the marijuana plants." *Id.*

Ferguson moved to suppress the drug evidence on the ground that the police entered his locked bedroom and searched it and the closet without a warrant. The circuit court found that the entry and search came within the community-caretaker exception. *Id.* ¶6.

The court of appeals affirmed. "It was only after the police could not eliminate the possibility that Ferguson was in the bedroom, and after they unsuccessfully attempted to have the occupants come out voluntarily to confirm their well-being, that the police entered the bedroom. Further, it was established that the only purpose in opening the closet door was to confirm that no highly intoxicated person was hiding there." *Id.* ¶14. The police concern for the bedroom's occupants was reasonable in light of the several intoxicated minors in the apartment, the large volume of empty liquor bottles, and the failure of the room's occupants to respond to the loud knocking and

shouting. *Id.* ¶15. Thus, the officers were reasonably exercising a bona fide community-caretaker function. The public interest in rendering assistance to highly intoxicated minors outweighed Ferguson's privacy rights. *Id.* ¶16.

In *State v. Matalonis*, 2016 WI 7, 366 Wis.2d 443, 875 N.W.2d 567, officers were dispatched at approximately 2:25 a.m. to the upper unit of an address for a medical call. *Id.* ¶ 4. Upon arrival, the officers were confronted with an injured individual, Antony Matalonis, who reported having been battered by multiple people. *Id.* ¶ 4. Antony was loaded into an ambulance and taken to a hospital. *Id.* Advised that Antony lived with his brother nearby, police followed a blood trail to a nearby residence. *Id.* ¶¶ 5-7. They heard loud bangs coming from inside that home. *Id.* ¶ 7. When Charles Matalonis opened the door, he was shirtless and out of breath, and police observed additional blood inside. *Id.* ¶ 9. Charles was not intoxicated but appeared to be pretty upset. *Id.* Charles stated that he lived alone and admitted that he had been involved in a fight with his brother, Antony. *Id.* ¶ 10.

The officers entered the residence and directed Charles to sit on the couch in his living room. *Id.* ¶ 11. Police subsequently searched the residence "to make sure

that no one else was inside the house or even injured in the house that needed medical attention." *Id.* ¶ 11. During that search, they found additional blood in the living room, kitchen, and on the stairs leading to the upper floor. *Id.* ¶ 12. Upstairs, one of the officers found blood spatters on a locked door. *Id.* ¶ 13. The officer later entered the locked room and found a large marijuana plant. *Id.* ¶ 19.

On appeal, our supreme court concluded the search of Matalonis' residence, including the search of the locked room, was permissible under the community caretaker exception to the warrant requirement. *Id.* ¶ 67. In finding the search of Matalonis' residence justified under this exception the court observed "[i]t is true, the officers did not know that there was an injured individual in any of the home's rooms. But the Fourth Amendment does not inflexibly require that officers be concerned about specific, 'known' individuals in order to be acting as community caretakers." *Id.* ¶43. The court explained,

Requiring an officer such as the one in *Kramer* to have concern for specific, "known" individuals in order to be acting as a community caretaker might well mean that an officer would have to have some kind of evidence pointing to the presence of specific individuals in a stalled, abandoned, or overturned vehicle on the side of the road before he or she could investigate the vehicle as a community caretaker.

Kramer suggests, like *Cady* and *Bies*, that whether the police are acting in their capacity as community caretakers does not depend upon whether the police are acting to protect persons that have specifically been identified. The reverse is also true: just because the police are acting to protect a person that has been specifically identified does not mean that the police are acting in their capacity as community caretakers. We cannot lose sight of the fact that the question of the lawfulness of the officers' conduct is ultimately one of reasonableness.

Id. ¶47-48 (citations omitted).

B. Analysis.

The record in this case reveals that the deputies had an objectively reasonable basis under the totality of the circumstances for the community caretaker function, and therefore, the deputies met the standard of acting as a bona fide community caretaker, whose community caretaker function was totally divorced from law enforcement functions. See *Pinkard*, 327 Wis.2d 346, ¶29; *Gracia* 345 Wis.2d 488, ¶¶18-22. The deputies knew they were responding to a residence where a reckless driver who was possibly vomiting was present. Within minutes of receiving the call the deputies arrived at the residence and observed the suspect vehicle, which was still warm to the touch indicating it had just been driven. Even so, police were unable to make contact with anyone inside the residence after repeated knocking on the door. When Deputy Torres

went around back of the residence, the patio door was wide open and a dog was running loose, but still no one answered the door. Both Deputy Torres and Deputy Post were concerned for the welfare of the occupant in the residence, and their actions in entering the residence were justified to ensure that Desing or any other person inside the residence was not in need of help. Although Desing told the complainant she was okay, the complainant was concerned enough to continue to monitor Desing, whom complainant observed to be sick.

Further the public interest in entering the residence outweighed the intrusion into Desing's privacy interest. Applying the *Pinkard* standards, there is no question that deputies were engaged in a bona fide community caretaker function at the time they entered and searched the residence. The public has a significant interest in ensuring the safety of a home's occupants when officers' reasonably conclude that assistance is needed. *Pinkard*, 327 Wis.2d 346, ¶¶ 45-48. In addition, the deputies did not choose the time or location of the search because they were responding to a 911 call from a concerned citizen. The degree of force used to enter the house was also acceptable given the circumstances. Deputies knocked on the door and waited for an occupant of the residence to answer. When no

one answered, deputies responded to the back door and found the patio door wide open and a dog running loose in the yard. After repeated attempts to contact anyone inside, no one answered. Because of the nature of call and the officers' observations of the unsecured residence it was certainly reasonable for deputies to enter the open residence to check on the welfare of the occupant they knew to be in the residence. The authority deputies displayed in gaining entrance to the residence was appropriate for the legitimate community caretaking objective they were pursuing. *Matalonis*, 2016 WI 7, ¶62.

Finally, there were no reasonable alternatives to the path chosen by the officer. The only alternative was to leave a party potentially in need of medical assistance alone in the residence, which would have been unreasonable for police officers charged with protecting the public. *Cf. Pinkard*, 327 Wis.2d 346, ¶¶57-58; *Gracia*, 345 Wis.2d 488, ¶27; *Horngren*, 238 Wis.2d 347, ¶¶16-17. "[T]he officers would have been derelict in their duty had they acted otherwise ... [and] the citizens of the community would have understandably viewed the officers' action as poor police work." *Pinkard*, 327 Wis.2d 346, ¶59 (citation and quotation marks omitted).

Based upon the record, this court should find that the deputies acted with a bona fide community caretaker function when they entered Desing's residence.

Citing *State v. Ultsch*, 2011 WI App 17, 331 Wis.2d 242, 793 N.W.2d 505 Desing argues that the officer's conduct failed to fall within the scope of the community caretaker exception to the general rule that warrantless searches and seizures violate the Fourth Amendment. Desing's reliance on *Ultsch* to support her position, however, is misplaced.

As previously stated, in *State v. Ultsch*, police were dispatched to a motor vehicle collision involving a Durango and a brick building. The brick wall of the building had been caved in at the doorway, and the vehicle had left the scene of the accident. *Id.* at ¶2. Police located the suspect vehicle at the beginning of a one-quarter mile long driveway of a residence located two to three miles away. *Id.* The vehicle had damage to the front left fender, but there was no evidence indicating that the driver had been injured. *Id.* at ¶3, 19. The driveway was covered in deep snow and the driver of the suspect vehicle had walked leaving the vehicle parked at the end of the driveway. *Id.* at ¶2-3. Police also could not drive down the driveway in those conditions. *Id.* at ¶3.

While officers were at the bottom of the driveway, a vehicle came down the driveway. The driver of that vehicle told police that the driver of the vehicle parked at the beginning of the driveway was his girlfriend and that she was up at the house and "possibly in bed or asleep." *Id.* at ¶3. The boyfriend did not express any concern for Ultsch's safety, nor did he mention that she needed any assistance. *Id.* at ¶20. After the boyfriend left, an officer with a four-wheel-drive vehicle arrived and the officers drove up to the house. The officers did not observe any blood in the snow as they drove up to the house. *Id.* at ¶3.

Once at the house officers knocked on the door. After receiving no answer, officers discovered that the house was unlocked and they proceeded to enter the residence. *Id.* at ¶4. Ultsch, who was located sleeping in a bed, was subsequently placed under arrest for operating a motor vehicle while intoxicated. *Id.* at ¶4-5.

Under these facts, the *Ultsch* court held that the officers did not have an objectively reasonable belief that the driver of the Durango was in need of assistance to justify a community caretaker function. *Id.* at ¶19-22. The court observed that "except for the fact that she [Ultsch] had been involved in a collision some time before - a collision which had only damaged the left front fender of

her large, heavy SUV - the officers had no indication whatsoever that Ultsch might need assistance." *Id.* at ¶21.

Unlike *Ultsch*, however, the deputies here had information before their entry into the residence that someone inside was in need of assistance. The deputies in this case were dispatched to the residence for a 911 call after a concerned citizen observed the driver of the registered vehicle possibly getting sick on the side of the roadway. The concerned citizen then observed the driver of the vehicle drive in a reckless manner. The concerned citizen followed the vehicle to the residence, where the driver was observed entering the residence. In addition, once deputies arrived at the residence of the vehicle's registered owner, not only was the vehicle warm to the touch, but the patio door to the residence was open and a dog was running loose. Even so, however, no one responded to the door after repeated attempts to contact the individual inside. These circumstances raised both deputies' concerns that someone could be in need of assistance.

Therefore, *Ultsch* does not support Desing's position that the warrantless entry in this case failed to satisfy the community caretaker exception.

In addition, contrary to Desing's position, *Pinkard* supports a finding of the community caretaker exception in this case. In *Pinkard*, the supreme court found that this exception applied when police entered a residence acting on an anonymous tip that two people "appeared to be sleeping" in a room with cocaine, money and a digital scale while the door to the residence stood wide open. *Pinkard*, 327 Wis.2d 346, ¶ 2, 785 N.W.2d 592. The supreme court reasoned that, with the door open and the occupants unresponsive, the occupants could easily have been victims of a crime or suffering from an overdose. *Id.*, ¶ 37.

Similar to *Pinkard*, deputies had evidence pointing concretely to the possibility that a member of the public was in need of assistance. Like *Pinkard*, deputies knew someone was present in the residence, however, no one answered the door after repeated attempts and a back door was left open with a dog running loose in the yard. Also like *Pinkard*, another person indicated concern for the well-being of the person inside the residence, which in conjunction with the deputies' observations at the residence served to heighten the deputies concern that someone was in need of assistance. In *Pinkard* an anonymous tip provided the corroboration, but here it was an identified complainant who observed Desing possibly getting

sick. In addition, the deputies here expressed concern for the well-being of the individual inside the residence, and only after a check of the residence did deputies achieve the purpose for which they were dispatched. Thus, similar to *Pinkard*, the facts here support the conclusion that deputies had a bona fide community caretaker purpose when they searched Desing's residence. Further, the public interest in rendering aid exceeded Desing's privacy interest.

In sum, officers were engaged in a bona fide community caretaker function. They possessed an objectively reasonable basis to conclude that someone may have been inside Desing's residence that required assistance or who may have posed a danger to others. In this particular case, the public interest in verifying no one needed assistance exceeded Desing's privacy interest in preventing the officers from accessing the bedroom of Desing's residence.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the trial court be affirmed in its denial of Desing's suppression motion.

Dated this ____ day of July, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

_____ Monospaced font: 10 characters per inch; double spaces; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides.

The length of the brief is _____ pages.

I also certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: _____

Signed,

Attorney