STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 17 AP 490, 17 AP 491

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SIERRA ANN DESING,

Defendant-Appellant.

REPLY BRIEF 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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I. THE STATE'S ARGUMENT THAT A REASONABLE BASIS EXISTED FOR THE EXERCISE OF THE COMMUNITY CARETAKER FUNCTION FAILS DUE TO ITS RELIANCE ON MISSTATEMENTS AND OMISSIONS OF FACT.

The first question to be addressed is whether the deputies' entry into Desing's home can be considered a bona fide exercise of the community caretaker function, which requires a determination of whether the entry was "totally divorced from the detection, investigation, or acquisition of evidence[.]"[1] There must have existed an "objectively reasonable basis" to believe that a person needed assistance.[2] "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."[3]

The State's reasons for believing that an objectively reasonable basis existed for Deputies Torres and Post to enter Desing's home may be summarized as follows:

1) The deputies knew they were responding to the residence where a reckless driver was present.
2) The driver had possibly been vomiting.
3) The vehicle in the driveway was still warm to the touch.

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[1] ***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).
[2] *Id.*, ¶19.
[3] *Id.*, ¶21.

4) The Deputies were unable to make contact with the occupants of the house by knocking at the door.
5) The patio door was open.
6) A dog was in the back yard.
7) The 911 caller "was concerned enough to continue to monitor Desing, whom complaint observed to be sick."[4]

The State does not paint an accurate picture of the scenario that existed at the time that the deputies decided to enter Desing's home. There was no objectively reasonable basis to conclude that Desing had been vomiting or sick. The 911 caller described "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."[5] The complainant called 911 and followed Desing not out of concern for her wellbeing but to report her for reckless driving. His complaints were that she was "all over the road," "all over the place," "doing 85 miles an hour," and that "she was gonna hurt somebody[.]"[6] The radio dispatcher, relaying the 911 caller's report to the deputies, repeatedly described the situation as a report of a "reckless driver," never as a person in need of medical assistance.[7]

[4] State's Brief, 27–28.
[5] 26:1.
[6] 26:1–4; *see also* ***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) (a police force, including dispatchers, is to be considered as a unit under the collective knowledge doctrine.)
[7] *See* Call 2, Call 4, Call 6, *at* 26:2, 4.

Therefore, the deputies arriving on scene had every reason to anticipate finding a reckless driver—not a person in need of medical assistance. Any factual findings by the circuit court to the contrary were unsupported by the record and clearly erroneous.

In addition to failing to acknowledge the true reason for deputies' dispatch to Desing's home, the State disregards facts known to the deputies that would tend to negate any subjective belief they may have held that Desing was sick. Desing told the 911 caller that she was OK.[8] Desing parked safely and appropriately in her driveway.[9] The 911 caller saw her get out of her car and enter the home without any evidence of medical distress.[10] Upon arrival, Post did not observe any signs of vomit on the car or see any other signs that the person who had been driving was in medical distress.[11]

No ambulance was dispatched to Desing's home, indicating that the law enforcement agency did not perceive this as a bona fide medical emergency.[12] 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.[13] He asked about her well-being only

[8] 26:1.
[9] 49:17.
[10] *Id.*
[11] 49:35–36.
[12] 26:1–6.
[13] 49:21–22.

after she volunteered the information that she was sick—after the seizure had already occurred.[14]

It would be unreasonable to conclude from the information available to law enforcement at the time of the home entry that Desing needed emergency medical assistance. Leaving aside the information about Desing possibly vomiting, the remaining facts cited by the State are that Desing was driving recklessly, her car had recently been driven, she was not answering the door, and her dog was out. The testimony of the homeowner established that it was common for the family to leave the back door open because the home was in a very safe area at the end of a cul-de-sac.[15]

The remaining factors—that Desing was reported as a reckless driver, that her vehicle was still warm, and that she was not responding to the deputies' knocks—simply establish that Desing was a suspected reckless driver who did not wish to answer the door. There was no objectively reasonable basis to conclude that Desing needed emergency medical assistance. Thus, the deputies' intrusion into Desing's home was an unlawful search, and any evidence derived from that search should have been suppressed.

[14] 49:22.

II. THE STATE'S APPLICATION OF THE BALANCING TEST COMMITS THE FUNDAMENTAL ERROR OF CONFLATING THE COMMUNITY CARETAKER FUNCTION AND THE COMMUNITY CARETAKER EXCEPTION TO THE WARRANT REQUIREMENT.

"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."[16] Even when law enforcement officers are performing a bona fide community caretaker function, any evidence discovered during the exercise of this function must be suppressed unless it is determined that the public need and interest in the intrusion outweighed the violation of the citizen's liberty.[17] The court must consider the four factors set forth in ***State v. Pinkard*** 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.[18]

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[15] 49:44.
[16] ***State v. Pinkard***, 2010 WI 81, ¶20, 327 Wis. 2d 346, 785 N.W.2d 592 (emphasis in original).
[17] ***State v. Kramer***, 2009 WI 14, ¶40, 315 Wis. 2d 414, 759 N.W.2d 598
[18] ***Pinkard***, 2010 WI 81, ¶42.

These factors were each fully addressed in the Defendant-Appellant's Brief.[19]

The State commits the fundamental error of conflating the community caretaker *function* with the community caretaker *exception*. For example, the State argues that the ***Pinkard*** factors go to whether "the deputies were engaged in a bona fide community caretaker function[.]"[20] The ***Pinkard*** factors have nothing to do with whether law enforcement officers were exercising the community caretaker function—these factors come into play when it has already been established that the officers were exercising the community caretaker function, to determine whether the exception ought to apply.

The State argues that there were no reasonable alternatives to the intrusion into Desing's home, arguing that the deputies would have been derelict in their duties had they left a person potentially in need of assistance alone in her home.[21] This argument is flawed for two reasons.

First, the State's argument rests on mere speculation that Desing needed help. As set forth above, Desing was not reported as

[19] *See* Defendant-Appellant's Brief, 25–34.
[20] State's Brief, 28.
[21] State's Brief, 29.

being sick or vomiting. She told the 911 caller that she was OK. She did not display any signs of distress when the caller saw her enter her house, and the deputies saw no signs of medical distress upon arriving at the home. In determining whether there were reasonable alternatives to entering the house, it is fair to consider the reasonableness of the deputies' belief that assistance was needed at all.

The law does not require that the warrantless entry into a home be found to be reasonable because of a law enforcement officer's mere desire to rule out hypothetical emergencies. The State's argument relies on a distorted version of the record and ignores contradictory facts to invent a *possible* medical emergency. This is rather like a child who has concluded that it is *possible* that a monster is hiding under the bed. Having raised the possibility, the child concludes that the only reasonable course of conduct is to insist that action be taken to get rule out the possibility of the monster under the bed. While the child may sincerely wish to rule out that possibility, that does not render his belief or actions reasonable.

Second, the State's argument rests on a misunderstanding of the issue presented in this case. While it is common for lawyers and courts to discuss community caretaker cases in terms of whether the

entry into the home was justified, the real question is whether, having entered Desing's home, the evidence derived from that entry should be admissible in her prosecution.[22] The ***Pinkard*** test exists because there are cases where the police may exercise a bona fide community caretaker function even though the exception to the warrant requirement does not apply—for example, when the public interest does not outweigh the privacy interest of the individual, or when the degree of overt force used is too great, or when feasible alternatives exist.[23]

The State's argument is essentially that if Desing is correct that the evidence derived from the entry into her home must be suppressed, then the deputies should have done nothing. If the only reason that the deputies wanted to enter the home was to gather evidence or to arrest Desing, then perhaps the State is correct in arguing that doing nothing would have been reasonable. But if the deputies' true goal was to assist Desing, then, acting under the auspices of the community caretaker *function*, it would have been perfectly acceptable for them to enter and render aid. By arguing that if the deputies' search does not meet the criteria for the community caretaker *exception*, that the only other choice was to do nothing, the

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

State renders the well-established distinction between the community caretaker function and the exception to the warrant requirement meaningless.[24]

Further, the State fails to address Desing's argument that even if entry into the home was justified, Torres' decision to order Desing out of her bed was an unreasonable seizure.[25] Torres saw Desing in her bed and could have engaged her in conversation from the hallway to inquire whether she needed help. Instead, he ordered Desing to get out of bed and follow him upstairs.[26] He only asked about her well-being after this point, when Desing volunteered information that she was sick.[27] Even after entering the home, Torres still had the reasonable alternative of asking Desing if she needed assistance before seizing her.

III. THE STATE MISAPPLIES THE HOLDINGS OF *STATE V. ULTSCH* AND *STATE V. PINKARD*.

The State attempts to distinguish ***State v. Ultsch*** by arguing that, unlike in ***Ultsch***, "the deputies here had information before their entry into the residence that someone inside was in need of

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[23] *Id.*, ¶20.
[24] *Id.*
[25] Arguments not responded to are deemed conceded. ***Charolais Breeding Ranches, Ltd., v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) citing ***State ex. rel. Blank v. Gramling***, 219 Wis. 196, 262 N.W. 614, 615 (1935).
[26] 49:21–22.

assistance."[28] In fact, in both this case and in ***Ultsch***, the record supports only speculation as to whether the occupant of the house was in need of assistance.

In ***Ultsch***, the defendant had struck a brick building with her vehicle, hard enough to cause structural damage.[29] From this, one might speculate that the defendant could be injured or in need of medical assistance. However, based on the absence of any concrete reason to believe that the defendant needed help and her boyfriend's failure to express concern for her safety, the Court of Appeals concluded that "[t]here was good reason to believe she was intoxicated and almost no reason to think that she was in distress."[30]

Here, the State again misstates the record ("a concerned citizen observed the driver…possibly getting sick"), omits the fact that Desing said she was OK, and omits the fact that neither the 911 caller nor the deputies saw any signs of a medical emergency.[31] This case is analogous to ***Ultsch.*** The hypothetical possibility of an emergency existed, but that possibility should have been weighed

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[27] 49:22.
[28] ***State v. Ultsch***, 2010 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505; State's Brief, 32.
[29] *Id.*, ¶2.
[30] *Id.*, ¶25.
[31] State's Brief, 32, *c.f.* 26:1.

against the absence of facts which would have corroborated it, as well as Desing's declaration that help was *not* needed.

The State also addresses ***State v. Pinkard***, arguing that it supports a finding that the entry into Desing's home is justified by the community caretaker exception.[32] In ***Pinkard***, a warrantless home entry was found to be justified when the police had been told that the defendant was passed out or sleeping next to apparent drugs and paraphernalia, the back door to the house was open, and the defendant was unresponsive.[33]

The State argues that this case is similar to ***Pinkard*** because both cases involved a failure to answer the door.[34] However, the State fails to highlight the most significant difference between the two cases: the physical condition of the respective defendants. In ***Pinkard***, the defendant was reported to be unresponsive *prior to* the police being called.[35] Desing, in contrast, was known to have arrived home, parked safely, and walked into the house without any indication of distress minutes before the deputies' arrival. In ***Pinkard***, it would be reasonable to conclude that the defendant was unable to respond to the door due to an emergency, while here it is

[32] ***Pinkard***, 2010 WI 81; State's Brief, 33–34.
[33] 2010 WI 81, ¶2.
[34] State's Brief, 33.

much more likely that Desing simply did not want to answer the door.

The State also argues that, like ***Pinkard***, another person had expressed concern for the well-being of the defendant.[36] As explained above, the 911 caller had not expressed any concern for Desing's safety—he had called to complain about her reckless driving and never suggested that she needed medical assistance.[37]

In ***Pinkard***, there was far more reason to believe that the occupants of the house needed aid. Accordingly, the ***Pinkard*** case does not support a finding that the community caretaker exception would apply to the entry into Desing's home.

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[35] ***Pinkard***, ¶2.
[36] State's Brief, 33.
[37] 26:1–4.

CONCLUSION

The State here misstates or omits critical portions of the record, fundamentally misunderstands the distinction between the community caretaker function and the community caretaker exception, and misapplies the relevant caselaw. For these reasons, in addition to those stated in Desing's brief-in-chief, the decision of the circuit court denying Desing's motion to suppress must be reversed. Had the evidence resulting from the entry into her home been suppressed, Desing would have not been convicted. Desing thus 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, _____ 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) for a brief produced using the following font:

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