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STATE OF WISCONSIN
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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 REPLY BRIEF

BY:

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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.

As recognized in *State v. Dumstrey,* 2016 WI 3, ¶22, 366 Wis.2d 64, 873 N.W.2d 502:

> "It is a 'basis principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). "Indeed, '[i]t is axiomatic that the physical entry of a home is the chief evil against which the wording of the Fourth Amendment is directed.'" *State v. Richter,* 2000 WI 58, ¶28, 235 Wis.2d 524, 612 N.W.2d 29. … Given this heightened Fourth Amendment protection, where police effectuate a warrantless arrest inside of a home, the State must prove that that the warrantless entry was justified by exigent circumstances (citation omitted).

Officer Johnson entered the lower residence at 524 Otter Avenue without a warrant. If he had no warrant, he had to have some other legal authority to enter this residence and to gather evidence against defendant Lux. He did not have that legal authority. Had an appropriate suppression motion been filed by defense counsel, the trial court would have been obligated to suppress the evidence gathered against defendant Lux by Officer Johnson.

A. <u>The community caretaker exception does not apply</u>.

The State suggests Officer Johnson may have been motivated to enter the residence to locate and aid the driver involved in an accident (State's brief at 8). There is no evidence in the record to support this contention. Officer Johnson admitted his sole justification related to the community caretaker function was to protect the personal safety of the elderly woman who entered the lower residence (61:34, 40-41). As previously argued, this cannot be a community care function for several reasons. Officer Johnson's safety concern for the

elderly woman was nothing more than theoretical. He pointed to no specific and articulable facts to support his contention that she was in any danger. Second, his actions after his entry into the residence demonstrate he was motivated by a desire to find the driver of the vehicle, not to protect the elderly woman. He admitted he separated from her after entry into the residence (61:35). His actions were not divorced from the investigation of crime. Third, by his own actions, he created the alleged safety issue by directly drawing the elderly woman into the investigation and causing her to enter the residence. Officer Johnson arguably created the very exigency he claims to have acted upon. That is forbidden under under the law previously cited from *State v. Kryzaniak,* 2000 WI App 44, ¶19, 241 Wis.2d 358, 624 N.W.2d 389. This search cannot be justified under the community caretaker exception.

B. Officer Johnson did not have valid consent to enter.

The trial court did not make a specific finding on whether Officer Johnson had valid consent to enter the lower residence. On appeal, the State suggests Officer Johnson had apparent authority to enter the lower residence (State's brief at 12). However, there is no evidence in the record that Officer Johnson believed the elderly woman resided in the lower residence. Officer Johnson admitted he spoke to the elderly woman for a period of time prior to his entry (61:31-33). He admitted he did not know whether she had the authority to give him permission to enter the residence (61:33).

As previously argued, issues related to a third party giving consent to enter may not always be taken at face value. *See State v. Kieffer,* 217 Wis.2d 531, 549, 577 N.W.2d 352 (1998). When there is doubt, further inquiry is necessary. *Id.* While he had time to do so, Officer Johnson did not make those inquiries. Officer Johnson's cannot act on an apparent authority when he did not make an attempt to determine the validity of the authority through an appropriate inquiry. Officer Johnson did not have to make a split decision regarding whether the elderly woman had authority to give consent to enter. He had the opportunity to ask appropriate questions before entering. He did not take advantage of that opportunity.

It is worth pointing out Officer Johnson had 20 years of experience as a police officer (59:4). Certainly, he would know he could not burst into a residence without valid legal authority. The fact he did not immediately enter the residence demonstrates that point.

C. Defendant Lux has standing to contest the search.

The State continues to make an argument that defendant Lux had no standing to object to Officer Johnson's entry into her residence (State's brief at 11-12). This argument is puzzling. Defendant Lux's citation for the offenses related to this case listed her address as "524 Otter Avenue" (1:2). The vehicle involved in the accident was registered to defendant at "524 Otter Avenue, Oshkosh, WI" (1:9). Defendant Lux was located in a bedroom at the residence at the time of her arrest. There is no evidence in record that she was unlawfully on the premises at the time of the officer's entry or that she did not live there.

D. The search was unlawful.

Had an appropriate motion been made by trial counsel, the evidence would have been suppressed, whether by the trial court, or on appeal. 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).

E. Trial counsel's errors were deficient and prejudicial.

Trial counsel's failure to file a meritorious motion to suppress was deficient performance. While trial counsel filed a motion to suppress, she did not challenge the authority of Officer Johnson to enter the lower residence to make contact with defendant Lux. Her decision not to file the motion was based not on strategy, but on an erroneous belief that because the elderly woman owned the entire building, she had the authority to allow police to enter the lower residence (61:10-11). As previously argued, property rights do not determine the ability of a person to consent to entry of a police officer. *See State v. Kiefer,* 217 Wis.2d 531, 549, 577 N.W.2d 352 (1998). Trial counsel's failure to file the motion was obviously prejudicial because the only evidence of defendant's Lux's probable intoxication was gathered as a result of the illegal search.

CONCLUSION

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

Dated: 6/16/2018

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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 1843 words.

Dated: 6/16/2018

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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: 6/16/2018

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Philip J. Brehm