STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18 AP 1154 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KATHYRN M. COOPER,

Defendant-Appellant

REPLY BRIEF OF 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.

Respectfully submitted,

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Defendant-Appellant

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ARGUMENT

I. THE ENTRY INTO MS. COOPER'S HOME WAS UNLAWFUL.

A. Ms. Cooper did not consent to Sgt. Retzki entering her home.

As stated in Ms. Cooper's brief-in-chief, to satisfy the reasonableness requirement of the Fourth Amendment, the police must have a warrant or an exception to the warrant requirement to enter a residence.[1] One possible exception is consent to a search.[2] The State relies on consent to justify Sgt. Retzki entering Ms. Cooper's home without a warrant.[3] It argues that when Sgt. Retzki entered Ms. Cooper's home, he did so based on her invitation.[4]

Sgt. Retzki's testimony was that Ms. Cooper motioned for him to come in, so he walked in, informed Ms. Cooper he was investigating the accident, and began to question her.[5] He did not inform Ms. Cooper that he was a police officer.[6] There was no testimony that he had been wearing his police uniform.[7] There had

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[1] Br. at 14; ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973); ***State v. Ferguson***, 2009 WI 50, ¶ 19, 317 Wis. 2d 586, 767 N.W. 2d 187.
[2] ***Schneckloth***, 412 U.S. at 219.
[3] State's Br. at 11.
[4] *Id.*
[5] R.62 at 8; 14.
[6] R.62 at 13–14.
[7] *Id.*; *Id.* at 33.

been no testimony that Ms. Cooper saw or would have been able to see his squad car from inside her kitchen.[8]

The State fails to demonstrate that Ms. Cooper knowingly invited *a police officer* into her home. Ms. Cooper does not dispute that she invited Sgt. Retzki into her home that evening. The dispute is, rather, whether the State has satisfactorily demonstrated that Ms. Cooper knowingly invited a police officer into her home. What the State did establish is that Sgt. Retzki, on duty, walked around Ms. Cooper's residence, approached Ms. Cooper's door, got waved in by Ms. Cooper, and then entered her home.[9] That is the extent of what the State can demonstrate. That was not clear and convincing evidence that Ms. Cooper unequivocally consented to a police officer entering her home.

Officer Krzykowski entered the home at Sgt. Retzki's invitation, not Ms. Cooper's. Ms. Cooper only acquiesced to a display of authority by Sgt. Retzki. Ms. Cooper did not consent to either officer entering her home. The State may not rely upon consent to justify either officer entering Ms. Cooper's home. Because the police did not obtain a warrant to enter the residence, any evidence seized

[8] R.62.
[9] R.62 at 14.

after this entry must be suppressed. Had the evidence been suppressed in circuit court, Ms. Cooper would not have pled to the charges.

B. If this Court finds Ms. Cooper consented to the police entering her home, she could not have voluntarily consented.

As stated in Ms. Cooper's brief-in-chief, the burden is on the State to demonstrate that Ms. Cooper freely and voluntarily consented to Sgt. Retzki entering her home.[10] Acquiescence to a claim of lawful authority is not free and voluntary consent.[11]

When the decision to give or not give consent is not knowing, it may also be coerced, "by explicit or implicit means, by implied threat or covert force."[12] Accordingly, a reviewing court must examine "all the surrounding circumstances" of the consent with "the most careful scrutiny" to ensure that the search was not "a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."[13] Though knowingly giving consent is just one factor to consider in analyzing voluntary consent, examining the facts here, Ms. Cooper's consent to the officer's entry into her home was not knowing and was therefore coerced. Given the other factors present, Ms. Cooper's consent to Sgt. Retzki entering her home was

[10] Br. at 16; ***Bumper v. North Carolina***, 391 U.S. 543, 548 (1968).
[11] ***Id.*** at 548–59.
[12] ***Schneckloth***, 412 U.S. at 228.
[13] ***Id.*** at 228–29.

involuntary. Any evidence derived from the unlawful entry must be suppressed.

When addressing whether Ms. Cooper could have voluntarily consented if Sgt. Retzki did not ever identify himself as a law enforcement officer, the State declares, "[Ms. Cooper's] knowledge on this point may be reasonably inferred from the record."[14] But there is no information in the record that Sgt. Retzki was wearing his uniform that evening.[15] Nor are there facts in the record that Sgt. Retzki identified himself as a police officer—Sgt. Retzki testified he did not do so.[16]

There are also several factors that are absent from this scenario that would be present in a typical encounter with the police. This was not a traffic stop situation, where Sgt. Retzki would have been in his squad car, lights flashing. Sgt. Retzki made contact with Ms. Cooper later. Nor did Sgt. Retzki testify that Ms. Cooper would have been able to see his squad car from inside her home.[17] In addition, likely because no officer spoke to Ms. Cooper when she allegedly hit the pole, there was no evidence presented during the evidentiary hearing that demonstrated Ms. Cooper *knew* she had been in an accident, or

[14] *Id.* at 12.
[15] R.62 at 33.
[16] R.62 at 13.
[17] R.62 at 8.

evidence through which the circuit court could have inferred Ms. Cooper knew she had allegedly hit a pole.[18] The State's argument that Ms. Cooper knew Sgt. Retzki was a police officer when she reportedly invited him into her home is not as convincing, and the point is not as obvious, as the State makes it out to be.

The State also points out that Sgt. Retzki "stood approximately 10 feet from [Ms. Cooper] before he entered her kitchen[.]"[19] According to the State, this was a fact that tended to demonstrate Ms. Cooper knowingly consented to Sgt. Retzki entering her home.[20] Why? Is the State's argument that Sgt. Retzki somehow established he was a police officer by being farther from the door? The State leaves the argument at that. Because the State failed to develop this argument, this Court need not consider it.[21]

Lastly, the State also argues that it is significant that Ms. Cooper did not revoke her consent after Sgt. Retzki walked three feet into her kitchen.[22] If the State's argument is that Ms. Cooper must have known that Sgt. Retzki was a police officer at that point, and that the fact she did not revoke her consent at this juncture demonstrates she knowingly invited a police officer into her home, the State

[18] R.62.
[19] *Id.* at 12.
[20] *Id.*
[21] ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).
[22] State's Br. at 13.

continues to disregard the main point. The issue is that Sgt. Retzki failed to identify himself as a police officer. As stated above, there were no context clues through which Ms. Cooper could have concluded that she was inviting a police officer into her home. The fact that Ms. Cooper did not revoke her consent when Sgt. Retzki first entered her home, and then later did not want to participate in any OWI investigation indicates that Ms. Cooper did not knowingly consent to Sgt. Retzki entering her home. [23]

In sum, when she waved Sgt. Retzki in, Ms. Cooper could not have known in what capacity Sgt. Retzki entered. Other factors demonstrate Ms. Cooper did not voluntarily consent to Sgt. Retzki entering her home. Ms. Cooper had an extraordinarily high blood alcohol concentration that evening.[24] She acted strangely, bursting into laughter at inappropriate times.[25] She also allowed an unknown man into her home while she appeared to be alone.[26]

When Sgt. Retzki allowed Officer Krzykowski into Ms. Cooper's home, that was a further encroachment upon Ms. Cooper's Fourth Amendment rights. There is no indication in the record that Ms. Cooper consented to the second officer entering her home.[27]

[23] R.62 at 23–24.
[24] R.62 at 25.
[25] R.62 at 24.
[26] R.62 at 8; R.62 at 13–14.
[27] R.62 at 26.

There was no testimony given during the motion hearing that she waved the second officer in or otherwise assented to his entering her home.[28] Accordingly, the State may not rely upon consent for the second officer to bolster its argument that Ms. Cooper voluntarily consented to the police entering her home.

C. No other exception to the warrant requirement may justify the warrantless entry.

Despite failing to raise the issue in circuit court, the State argues in its reply brief that both exigent circumstances and the community caretaker role justified Sgt. Retzki's warrantless entry into the home.[29] The State argues, "Sgt. Retzki was essentially exercising a community caretaker function" when he entered Ms. Cooper's residence.[30] The State cites to ***State v. Gracia,*** which it states is a comparable situation to that of Ms. Cooper, as it relates to the community caretaker argument.[31] Because the State failed to raise either exigent circumstances or the community caretaker argument in circuit court, it forfeited these arguments on appeal.[32]

Should this Court find that the State did not forfeit the exigent circumstances argument, Sgt. Retzki's entry cannot be justified under

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[28] R.62 at 26.
[29] State's Br. at 14.
[30] *Id.*
[31] *Id.*; ***State v. Gracia***, 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87.
[32] ***In re Guardianship of Willa L.***, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155.

exigent circumstances. Presumably, though it does not specify, the relevant exigent circumstances the State refers to is a fear for "the safety of a suspect."[33] Yet, for reasons addressed below, Sgt. Retzki could not have been fearful for Ms. Cooper's safety.

With regard to the State's community caretaker argument, the warrantless entry could not be justified under these grounds. The community caretaker exception to the warrant requirement is justified under circumstances in which the police have a legitimate reason to fear for a person's safety or the security of their property.[34] A reviewing court applies a three-prong test, determining:

> (1) [W]hether a search or seizure within the meaning of the Fourth Amendment has occurred;
> (2) [I]f so, whether the police were exercising a bona fide community caretaker function; and
> (3) [I]f so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.[35]

Here, there is no dispute that a search under the Fourth Amendment occurred. Sgt. Retzki entered Ms. Cooper's home, which "is accorded the full range of Fourth Amendment protections."[36] With regard to the second prong, the police could not have been engaged in a bona fide

[33] ***State v. Ferguson***, 2009 WI 50, ¶ 19, 317 Wis. 2d 586, 767 N.W. 2d 187.
[34] ***State v. Pinkard***, 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592.
[35] ***Id.*** ¶ 29.
[36] ***Id.*** ¶ 30 (internal citations omitted).

community caretaker function. Sgt. Retzki could not have been concerned for Ms. Cooper's wellbeing, because there had been no signs that Ms. Cooper was injured. There are no facts in the record that the witness to the accident indicated Ms. Cooper had suffered an injury. Furthermore, there are no facts in the record that show Sgt. Retzki was concerned at any point about Ms. Cooper's wellbeing.

There is no need to examine the third factor, since there had been no bona fide exercise of the community caretaker function. Should this Court find there had been a legitimate exercise of the community caretaker function, entering Ms. Cooper's home was a significant intrusion of her privacy interests. Her expectation of privacy in her home was great.[37] This significant intrusion cannot be balanced by any public interest to entering the home without a warrant. This was not a life and death situation. There was no reason to believe that Ms. Cooper was suffering from a drug overdose, or that she was otherwise in danger. Sgt. Retzki should have obtained a warrant.

In the ***Gracia*** case, the Wisconsin Supreme Court considered whether the police had an objectively reasonable basis to believe that the defendant was hurt when they entered his bedroom without a

[37] ***Id.*** ¶ 56.

warrant.[38] The Court held that the community caretaker exception justified the police's warrantless entry.[39] The Court relied on the fact that "the damage at the scene of the accident and to the car observed at [the defendant's] house was extensive" and that the police "consistently stated their concern" for the defendant.[40] In fact, the defendant's brother was also concerned—to the extent that he helped the police break open the door to the defendant's bedroom.[41]

None of the factors present in ***Gracia*** are present here. There is no evidence in the record that police officers were concerned with Ms. Cooper's wellbeing when they entered her residence. There is no evidence that any other person, including Ms. Cooper's husband, was concerned about her wellbeing. Though her vehicle apparently had "extensive damage," it is unclear what Sgt. Retzki meant by "extensive damage," or whether the damage rose to the level of that in ***Gracia***. Regardless, no other factors from ***Gracia*** were present, and Sgt. Retzki's warrantless entry may not be justified under those grounds.

[38] ***Gracia***, 2013 WI 15, ¶ 21.
[39] *Id.*
[40] *Id.* ¶ 21–22.
[41] *Id.* ¶ 22.

II. ANY CONSENT MS. COOPER GAVE TO BLOOD TESTING WAS INVOLUNTARY.

A. Ms. Cooper's consent to blood testing was involuntary under *State v. Artic.*

As stated in Ms. Cooper's brief-in-chief, under ***State v. Artic***, the Court set forth a non-exclusive list of factors to be considered in determining the voluntariness of consent to search:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent;
> (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep;
> (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite;
> (4) how the defendant responded to the request to search;
> (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and
> (6) whether the police informed the defendant that he could refuse consent.[42]

In addition to these factors, the Wisconsin Supreme Court has noted that the State's burden to show voluntary consent is "more difficult" when the defendant is in custody at the time that consent is given.[43]

The State argues, "[Ms. Cooper]'s actions, in conjunction with her implied consent pursuant to Wisconsin law, establish by clear and

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[42] ***Id.*** ¶ 33, *citing* ***State v. Phillips***, 218 Wis. 2d 180, 577 N.W.2d 794 (1998) (formatting added).
[43] ***Gautreaux v. State***, 52 Wis. 2d at 492.

convincing evidence that she consented to the blood draw."[44] The State does not fully explain what those actions were. Presumably, the State refers to the fact that Officer Krzykowski read Ms. Cooper the ITAF, and she submitted to blood testing.[45]

The State does not adequately explain how implied consent works and seems to indicate that Ms. Cooper provided free and voluntary consent to blood testing through a statute.[46] That is not how consent works--in the OWI context or otherwise. The implied consent law serves to "provide[] an incentive for voluntary chemical testing, *i.e.*, not facing civil refusal procedures and automatic revocation[.]"[47] When the State refers to Ms. Cooper's "implied consent" to blood testing, the State argues she did not withdraw her previously given consent to testing.[48]

The State declares that, "[n]othing in the record suggests that [Ms. Cooper] was unable to understand the Informing the Accused or that Ofc. Krzykowski conveyed false or misleading information in order to secure [Ms. Cooper]'s consent."[49] The State seems to misunderstand that the burden is not on Ms. Cooper to demonstrate

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[44] State's Br. at 17.
[45] R.62 at 21; *Id.*
[46] State's Br. at 17.
[47] ***State v. Marshall***, 2002 WI App 73, ¶ 13, 251 Wis. 2d 408, 642 N.W.2d 571.
[48] State's Br. at 17.
[49] *Id*. at 18.

involuntary consent—the burden is on the State to demonstrate voluntary consent, and nothing in the record indicates Ms. Cooper's consent was *voluntary*. Ms. Cooper was handcuffed and placed in the back seat of the squad car before being asked to submit to a blood test.[50] Officer Krzykowski read the Informing the Accused form verbatim, and Ms. Cooper gave an affirmative response when asked to submit to the test.[51]

The State *must* present positive evidence, to a clear and convincing standard, that Ms. Cooper made "an essentially free and unconstrained choice, not the product of duress or coercion, express or implied."[52] It is insufficient for the State to declare that "nothing in the record suggests" Ms. Cooper submitting to the blood draw was not voluntary.[53] Caselaw requires the State to point to positive evidence that demonstrates Ms. Cooper voluntarily consented.[54]

The State does not address Ms. Cooper's argument that her personal characteristics prevented her from voluntarily consenting.[55] These characteristics include the fact that she acted eccentrically that evening, and that her blood alcohol level was likely greater than a .33

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[50] R.62 at 21.
[51] R.62 at 20–21.
[52] ***State v. Blackman***, 2017 WI 77, ¶ 56, 377 Wis. 2d 339, 898 N.W.2d 774 (internal citations and punctuation omitted).
[53] State's Br. at 18.
[54] ***Blackman***, 2017 WI 77, ¶ 56.
[55] Br. at 31–32; State's Br. at 17–19.

BAC level when Officer Krzykowski asked her to submit to an evidentiary blood test.[56] Nor has the State presented any evidence to suggest that Ms. Cooper has a greater-than-average knowledge of the law or of legal principles. These characteristics favor a finding that she did not voluntarily consent to the search.

Because the State has entirely failed to meet its burden of demonstrating Ms. Cooper voluntarily consented to blood testing, all evidence derived from the collection and analysis of her blood sample should have been suppressed. Had the motion to suppress been granted in circuit court, Ms. Cooper would not have pled to the OWI offense.

[56] R.62 at 23–24.

CONCLUSION

For the reasons set forth above and in her brief-in-chief, Ms. Cooper respectfully requests that this Court reverse the lower court's ruling denying her suppression motions. Had the circuit court suppressed the blood test results in this case, Ms. Cooper would not have pled to the OWI charges.

Dated at Madison, Wisconsin, November 1, 2018.

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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