STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2018 AP 338 CR

v.

JODI J. LUX,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT BRANCH FIVE

The Honorable John A. Jorgensen, Presiding

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Was trial counsel ineffective in failing to file a motion to suppress evidence?

The trial court found that trial counsel was not ineffective for her failure to file a motion to suppress the arrest based upon illegal entry.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is requesting neither oral argument nor publication as this matter involves a one-judge appeal and is not eligible for publication.

STATEMENT OF THE CASE

As respondent, the State exercises its option to not present a full statement of the case. See *Wis. Stat. § 809.19(3)(a)2.* Instead, for this appeal to be appropriately considered, the State will present additional facts in the argument portion of its brief, when necessary, for this appeal to be appropriately considered.

ARGUMENT

I. DEFENDANT SHOULD BE DENIED A NEW TRIAL BECAUSE TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO FILE A MOTION TO SUPPRESS EVIDENCE

Trial counsel's decision not to file a suppression motion did not constitute ineffective assistance of counsel because the decision was a strategic one.

A. Standard of Review

A defendant claiming ineffective assistance of counsel has the burden to demonstrate ineffective assistance of counsel under the test enumerated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland,* the Supreme Court determined that in order to succeed on an ineffective assistance of counsel claim, the defendant must first demonstrate that counsel's performance was deficient, which requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id*. at 687, 104 S.Ct. at 2064. Second, the defendant must demonstrate that the deficient performance prejudiced her defense, which requires a showing that "the counsel's errors were so serious as to deprive [her] of a fair trial, a trial whose result is unreliable." *Id*. Unless a defendant makes both

showings, it cannot be said that the conviction "resulted from a breakdown in the adversary process that renders the result unreliable." *Id*.

Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *State v. Thiel*, 2003 WI 111, ¶ 23, 264 Wis.2d 571, 665 N.W.2d 305. When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." *Id*. 264 Wis.2d 571, ¶ 19. Counsel need not be perfect, indeed not even very good, to be constitutionally adequate. *Id*. 264 Wis.2d 571, ¶ 23. In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant has the burden to 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 the confidence in the outcome." *Id*. The defendant failed to meet her burden in proving both prongs of the *Strickland* test.

B. Legal Analysis

Trial counsel's performance was not deficient

A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel. *See State v.*

Felton, 110 Wis.2d 485, 501-02, 329 N.W.2d 161 (1983). Trial counsel pursued a reasonable trial strategy in deciding not to file a second motion to suppress based on a theory of illegal entry. Trial counsel's performance was objectively reasonable. At the October 11, 2017, evidentiary hearing, Attorney Ostrowski testified credibly, providing a strategic basis for her decision to not file a motion to suppress based on a theory of illegal entry.

Attorney Ostrowski has been employed as a State Public Defender for more than two years and has handled over twenty traffic cases. (R61:16). She evaluates each case she is assigned for suppression issues. *Id*. She appropriately filed a motion to suppress in this case challenging probable cause for arrest. (*See Defendant's Motion to Suppress*, filed December 22, 2016, and heard on February 1, 2017). (R13, R59). When pressed about her reasoning for not filing a motion to suppress based on a theory of illegal entry, Attorney Ostrowski testified that she had discussed the matter with the defendant. (R61:17-19). Attorney Ostrowski testified that she knew from discussions with the defendant that the upstairs resident (elderly woman) was the owner of the entire building and she did not believe there was an issue with her proceeding into that lower unit. (R61:10). Attorney Ostrowski believed the relationship between the elderly

woman/property owner and the grandson or occupant of the lower residence was familial. (R61:18).

Attorney Ostrowski further indicated that it was a strategic decision to not file an additional suppression motion after the initial motion hearing, as Officer Johnson testified that he was acting under a community caretaker function. (R61:19-20). Attorney Ostrowski further explained that "[b]ased on the testimony that Officer Johnson gave us at the motion hearing, I thought that when he testified in front of a jury it would be very clear to them that he didn't do things necessarily the way he was supposed to and I was confident that we had made the right decision to challenge on that regard. And now we had testimony that [Officer Johnson] was locked into from that motion hearing that we could potentially use to impeach at trial." (R61:20). Attorney Ostrowski further explained that she had researched the illegal entry issue. (R61:27). She recalled "looking at a number of cases that an owner of a home could consent" so she "took it under consideration that the woman who had allowed officers into the lower unit was the owner of that entire building, and [she] used that as her basis." (R61:27).

Attorney Ostrowski's strategic decision to not file an additional suppression motion was not only based on her legal research but also based

on the abundance of testimony elicited from Officer Johnson regarding his basis for entry into the residence. (R59:26-32; R61:19-20).

Based on the foregoing, it cannot be said that Attorney Ostrowski's conduct fell below an objective standard of reasonableness. It cannot be said that under these circumstances, Attorney Ostrowski's omission was outside the range of professionally competent assistance. Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. Trial counsel was not deficient. The defendant has not proven the first prong of *Strickland*.

Defendant has not established prejudice

Even if trial counsel had been deficient, the defendant nevertheless would not prevail because the defendant has not established under the second *Strickland* prong that she has a meritorious Fourth Amendment claim and that she was therefore prejudiced by the failure to file a suppression motion. Thus, if defense counsel had filed a motion to suppress the evidence uncovered in the valid search of the apartment where (despite no actual evidence of residency except for the defendant's recently-filed affidavit) defendant claims she was staying, this motion would have been

unsuccessful as Officer Johnson was acting in a *bona fide* community caretaker role.

1. Community Caretaker

Officer Johnson was exercising a community caretaker role when he ensued investigation in attempting to locate the driver of the vehicle with significant fresh damage that had just been involved a serious crash. Moreover, Officer Johnson was acting in a community caretaker role in following, with permission, the elderly woman into the residence with an unidentified individual that had just been in a serious traffic crash and may be injured. (R59:13). In her brief, the defendant acknowledges this theory and points to the relevant case: *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis.2d 346, 785 N.W.2d 592. 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.... *State v. Matalonis*, 2016 WI 7, ¶ 31, 366 Wis.2d 443, 875 N.W.2d 567 (quoting *Pinkard*, 327 Wis.2d 346, ¶ 29). The defendant argues that Officer Johnson was not performing a community caretaker function when he entered the lower residence because his desire to enter the residence was not only the elderly woman's safety, but also to obtain evidence of a crime. The defendant previously argued that the incident took place in the middle of the day, so the officer had plenty of time to obtain a warrant. However, Officer Johnson testified consistently that he was concerned for the elderly woman's safety. Furthermore, because the traffic crash occurred in the middle of the day as opposed to bar time, it is reasonable to believe that Officer Johnson was concerned for the driver's safety as the driver had just been involved in a serious traffic crash with significant damage not only to

a porch but also the vehicle itself. The damage was so extreme that debris from the porch was imbedded in the vehicle.

Lastly, it is undoubtedly in the public's best interest for law enforcement to reasonably investigate the state of the driver who has just been involved in a serious crash. In determining whether this public interest outweighs the intrusion upon the privacy of the defendant, it is significant to consider the specific facts of this case. Namely, that the defendant was inside of a bedroom when Officer Johnson entered the common area of the lower apartment. Officer Johnson testified that he knocked on that bedroom door and the defendant voluntarily answered the door. (R59:14). As a guest at the residence, if the defendant had any reasonable expectation of privacy, the most would be in the bedroom. She decided to open the door upon Officer Johnson's knocking. She voluntarily opened the door to allow contact. Officer Johnson was exercising a *bona fide* community caretaker function when he ensued investigation in attempting to locate the driver of the vehicle with significant fresh damage that had just been involved a serious crash. He was further exercising a *bona fide* community caretaker function when he, after asking permission, followed the elderly woman and owner of the residence into the lower apartment.

2. Consent

Alternatively, the State asserts that Officer Johnson had consent to enter the residence. The defendant frames the suppression issue as one of third-party consent. The defendant argues that the elderly woman who owns the entire building had no authority to permit Officer Johnson to enter into her grandson's apartment. The defendant further argues that it is irrelevant whether the elderly woman who owns the entire building had authority herself to enter her grandson's apartment. The defendant cites to *State v. Kieffer*, 217 Wis.2d 531, 577 N.W.2d 352 (1998), and believes the issue in that case to be "almost identical" to the issue here. That is simply not the case.

Salient facts distinguish *Kieffer* from the instant case. In *Kieffer*, the property owner/father-in-law knew the defendant, *Kieffer*, and knew that *Kieffer* was living in his residence. Furthermore, Dawn and John Kieffer testified that they had actually considered the property owner/father-in-law to be their landlord and that they had a right to exclude anyone from the loft area. *Id*., 217 Wis.2d 531, ¶ 27. Not only did the Kieffers testify to the extent of that relationship, but there was also actual evidence of this landlord-tenant relationship through payment of utility bills. There existed

evidence of a reasonable expectation of privacy from the Kieffers' perspective, as the property owner/father-in-law had a habit of knocking on the door prior to entering the loft- which was in an entirely separate building than that of the property owner/father-in-law's residence.

Moreover, the State would argue that the defendant lacks standing to challenge entry into the residence. In the instant case, there is no evidence that the defendant had a reasonable expectation of privacy in the grandson's apartment. There is no evidence that the elderly woman/property owner knew who the defendant was or that she was staying at her grandson's apartment. The defendant was located in a bedroom with the grandson's mother, and only came out from hiding – voluntarily – after Officer Johnson knocked on the bedroom door. Officer Johnson testified that the grandson indicated that the "driver of that car was visiting his mother which was in the first bedroom off the dining room." (R59:13). If the grandson and apartment resident believed that the defendant was visiting, then it is entirely reasonable for Officer Johnson to believe that the defendant was visiting, as a guest, with no reasonable expectation of privacy to the bedroom let alone his apartment. Furthermore, even the defendant's attorney testified that she was of the understanding that it was a "family

situation." (R61:18). Attorney Ostrowski was of the understanding that "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." (R61:18). There is no evidence of a landlord-tenant relationship. The defendant had no reasonable expectation of privacy over the apartment and therefore no standing to challenge Officer Johnson's entry into the residence.

The defendant further points to *United States v. Matlock*, 415 U.S. 164, 169, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), for the assertion that legal property rights do not resolve the issues of consent, and that just because the elderly woman owns the entire building she does not simply have authority to give law enforcement consent to enter. From the State's perspective, if the court finds that the defendant had standing to challenge Officer Johnson's entry, the issue is one of apparent authority and reasonableness. Officer Johnson reasonably relied upon the elderly woman/property owner's apparent common authority over the lower residence in order to conduct a warrantless search of the lower residence.

Under *United States v. Matlock*, 415 U.S. 164, 169, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), "the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial." The United States Supreme Court has held that law enforcement may rely upon a third party's apparent common authority to consent to a search of the defendant's residence, even if that third party lacks actual common authority to do so, provided that the reliance is "reasonable." *Illinois v. Rodriguez*, 497 U.S. 177, 186-87, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). The reasonableness of an officer's reliance in any given situation is determined by use of an objective standard. *See id.* at 188-89, 110 S.Ct. at 2801. Therefore, the court must consider whether "the facts available to the officer at the moment [of the search] warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Id*. at 188-89, S.Ct. at 2801 (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1879-80, 20 L.Ed.2d 889 (1969)(internal quotation marks omitted). If those facts do not warrant such belief, then "warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid." *Id*. at 188-89, 110 S.Ct. at 2801.

The touchstone of the Fourth Amendment is reasonableness. In considering whether Officer Johnson was reasonable in his decision to rely upon the elderly woman/property owner's apparent common authority over the lower residence in order to conduct a warrantless search of the lower residence, it is necessary to consider the extent of Officer Johnson's knowledge at the time of the warrantless search of the lower residence. Before entering the lower apartment, Officer Johnson knew that the building appeared to have more than one residence or unit. (R59:11). Officer Johnson believed that the elderly woman resided in the residence. *Id*. Officer Johnson knew that the elderly woman did not recognize the suspect damaged vehicle. *Id*. Officer Johnson also knew that the elderly woman was not the owner or driver of the damaged vehicle. *Id*. Officer Johnson knew that the vehicle was significantly damaged. (R59:10-11). Officer Johnson knew that there was one set of footprints leading from the parked vehicle to the residence entrance. *Id*. Officer Johnson knew that the elderly woman's grandson lived in the lower residence. *Id*.; (R59:32-33) Officer Johnson knew that the elderly woman knew that her grandson was not the owner of the damaged vehicle. *Id*. Officer Johnson knew that the elderly woman did not know who the driver of the vehicle was. *Id*. Officer

Johnson knew that the elderly woman observed the damaged vehicle and the one set of footprints. *Id*. Officer Johnson did not know whether the elderly woman believed her grandson may have been driving and may have been injured as a result of the damage. Officer Johnson testified that he was concerned about the elderly woman's safety, as he knew that both he was and she was unaware of who was in the apartment. (R61:34) Officer Johnson testified:

> I initially was concerned. She's an elderly walking into the apartment that I don'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.

(R59:12-13). Officer Johnson further explained that he "didn't feel 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. She didn't know who owned the car." (R61:34). Officer Johnson had no reason to doubt the elderly woman's authority to simply walk into her grandson's residence. At no point did Officer Johnson direct the elderly woman to open the door for him. She merely did it herself. Based on Officer Johnson's testimony, she did not think twice. She manifested her apparent common authority by leading Officer Johnson into the residence and giving him permission to

enter. Together, these facts would lead Officer Johnson to reasonably believe that the elderly woman could enter the lower residence at will, even if that belief was ultimately a mistaken one.

The defendant carries the heavy burden and must show that she would have been successful on a suppression motion. The trial court heard testimony from Officer Johnson on October 11, 2017, and thereafter found that Officer Johnson was acting in a caretaker capacity when he entered into the apartment with the owner. The defendant has failed to meet her burden in proving the second *Strickland* prong. As such, the defendant's motion for new trial must be denied.

CONCLUSION

For the reasons set forth above, this court should affirm the trial court's order denying Lux post-conviction relief and uphold its finding that trial counsel was not ineffective. The defendant's motion for a new trial must be denied.

Dated at Oshkosh, Wisconsin, this _____ day of June, 2018.

_____
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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3235 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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.

I further certify that on the date of signature I routed the enclosed briefs to our office station for first class US Mail Postage to be affixed and mailed to:

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