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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
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CASE NO. 2018AP00338-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2016 CT 442**
(Winnebago County)

JODI J. LUX,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HONORABLE JOHN A. JORGENSON PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

BY:

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STATEMENT OF ISSUE

I. WHETHER DEFENDANT SHOULD BE GRANTED A NEW TRIAL BASED ON INEFFECTIVE ASSISTANCES OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO FILE A MERITORIOUS MOTION TO SUPPRESS EVIDENCE.

The trial court ruled trial counsel was not ineffective in failing to file a motion to suppress evidence (62:2-6, App. at 101-05).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. As this is a one-judge appeal, the case is not eligible for publication.

STATEMENT OF THE CASE

On 5/12/16 a criminal complaint was filed in Oshkosh County Circuit Court against defendant Jodi J. Lux alleging the commission of the offense of operating while intoxicated as a third offense, the offense allegedly occurring on 1/7/16 (1). On 7/25/16, a jury trial was requested by defendant (57:2). On 12/22/16, a motion to suppress was filed by the defense, alleging the investigating officer did not have probable cause to arrest defendant for operating while intoxicated (13). On 2/1/17, a motion hearing on the issue of suppression was held (59). At the conclusion of the hearing, the court denied the motion to suppress (59:44-47). On 3/21/17, the matter proceeded to a jury trial (60). At the conclusion of the trial, defendant was found guilty of the offense (32, 60:226-28). The court proceeded directly to sentencing (60:228-31). Defendant was sentenced to 50 days jail, was fined $600 plus costs, her driving privileges were revoked for 24 months and an ignition interlock device was ordered for 24 months (60:230-31). The court stayed defendant's jail term pending appeal (60:231). Defendant filed a timely notice of intent to seek postconviction relief (31).

On 9/11/17, a postconviction motion was filed on behalf of defendant (47). Defendant asserted she was denied the effective assistance of counsel because trial counsel failed to file a meritorious motion to suppress evidence based on an illegal entry into her residence by the arresting officer (47).[1] On 10/11/17, a postconviction motion hearing was held (61). On 1/25/18, the trial court orally denied defendant's motion (62:2-6, App. at 101-05). On 1/31/18, an order denying postconviction relief was entered (52). On 2/19/18, a notice of appeal was filed.

STATEMENT OF FACTS

The issue in this case revolves around whether the arresting officer, Officer Randy Johnson of the Oshkosh Police Department had legal authority to enter defendant Lux's residence and to further his investigation in violation of defendant Lux's Fourth Amendment rights.

The relevant facts are not greatly disputed. Officer Randy Johnson of the Oshkosh Police Department testified at the original suppression hearing on 2/1/17 and the postconviction motion hearing on 10/11/17 (59:2-42, 61:29-46). Officer Johnson testified he was called to a hit and run accident at 219 Bay Street in Oshkosh on 1/7/16 (59:4). The steps leading to the front door of the residence were heavily damaged (59:6). At the scene, he found what appeared to be the front license plate of the suspect vehicle (59:6). He testified he was at the accident scene for less than 10 minutes (59:6). Shortly thereafter, he found the suspect vehicle parked at 524 Otter Avenue, located within one-half of a block of the accident scene (59:6, 8). The vehicle appeared to have been in an accident and had white wood imbedded in it, the same color of wood at the accident scene (59:9).

Officer Johnson followed footprints in the snow from the suspect vehicle to the back door of 524 Otter Avenue (59:10-11). While Officer Johnson knocked on the door, it came open, revealing a common hallway between the upper and lower apartments (59:11). He knocked on the lower apartment's locked door (59:11). No one answered (59:11). After he knocked, a woman came from upstairs and asked the

[1] Defendant is abandoning the claim she was denied a fair trial based on the failure of trial counsel to object to the admission of evidence she had marijuana metabolite in her blood draw.

officer why he was there (59:11). During the 2/1/17 hearing, Officer Johnson testified the woman told him it was probably someone to see her grandson who lives in the lower apartment (59:11). He testified she walked past him, opened the door and began walking into the apartment (59:11). He testified at that time he did not ask her who owned the building (59:11). He testified the door did not appear to be locked (59:11). He followed her in, justifying his actions as follows:

> I was initially concerned. She's an elderly walking into an apartment that I didn't know who's in there, who's driving the car. I was concerned for her going in there by herself. I expressed that and asked her if I could come in, and she told me that I could (59:12-13).

During the postconviction motion hearing, he gave somewhat different testimony regarding his entry. He testified he knocked on the door to the lower apartment (61:31). While he was doing so, a person from upstairs came out (61:31). He went upstairs to talk to her (61:31). He told the woman he was investigating a hit and run accident and asked her if she would come out and look at the car and see if she knew whose it was (61:31). The two of them went out and looked at the car (61:31). She said she did not know whose car it was and suspected it was somebody visiting her grandson A.L., who lived in the lower apartment (61:31). She did not indicate where she lived (61:33). She did not say she lived in the lower residence and never gave him any reason to believe she lived there (61:33). He did not have any significant discussions with her regarding living arrangements of persons in the lower residence (61:33). She entered the lower residence (61:33). He asked her for permission to enter before doing so (61:33). He admitted he did not know whether she had the ability to give permission to enter the residence (61:34). At the postconviction motion hearing, he again testified he went in because he was concerned for her safety (61:34). When asked whether there was any other reason why he went in, he testified:

> No, I didn't fee comfortable with her being approximately 80 years old going into a house looking—she was obviously comfortable going in. She knew the door was unlocked, she grabbed it without hesitation and walked in (61:34).

He admitted he did not have a warrant to enter and than no one from the downstairs residence ever consented to him coming into the residence (61:34). He admitted he made no effort to try to convince the woman not to go into the lower residence (61:42).

A series of questions was asked by the trial court during the postconviction motion hearing:

> The court: When—I forgot the lady's name, the owner of the duplex, entered into that lower area, was that at your direction?
>
> Officer Johnson: No. She basically walked away from me like she was mad and was going to go in there and figure out what was going on.
>
> The court: So when you or someone used the word community caretaker, was it for the driver of the car or this 80-year-old lady?
>
> Officer Johnson: When I went in there, I was more concerned about the safety of this 80-year-old lady going into an apartment that she didn't know who was in there, had no idea who was driving this car or what they were doing in this apartment, why they didn't stop for now two accidents (61:40-41).

Once in the lower apartment, Officer Johnson found defendant Lux, made observations about her condition, and arrested her for operating while intoxicated (61:39, 44-46).

Defendant Lux's trial attorney, Nicole Ostrowski, testified during the postconviction motion hearing (61:4-28).[2]

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[2] The allegation of ineffective assistance of counsel is far from an indictment on Attorney Ostrowski's general competence as an attorney. As recognized in *State v. Felton*, 110 Wis.2d 485, 329 N.W.2d 161, 167 (1983):

> Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry of culpability. The concern is simply whether the adversary system functioned properly: the question is not whether the defendant received the assistance of effective counsel but whether he received the effective assistance of counsel in applying this standard, judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal to fallible to expect otherwise. (citation omitted).

She testified she had two years of legal experience (61:4). As to why she did not challenge Officer Johnson's entry into the residence she testified:

> Through my discussions with Ms. Lux, I was made aware that the upstairs resident was actually the owner of the entire building so my reasoning for not challenging her entry into the lower was because she was the owner of the entire building, and I didn't think there was an issue with her proceeding into that lower unit. … Beside my discussion with Ms. Lux about the upper resident being the owner, we also discussed that I thought it **potentially** could fall into one of the warrant exceptions because the officer was investigating an incident that had occurred (emphasis added). And I didn't think it qualified under hot pursuit but may community caretaker function or something of that sort as he was trying to find the individual who had operated a vehicle that crashed into a porch (61:10-11).

Attorney Ostrowski admitted there was a potential issue for the court to resolve (61:11). As to the living arrangement in the building, Attorney Ostrowski testified:

> We did talk about everyone that lived in the entire—in the entire building, excuse me. I don't recall if we specifically talked about lease documents. It's my understanding it's a family situation. So the upstairs resident is the owner of the entire building and then the downstairs unit is occupied by the owner's daughter and then her son. So her daughter and grandson who is—the daughter is Ms. Lux's friend and was letting Ms. Lux stay there (61:18).

Attorney Ostrowski testified that defendant Lux had lived at the residence for some time (61:19). She testified she did not file a further motion to suppress based on the illegal entry of Officer Johnson because he was acting under a community caretaker function, trying to find the operator of the vehicle (61:20).

Defendant's Lux's address on her citation was 524 Otter Avenue (1:2). The vehicle involved in the accident was registered to defendant Lux, 524 Otter Avenue, Oshkosh, WI (1:9).

ARGUMENT

I. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BASED ON INEFFECTIVE ASSISTANCES OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO FILE A MERITORIOUS MOTION TO SUPPRESS EVIDENCE.

A. Ineffective assistance of counsel.

The concept of ineffective assistance of counsel is discussed and defined in *State v. Cooks*, 2006 WI App 262, ¶¶32-34, 297 Wis.2d 633, 726 N.W.2d 322:

> Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. The right to counsel includes the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard for determining whether counsel's assistance is effective under the Wisconsin Constitution is the same as that under the Federal Constitution. (citation omitted). To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. A defendant must establish that counsel's conduct falls below an objective standard of reasonableness. (citation omitted). However, "every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." (citation omitted). To prove constitutional prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (citation omitted). Appellate review of an ineffective assistance of counsel claim presents a mixed question of fact and law. (citation omitted). We will not disturb the trial court's finding of fact unless they are clearly erroneous. (citation omitted). The ultimate determination of whether the attorney's

> performance falls below the constitutional minimum is a question of law subject to our independent review.

The failure to file a meritorious motion, which would have led to the suppression of the evidence against defendant, would be ineffective assistance of counsel. *See State v. Cleveland,* 114 Wis.2d 213, 217, 338 N.W.2d 500, 502 (Ct. App. 1983).

B. Community caretaker analysis.

The Fourth Amendment prohibits police officers from entering residences without lawful authority. A search of a residence without a search warrant is presumptively unreasonably. *Welch v. Wisconsin,* 466 U.S. 740, 748 (1984). In the absence of a search warrant, the State has the burden of demonstrating an exception to the warrant requirement. *Id.* at 750. The trial court concluded Officer Johnson's warrantless entry into the residence was justified by the community caretaker exception (62:2-6, App. at 101-05).

1. Relevant law.

In *State v. Asboth,* 2017 WI 76, ¶¶12-13, 376 Wis.2d 644, 898 N.W.2d 541, the Wisconsin Supreme Court discussed the doctrine of community caretaker:

> "A seizure conducted without a valid warrant is presumptively unreasonable." *State v. Brereton*, 2013 WI 17, ¶ 24, 345 Wis.2d 563, 826 N.W.2d 369 (citing *United States v. Ross*, 456 U.S. 798, 824-25, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)). "[B]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" however, "the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). This court has recognized one such exception where a law enforcement officer is "serving as a community caretaker to protect persons and property." *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis.2d 346, 785 N.W.2d 592. Specifically, law enforcement officers may conduct a warrantless seizure without violating the Fourth Amendment when performing community caretaker functions-those actions "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State v. Kramer*, 2009 WI 14, ¶¶ 19-20, 315 Wis.2d 414, 759

> N.W.2d 598 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973)). When evaluating a claimed community caretaker justification for a warrantless search or seizure, Wisconsin courts apply a three-step test, which 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.... *Matalonis*, 366 Wis.2d 443, ¶ 31 (quoting *Pinkard*, 327 Wis.2d 346, ¶ 29).

In *State v. Pinkard,* 2010 WI 81, 327 Wis.2d 346, 785 N.W.2d 592, the court recognized an officer's entry into a home under a community caretaking function should be subject to heightened scrutiny:

> [W]e note that there is no language in *Cady* or *Opperman* that limits an officer's community caretaker functions to incidents involving automobiles. We read *Cady* not as prohibiting officers from entering a residence without a warrant while exercising a community caretaker function, but instead as "counseling a cautious approach when the exception is invoked to justify law enforcement intrusion into a home." *South Dakota v. Deneui*, 775 N.W.2d 221, 239 (S.D.2009); see also *United States v. Gillespie*, 332 F.Supp.2d 923, 929 (W.D.Va.2004) (citing *Cady*, the court explained that relying on the community caretaker exception to support a warrantless entry into a home is "more suspect" than when a community caretaker function is involved in the search of an automobile). 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. Whether a given community caretaker function will pass muster under the Fourth Amendment so as to permit a warrantless home entry depends on whether the community caretaker function was reasonably exercised under the totality of the circumstances of the incident under review. *Id.* at ¶20.

The *Pinkard* court discussed the third step of the community caretaker analysis:

> The third step requires us to determine whether the officers' exercise of a bona fide community caretaker function was reasonable. *Id.* at ¶40. To make this determination, we balance the public interest or need that is furthered by the officers' conduct against the degree and nature of the intrusion on the citizen's constitutional interest. Id. "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." Id., ¶ 41. In balancing these competing interests, we consider four factors:
>
> > "(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.* at ¶¶41-42.

2. Facts to law analysis.

When one conducts the appropriate analysis of each of the relevant considerations, it is apparent the community caretaker exception does not apply.

Whether a search or seizure within the meaning of the Fourth Amendment has occurred.

It cannot be seriously argued that a search has not occurred. Officer Johnson entered the lower residence at 524 Otter Ave. and gathered evidence from defendant once inside. A search occurred.

If a search has occurred, whether the police were exercising a bona fide community caretaker function.

With this factor, the court must look at whether the law enforcement officer is serving as a community caretaker to protect persons and property. This function must be totally divorced from the detection, investigation or acquisition of evidence related to a violation of a criminal statute. This factor weighs heavily against the State in the analysis. First, Officer Johnson's entry into the residence was obviously not divorced from a criminal investigation. At the time of his entry into the residence, Officer Johnson was investigating a criminal traffic offense involving property damage. When one views photos of the scene of the accident, it is apparent the damage was not overly extensive (21). As part of that process, he was trying to find the driver of the vehicle. He knew the driver was likely in the building at 524 Otter Avenue. By process of elimination, based on what he was told by the elderly woman, he believed the driver was likely in the lower residence. He had a desire to get into the lower residence to make contact with the driver. His actions were not divorced from a criminal investigation. To say otherwise is disingenuous.

Second, Officer Johnson suggestion that he was solely motivated to enter the residence to protect the elderly woman is not borne out by other facts and circumstances. Officer Johnson was not investigating a violent crime. He had no specific reason to believe the elderly woman would be subject to attack within the apartment. He admitted that once he entered the residence, he separated from the woman in his search for the driver (61:35). While it always a good thing for a police officer to protect others, if Officer Johnson's desire to protect the elderly lady from harm justifies the entry into the lower residence in this case, this type of exception would swallow up the rule that protects citizens from warrantless intrusions into their home by police officer. Any time an officer believes a criminal suspect is in a house, he or she could **always** enter under a plausible pretense that others within the house were at risk to be victimized by the criminal suspect. In the absence of specific and articulable facts indicating real danger to the elderly woman, this justification for entry is insufficient.

Third, Officer Johnson arguably created the alleged exigent safety concern he claims to have acted upon. He told the elderly woman he was investigating an accident. He showed her the vehicle damage. He admitted the elderly woman was mad when she entered the lower residence and entered with a resolve to get answers to what had happened (61:40). He provided the information to her that created her emotional condition. His actions directly precipitated her enter the lower residence. In *State v. Kryzaniak,* 2000 WI App 44, ¶19, 241 Wis.2d 358, 624 N.W.2d 389, the court recognized police cannot create exigent circumstances by their conduct. That is exactly what happened here.

<u>If the officer was performing a bona fide community caretake function, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised, considering the degree the degree of the public interest and the exigency of the situation.</u>

For many of the reasons already stated, Officer Johnson was not performing a bona fide community caretaker function. Assuming for the sake of argument he was, the degree of intrusion by the officer is unacceptable. Police officers cannot enter private residences without a warrant in the absence of compelling circumstances. This factor focuses on weighing the danger to the elderly woman versus the rights of the residents, including defendant Lux, to be free from government searches of their living areas. The danger to the elderly woman was theoretical. Any exigency was theoretical. There was no factual reason for the officer to believe she would be subject to attack within the residence. Given the lack of real danger to the woman, it is difficult to see how the officer's concern for her safety outweighed a time-honored notion that citizens have a right not to have police officer invade their personal living areas.

The attendant circumstances surrounding the [search], including time, location, the degree of overt authority and force displayed.

This factor weighs in favor of defendant Lux. While there is no evidence the officer drew a gun during the entry into the residence, he made contact with defendant Lux and had her relent to his authority. Any suggestion that she was free not to do borders on absurd. If she was free to go, where was she going to go with the officer standing in her dwelling?

Whether an automobile is involved.

This factor weighs entirely in favor of defendant. As noted in *Pinkard,* a reviewing court must exercise heightened scrutiny in determining whether the community caretaker function justifies the entry into a home. The community caretaker function is not a shortcut to defeating the privacy interests of persons in their residences.

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

Any suggestion that Officer Johnson had no other choice but to enter the lower residence is myopic. The focus here is on why he had to act to protect the safety of the elderly woman. He obviously had other options. He could have told her he did not want her to inject herself into the investigation. He could have told her not to go into the lower residence. He could have continued his effort to try to get an occupant of the lower residence to come to the door. He could have tried to call the owner of the suspect vehicle, defendant Lux. Again, he was investigating a traffic accident not involving injury.

3. Community caretaker is inapplicable.

A fair analysis demonstrates the community caretaker exception does not apply to the facts of this case. The trial court erred in so finding. This court should so find.

C. Consent to enter.

While the State argued Officer Johnson had consent to enter the lower residence, the trial court did not authorize the search as being pursuant to consent. For the sake of completeness, defendant feels it important to address the issue of whether Officer Johnson had consent to enter.

1. Relevant law.

In *State v. Kieffer,* 217 Wis.2d 531, 577 N.W.2d 352 (1998), the court addressed an issue regarding whether a father-in-law had the authority to allow police into the apartment of defendant over a garage at a residence. The father-in-law lived at the same address and defendant shared common living space with him. However, defendant rented the apartment from the father-in-law. In addressing the issue, the court wrote:

> The United States Supreme Court in *Matlock*[3], described the bounds of third-party consent to search:
>
> [T]he authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, (citation omitted) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-habitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. *Id.* at 542.

The *Kieffer* court further indicated:

> The *Rodriguez*[4] court cautioned that officers may not always take third-party consent to a search at face value, but must consider the surrounding circumstances. That consideration often demands further inquiry. Even when the consent is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt it truth and not act upon it without further inquiry. … *See also, People v. Brooks,* 277 Ill.App. 2d

[3] *United States v. Matlock,* 415 U.S. 164 (1974).
[4] *Illinois v. Rodrigue*z, 497 U.S. 177 (1990).

> 392, 214 Ill.Dec. 79, 85, 660 N.E.2d 270 (1996)(police officers may not "proceed with inquiry in ambiguous circumstances or always accept at face value the consenting party's apparent assumption that he [or she] has authority to allow the contemplated search"). *Id.* at 549.

2. Analysis.

Any entry into the lower residence based on consent would have had to flow from the elderly woman from the upper residence. The record is devoid of any evidence that the elderly woman lived in the lower residence or that she had authority to give valid consent to Officer Johnson to enter. The officer had no reason to believe she lived in the lower residence. As noted in the law from *Keifer,* law enforcement officers cannot always take consent at face value. Officers are required to make appropriate inquiries to determine whether consent could be given, especially if there is time to do so. In this case, Officer Johnson did not make those inquiries. There are insufficient facts in this record to support a conclusion Officer Johnson had valid consent to enter.

D. Standing.

The State made an argument that defendant Lux had no standing to object to Officer Johnson's entry into her residence. That argument is easily dismissed. Defendant Lux's address was 524 Otter Avenue on the date of the accident. She was located in a bedroom at the residence. There is no evidence in record that she was unlawfully on the premises at the time of the officer's entry. In short, regardless of whether she was living there one day or six months, she had standing to object to the officer's entry into the residence.

E. The search was unlawful.

It is apparent there was not a lawful basis for Officer Johnson to enter defendant Lux's residence. Her seizure flowed directly from that illegal entry. The officer's observations of defendant's alleged intoxication were a direct result of the illegal entry. All evidence gathered against defendant was a direct result of the illegal entry. Suppression of evidence gathered as a result of the illegal entry into defendant Lux's residence as

fruit of the poisonous tree is an appropriate remedy. *See e.g. State v. Bermudez,* 221 Wis.2d 338, 347, 585 N.W.2d 628 (Ct.App. 1998).

F. Trial counsel's errors were deficient, prejudicial.

Trial counsel's failure to file a meritorious motion to suppress was deficient performance. There was no reason for her to have not challenged the officer's entry into the residence. The error was obviously prejudicial because there is a reasonable likelihood the outcome of the proceeding would have been different had the error no occurred. It is difficult to imagine how the State could have proven its case had the relevant evidence been suppressed. Virtually all of the evidence gathered against defendant was the result of the illegal entry into the lower residence.

CONCLUSION

For the reasons set forth above, defendant should be granted a new trial.

Dated: 5/6/2018

_____
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CERTIFICATION AS TO FORM AND LENGTH/APPENDIX CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 5276 words.

I certify that filed with this brief, as part of this brief, an appendix complying with s. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court entries;

(3) the findings or opinions of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning related to those issues.

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

Dated: 5/6/2018

_____
Philip J. Brehm

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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 on or after this date and that 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: 5/6/2018

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Philip J. Brehm

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