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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18 AP 1154 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHRYN M. COOPER,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED ON JUNE 13, 2018, IN THE CIRCUIT COURT FOR PORTAGE COUNTY, THE HONORABLE TODD WOLF PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

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Whether the circuit court correctly determined that Defendant-Appellant voluntarily consented to a blood draw.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs should fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side.

The State does not request publication because the issues present no more than the application of well-settled rules of law to a recurring fact situation.

STATEMENT OF CASE AND FACTS

On January 5, 2017, while on duty as an officer of the Stevens Point Police Department, Sergeant Michael Retzki ("Sgt. Retzki") responded to a call concerning an accident in which a single vehicle had struck a light pole. (R.62: 4-5). Dispatch advised Sgt. Retzki that the vehicle's license plate was located at the scene of the accident, and that the owner of the license plate, identified as Kathryn Cooper ("Defendant-Appellant"), resided on Fourth Avenue. (R.62: 5-6). Sgt. Retzki drove to Defendant-Appellant's residence. (R.62: 6). As Sgt. Retzki approached Defendant-Appellant's residence, he observed a pickup truck parked nearby. (R.62: 6). An unidentified man in the pickup truck flagged down Sgt. Retzki and informed him that he witnessed the accident.

(R.62: 6). The man stated that he saw a vehicle strike a light pole and then followed the vehicle to the current location. (R.62: 10). Sgt. Retzki walked to the back of Defendant-Appellant's driveway and observed a parked vehicle with extensive damage that was leaking fluid. (R.62: 7). Sgt. Retzki proceeded to the back porch of the residence and observed Defendant-Appellant walking around the kitchen area. (R.62: 7). Sgt. Retzki then knocked on the back door. (R.62: 7-8). Defendant-Appellant saw Sgt. Retzki and performed a gesture of invitation into the residence by reaching her hand out and waving it back towards herself. (R.62: 8, 14). In response to that gesture, Sgt. Retzki entered Defendant-Appellant's residence. (R.62: 8). Sgt. Retzki told Defendant-Appellant that he was investigating an accident, informed Defendant-Appellant that her vehicle was damaged, and asked her if she recalled being in an accident. (R.62: 14).

Officer Dana Krzykowski ("Ofc. Krzykowski") subsequently arrived at the residence. (R.62: 8). Ofc. Krzykowski approached the back door of the residence and made eye contact with Sgt. Retzki. (R.62: 8-9). Sgt. Retzki then waved Ofc. Krzykowski into the residence and opened the back door. (R.62: 9, 18). Ofc. Krzykowski entered the residence and proceeded to ask Defendant-Appellant questions about the accident. (R.62: 19). Defendant-Appellant eventually submitted to field sobriety tests, and Ofc. Krzykowski arrested Defendant-Appellant for OWI based on his observations during those tests. (R.62: 19).

After Ofc. Krzykowski arrested Defendant-Appellant, he read her the Informing the Accused verbatim, and Defendant-Appellant agreed to a blood draw. (R.62: 21). A subsequent analysis of Defendant-Appellant's blood indicated that her blood alcohol concentration that evening was 0.330 g/mL. (R.62: 25).

On February 10, 2017, the Portage County District Attorney's Office charged Defendant-Appellant with operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration, both as third offenses. (R.2). On May 5, 2017, Defendant-Appellant moved to suppress all evidence derived from the police's unlawful entry into her home. (R.20). Defendant-Appellant also moved to suppress the blood test result based on a lack of constitutional consent. (R.19).

On December 15, 2017, Portage County Circuit Court Branch 3, presided over by the Honorable Todd Wolf, heard testimony and argument on both motions. The court first denied Defendant-Appellant's unlawful entry motion. The court held that Defendant-Appellant unequivocally consented to Sgt. Retzki's entry into the residence:

> There wasn't testimony here today that [Sgt. Retzki] was in uniform, but he indicated he was on duty, he was responding to this as a law enforcement officer, and that immediately within – and he described the same distance today, which I noticed to be about ten feet, although that distance wasn't put on the record, he was waved in by Ms. Cooper then, and stated come in, come in. I don't even know if there as to be a necessity that she has to know it's an officer. The idea is whether she gave voluntary consent for that person to enter.
>
> I don't know what more consent one can ask or assume they have if someone tells them to come in, come in, and waves in a motion, the hand coming towards that individual then to come in. The officer entered.
>
> If she was concerned it was an officer, she could have at that point in time revoked consent because clearly as he walked in there, and he said he stood in two to three feet in the doorway in that kitchen area there. Well, if they were ten feet when she waved him in, and he had to be within eight to seven feet of the distance then when he walked in the residence then and began describing why he was there and what was going on. I don't find any information whatsoever

> to say that this was an unlawful entry by Officer Retzki. (R.62: 33-34).

The court similarly determined that Ofc. Krzykowski's entry into the residence was lawful:

> Clearly, there's no information that Ms. Cooper invited the second officer in, but I'm not aware of any case out there that indicates . . . that when that one officer is there after being invited in, that means a defendant has to say, yes, you, number one officer, can come in or if there is a second officer with him, you can come in, the third officer, you can come in.
>
> This officer is in an area that he was invited into. Another officer arriving then and coming to that same location, it wasn't that Officer Retzki then went to some other location and Officer Retzki wasn't already there, so I don't find any evidence here to indicated that this was an unlawful entry by the officers then, and the motion regarding the entry is denied. (R.62: 34-35).

The court also denied Defendant-Appellant's motion to suppress her blood test results. The court emphasized:

> I didn't find any reason here that there has been any evidence that [Ms. Cooper] was – had any sort of trickery or deception or misrepresentation. The officer indicated he went through the Informing the Accused with her, read the Informing the Accused verbatim, and that there was no indication and no contrary evidence to say that she didn't at that point in time agree, which I agree, really, is a continuation of her previous implied consent here, and that there was no indication she was deprived of any sleep or food or anything such as that.
>
> ….
>
> There was no indication the officers on that night that she wasn't able to understand what she was being read. She answered the question. There was no hesitation. She wished to talk to her husband, was brought out by the officer, a very rational thing someone might ask to do, which actually was emphasized here in the defense argument, was part of the reason she was willing to perform the testing. They went through the testing procedure. The officers appeared to do

> nothing to deceive her or trick her, and for all of those reasons . . ., I do find that the consent was voluntary . . . . (R.62: 40-41).

On June 13, 2018, Defendant-Appellant pled guilty to operating while under the influence of an intoxicant as a third offense, and the court pronounced sentence. (R.40; R.41). On June 18, 2018, Defendant-Appellant appealed her conviction to this Court. (R.52).

ARGUMENT

1. The circuit court correctly held that the police entry into Defendant-Appellant's residence was lawful.

a. Standard of Review

The question of whether a search or seizure is reasonable under the Fourth Amendment is a question of constitutional fact. *State v. Kieffer*, 217 Wis.2d 531, 541, 577 N.W.2d 352 (1998). When a Fourth Amendment challenge is raised at the trial court level, the trial court considers the evidence, makes findings of evidentiary or historical fact, and then resolved the issue by applying constitutional principles to those historical facts. *State v. Martwick*, 2000 WI 5, ¶¶ 16-17, 231 Wis.2d 801, 604 N.W.2d 552. On review, appellate courts give deference to the trial court's findings of evidentiary or historical fact, but determine the question of constitutional fact independently. *State v. Griffith*, 2000 WI 72, ¶ 23, 236 Wis.2d 48, 613 N.W.2d 72.

b. Legal Argument

i. Defendant-Appellant unequivocally and voluntarily consented to police entry into her residence.

"The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution

protect the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *State v. Robinson*, 2010 WI 80, ¶ 24, 327 Wis.2d 302, 786 N.W.2d 463. Due to the constitutional sanctity of the home, courts have interpreted these provisions to mean that "the police may not venture across the threshold [of a home] without a warrant except under limited circumstances, on pain of suppression." *State v. Sobczak*, 2013 WI 52, ¶ 11, 347 Wis.2d 724, 833 N.W.2d 59. One such exception – "jealously and carefully drawn" – "recognizes the validity of searches with the voluntary consent of an individual possessing authority." *Georgia v. Randolph*, 547 U.S. 103, 109, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) (internal quotation marks and citation omitted). The State must establish consent by clear and convincing evidence. *State v. Tomlinson*, 2002 WI 91, ¶ 21, 254 Wis.2d 502, 648 N.W.2d 367.

The uncontroverted testimony at the suppression hearing established by clear and convincing evidence that Defendant-Appellant unequivocally consented to Sgt. Retzki's entry into her residence. Sgt. Retzki testified that while he was "on duty" on January 5, 2017, he responded to Defendant-Appellant's residence in order to investigate a reported accident. (R.62: 4-5). Sgt. Retzki stated that he walked onto Defendant-Appellant's porch and observed Defendant-Appellant walking inside her kitchen. (R.62: 7-8). Sgt. Retzki testified that after he knocked on the back door, Defendant-Appellant "looked at me and just waved, come on in, come on in, so I opened the door and went in . . . ." (R.62: 8). Sgt. Retzki later restated his testimony, indicating that Defendant-Appellant "looked and then, come on in. She just yelled." (R.62: 13). Sgt. Retzki also noted that Defendant-Appellant "used big motions, come on in." (R.62: 13). The record reflects that as Sgt. Retzki testified about Defendant-Appellant's motions inviting him into her residence, he reached his

hand out in front of him and waved it backward toward himself as a gesture of invitation into the residence. (R.62: 14).

"Whether the consent was given in fact is a question of historical fact. The findings of the circuit court will be upheld if it is not contrary to the great weight and clear preponderance of the evidence." *State v. Blackman*, 2017 WI 77, ¶ 55, 377 Wis.2d 339, 898 N.W.2d 774. The circuit court's findings were consistent with the great weight and clear preponderance of the evidence. Sgt. Retzki's testimony demonstrates that Defendant-Appellant made an unambiguous gesture to Sgt. Retzki signaling her consent to his entry into her residence. As the circuit court noted, "I don't know what more consent one can ask or assume they have if someone tells them to come in, come in, and waves in a motion, the hand coming towards that individual then to come in." (R.62: 34). Accordingly, the circuit court inferred Defendant-Appellant's voluntary consent from her own actions.

Defendant-Appellant asserts that she could not have voluntarily consented to Sgt. Retzki's entry into her home because Sgt. Retzki did not identify himself as a police officer before or after he entered her kitchen, and nothing in the record indicates that Defendant-Appellant was aware that Sgt. Retzki was a police officer. However, Defendant-Appellant's knowledge on this point may be reasonably inferred from the record. As the circuit court emphasized, although "[t]here wasn't testimony here today that [Sgt. Retzki] was in his uniform . . . he indicated he was on duty, [and] he was responding to this as a law enforcement officer . . . ." (R.62: 33). That testimony, coupled with the fact that Sgt. Retzki stood approximately ten feet from Defendant-Appellant before he entered her kitchen, was sufficient to establish Defendant-Appellant's knowing consent. (R.62: 33-34). Likewise, as the circuit court noted, Defendant-Appellant

did not revoke her consent after Sgt. Retzki walked two to three feet into her kitchen. (R.62: 34). Moreover, Defendant-Appellant did not revoke her consent after Sgt. Retzki clearly identified himself as law enforcement by informing her that he was investigating an accident. (R.62: 14). Defendant-Appellant's failure to take action in opposition to Sgt. Retzki suggests that she had no concerns that Sgt. Retzki was a police officer. (R.62: 34).

Defendant-Appellant also argues that she did not provide Ofc. Krzykowski with consent to enter her residence because he entered at Sgt. Retzki's invitation. However, the evidence indicates that Ofc. Krzykowski had consent to enter the residence for the same reason Sgt. Retzki had consent. Sgt. Retzki testified that after Ofc. Krzykowski came to the back door of the residence, Sgt. Retzki made eye contact with him and "just waved him in." (R.62:9). Ofc. Krzykowski similarly testified that Sgt. Retzki "opened the door" to let him into the residence. (R.62: 18). Because Defendant-Appellant had provided unequivocal consent for one police officer to enter her residence, it may be reasonably inferred that her consent extended to additional officers investigating the same accident. Moreover, as with Sgt. Retzki, Defendant-Appellant did not revoke her consent or otherwise vocalize any objections to Ofc. Krzykowski's presence after he entered her kitchen. Based on those facts, Defendant-Appellant consented to Ofc. Krzykowski's entry into her residence.

ii. Exigent circumstances and the community caretaker function justified warrantless entry into Defendant-Appellant's residence.

Police may also enter a residence without a warrant in the presence of exigent circumstances, which "exist when it would be unreasonable and contrary to public policy to bar law enforcement officers at the door." *State v.*

Ferguson, 2009 WI 50, ¶ 19, 317 Wis.2d 586, 767 N.W.2d 187 (citation and quotations omitted). Four well-recognized categories of exigent circumstances have been held to authorize a law enforcement officer's warrantless entry into a home: (1) hot pursuit of a suspect; (2) a threat to the safety of a suspect or others; (3) a risk that evidence will be destroyed; and (4) a likelihood that the suspect will flee. *Id.* at ¶ 20.

Exigent circumstances existed in the instant case. As Sgt. Retzki testified, he received a call to investigate an accident in which the suspect vehicle ran over a light pole and then fled the scene of the accident, leaving only a license plate at the location of the accident. (R.62: 5). When Sgt. Retzki responded to Defendant-Appellant's residence, an unknown man informed him that he witnessed the accident, followed the suspect vehicle, and observed the vehicle park in Defendant-Appellant's driveway. (R.62: 6, 10). Sgt. Retzki examined the vehicle in Defendant-Appellant's driveway and observed "extensive damage and fluid leaking down." (R.62: 7).

Sgt. Retzki lawfully entered Defendant-Appellant's residence to investigate a threat to the safety of the driver of the suspect vehicle based on the statements made to him by a citizen witness and his observation of "extensive damage" to the suspect vehicle. By entering Defendant-Appellant's residence, Sgt. Retzki was essentially exercising a community caretaker function. "The United States Supreme Court and courts of this state have recognized that a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures." *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis.2d 346, 785 N.W.2d 592.

State v. Gracia, 2013 WI 15, 345 Wis.2d 488, 826 N.W.2d 87, is instructive. In that case, the City of

Menasha Police Department received a report of a downed traffic signal impeding traffic. *Id.* at ¶ 6. Officers examined the scene of the accident and determined that a vehicle had struck the signal and then left. *Id.* Officers also located a mangled license plate belonging to a 1999 Buick Regal LS next to the damaged traffic signal. *Id.* After some investigation, officers arrived at a trailer home belonging to the defendant, Juan Gracia, and found a Buick Regal in the driveway. *Id.* at ¶ 7. Officers observed significant front-end damage to the vehicle, with the front bumper caved in and missing pieces. *Id.* Gracia's brother eventually arrived at the residence and let the officers into the residence. *Id.* at ¶ 8. Gracia's brother then informed officers that Gracia had locked himself in a bedroom. *Id.* As officers approached the bedroom, Gracia yelled, "Go away." *Id.* With the assistance of Gracia's brother, officers forced entry into the bedroom and located Gracia lying on the bed. *Id.* Officers observed Gracia's bloodshot eyes, slurred speech, and the strong odor of intoxicants emanating from Gracia. *Id.* Gracia admitted to driving the Buick Regal, and officers arrested him for operating a vehicle while under the influence of an intoxicant. *Id.*

On appeal, the Wisconsin Supreme Court upheld the warrantless entry into Gracia's bedroom, determining that the officers reasonably exercised the community caretaker function. *Id.* at ¶ 29. In reaching that conclusion, the court held that the officers had an objectively reasonable basis to believe Gracia was hurt. *Id.* at ¶ 21. The court noted that "the damage at the scene of the accident and to the car observed at Gracia's house was *extensive*." *Id.* at ¶ 22 (emphasis added). The court emphasized that "not only was a traffic signal completely knocked down, but the front end of the vehicle was essentially caved in, pieces of the bumper were left at the scene, and the front license plate was entirely ripped off." *Id.* at ¶ 21.

Like the officers in *Gracia*, Sgt. Retzki also had an objectively reasonable basis to believe Defendant-Appellant was hurt. Just as the officers in *Gracia* observed "extensive" damage to the Buick Regal, Sgt. Retzki observed "extensive damage and fluid leaking down." (R.62: 7). Moreover, just as the accident in Gracia resulted in a traffic signal being knocked down and a license plate being ripped off, the accident in the instant case resulted in a light pole being knocked down and license plate being ripped off. (R.62: 5). Accordingly, by entering Defendant-Appellant's residence, Sgt. Retzki was appropriately responding to exigent circumstances and exercising his community caretaker function.

2. The circuit court correctly held that Defendant-Appellant voluntarily consented to a blood draw.

a. Standard of Review

Appellate review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. *State v. Tullberg*, 2014 WI 134, ¶ 27, 359 Wis.2d 421, 857 N.W.2d 120. An appellate court will uphold a circuit court's findings of fact unless those findings are clearly erroneous, but will conduct an independent, de novo analysis of the application of constitutional principles to the facts found. *Robinson*, 2010 WI at ¶ 22.

b. Legal Argument

Defendant-Appellant's consent to blood testing was voluntary.

Blood draws constitute searches under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. *Blackman*, 2017 WI at ¶ 53. Warrantless searches are per se unreasonable and are unlawful, subject to a few "clearly

delineated" exceptions, such as a search conducted pursuant to consent. *State v. Artic*, 2010 WI 83, ¶ 29, 327 Wis.2d 392, 786 N.W.2d 430. In order to establish that a blood draw was consensual, the State must prove by clear and convincing evidence that consent to the blood draw was "given in fact by words, gestures, or conduct," and that the consent was "voluntary." *Id.* at ¶ 30.

Under Wisconsin's Implied Consent Law, "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol . . . when requested to do so by a law enforcement officer . . . ." Wis. Stat. § 343.305(2). An officer may request a blood sample from a suspect upon an arrest for operating a vehicle while under the influence of an intoxicant. Wis. Stat. § 343.305(3)(a). Prior to the blood draw, an officer must read the suspect the Informing the Accused, which conveys statutory information regarding the reason for the blood draw and the civil and evidentiary penalties faced upon refusal of the blood draw. Wis. Stat. § 343.305(4). As the United States Supreme Court has held:

> It is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may fairly inferred from context. . . . Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185, 195 L. Ed. 2d 560 (2016).

Defendant-Appellant's actions, in conjunction with her implied consent pursuant to Wisconsin law, establish by clear and convincing evidence that she consented to the blood draw. Ofc. Krzykowski testified that after Defendant-Appellant was arrested for OWI, he read her

the Informing the Accused verbatim. (R.62: 20). Ofc. Krzykowski further testified that Defendant-Appellant agreed to the blood draw following that reading. (R.62: 21). Nothing in the record suggests that Defendant-Appellant was unable to understand the Informing the Accused or that Ofc. Krzykowski conveyed false or misleading information in order to secure Defendant-Appellant's consent.

"Whether the consent was given in fact is a question of historical fact. The findings of the circuit court will be upheld if it is not contrary to the great weight and clear preponderance of the evidence." *Blackman*, 2017 WI at ¶ 55. The findings of the circuit court are consistent with the great weight and clear preponderance of the evidence. The court noted:

> I didn't find any reason here that there has been any evidence that [Ms. Cooper] was – had any sort of trickery or deception or misrepresentation. The officer indicated he went through the Informing the Accused with her, read the Informing the Accused verbatim, and that there was no indication and no contrary evidence to say that she didn't at that point in time agree, which I agree, really, is a continuation of her previous implied consent here, and that there was no indication she was deprived of any sleep or food or anything such as that.
>
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> There was no indication the officers on that night that she wasn't able to understand what she was being read. She answered the question. There was no hesitation. She wished to talk to her husband, was brought out by the officer, a very rational thing someone might ask to do, which actually was emphasized here in the defense argument, was part of the reason she was willing to perform the testing. They went through the testing procedure. The officers appeared to do nothing to deceive her or trick her, and for all of those reasons . . ., I do find that the consent was voluntary . . . . (R.62: 40-41).

As such, Defendant-Appellant's affirmative consent to the blood draw negated the need for a warrant.

CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the rulings of the circuit court and deny the Defendant-Appellant's requests for relief.

Dated at Stevens Point, Wisconsin, this 19th day of October, 2018.

Electronically signed by Kristian Mukoski October 19, 2018

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FORM AND LENGTH CERTIFICATION

I hereby certify that that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,575 words.

Dated at Stevens Point, Wisconsin, this 19th day of October, 2018.

Electronically signed by Kristian Mukoski October 19, 2018

_____

Kristian R. Mukoski
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ELECTRONIC BRIEF CERTIFICATION

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

I further certify that the 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 at Stevens Point, Wisconsin, this 19th day of October, 2018.

Electronically signed by Kristian Mukoski October 19, 2018

_____

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18 AP 1154 CR

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v.

KATHRYN M. COOPER,

Defendant-Appellant.

CERTIFICATION OF MAILING

Pursuant to Wis. Stat. §809.80, the State of Wisconsin, plaintiff-respondent, by Assistant District Attorney for Portage County Kristian Mukoski, hereby certifies that the enclosed Brief of Plaintiff-Respondent was deposited in the US Mail as a Priority Mail item, postage prepaid, on October 19, 2018.

Electronically signed by Kristian Mukoski October 19, 2018

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