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WISCONSIN COURT OF APPEALS
DISTRICT III
Appeal No. 2018-AP-001762
Circuit Court Case No. 2018CF000032

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

JESSE J. JENNERJOHN,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AFTER
SENTENCING DEFENDANT AND DENYING
DEFENDANT'S MOTION TO SUPPRESS EVIDENCE
THE HONORABLE MITCHELL J. METROPULOS,
PRESIDING

**BRIEF OF DEFENDANT-APPELLANT JESSE J.
JENNERJOHN**

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STATEMENT OF THE CASE

This is an appeal from an order entered on August 10, 2018, in the Circuit Court for Outagamie County, by the Honorable Mitchell J. Metropulos, after sentencing the defendant, Jesse Jennerjohn, on August 3, 2018, and denying defendants motion on June 6, 2018, which sought to suppress evidence obtained from a warrantless search of his home. Defendant, Jesse Jennerjohn, appeals all of these.

Jesse Jennerjohn was charged with possession with intent to deliver THC, a class H felony, arising out of the warrantless search of his residence on November 29, 2017. R. 1 & 2. The search occurred following Jesse's arrest outside his residence. Jesse filed a motion to suppress the evidence from the search because his home was searched without a warrant. R. 7. The state argued that the search was permissible under either or both of the "protective sweep" and/or "community caretaker" exceptions to the search warrant requirement. R. 32, p. 81, l. 15-18.

The incident at Jesse's home unfolded as follows:

Appleton Police Officer Dominic Hall was initially dispatched to Grumpy's Pub, at 11:00 p.m., regarding a male using profanities and attempting to fight with others at

the bar. R. 31, p. 5, l. 7-14. Officer Hall met with bartenders at Grumpy's Pub who told him they had kicked Jesse out of the bar because of the aforementioned behavior. *Id.* at p. 5, l. 17-p. 6, l. 6.

Officer Hall also testified that he met with Jesse's neighbor Lisa who saw Jesse at her house just before police arrived. *Id.* at p. 13, l. 6-13. Officer Hall testified about his interaction with Lisa as follows:

Q. Did she recall any specific statements that he made or general nature of something of the statements he made?

A. He did make a statement as to that he wanted to go back and grab his gun and then go back to the bar and "shoot that dude."

Q. Was that statement made by Lisa, the neighbor?

A. Correct, sir, that was the statement that she made to us that was relayed through her to us from Jesse.

Id. at p. 14, l. 8-15.

Appleton Police Officer Nicholas Meyer was dispatched to Jesse's residence based on the disturbance at Grumpy's Pub. *Id.* p. 50, l. 7-15. Officer Meyer was the first officer to arrive at Jesse's residence. *Id.* at p. 60, l. 9-10. As officers approached Jesse's residence, they saw him across the street from his residence, talking to a female neighbor, later

identified as Lisa Walker. R. 31, p. 8, l. 15 – p. 10, l. 21. Lisa testified that Jesse knocked on her door and told her that he was hurt. R. 32, p. 6, l. 12-17. She took him inside her house to bandage his hand and then walked him back over to his house. *Id.* It was at this time that officers surrounded Jesse's house. *Id.*

Jesse quickly moved to his front door and then into his house, ignoring officers commands to stop. R. 31, p. 8, l. 15 – p. 10, l. 21. Officer Hall knocked on Jesse's door announcing that the Appleton Police Department wanted to talk to him; Jesse did not respond. *Id.* p. 11, l. 19 – p. 12, l. 4. Jesse did, however, come to a front window several times; once with a phone, appearing to record the officers. *Id.*

Neighbor Lisa was questioned by officers at the scene that night, before they entered and searched Jesse's house. R. 32, p. 6, l. 22-24. At the evidentiary hearing, Lisa listened to the officers' recording of their questions and her answers. R. 32, p. 7, l. 3- p. 8, l. 10. On the recording, she told officers that Jesse lived alone. *Id.* She never told officers that Jesse lived with anyone else. *Id.* Jesse did not tell her that anyone else

lived with him. *Id.* She never told officers that she believed anyone else was in Jesse's house. She never said Jesse had a girlfriend. *Id.* She did not see anyone else go into the house that night and finally, she stated that she lives "right next door" to Jesse. *Id.*

Officer Alyssa Blankenship's body camera recorded her questioning of neighbor Lisa. *Id.* P. 47, 1. 9 – p. 48, 1. 18. Officer Blankenship confirmed that Lisa told her that Jesse lived alone. *Id.*

Sergeant Craig Rohm was also called to Jesse's residence for the disturbance in the late evening of November 28/early morning of November 29, 2017. R. 32, p. 50, 1. 25-p. 51, 1. 9. Sgt. Rohm was familiar with a friend of Jesse, by the name of Dawn De Guelle. *Id.* p. 51, 1. 23-p. 53, 1. 3. Sgt. Rohm believed that, based on his knowledge of Dawn's relationship with Jesse that she could help get Jesse out of his house peacefully. *Id.*

Officer Rohm called Dawn at 11:49 p.m. on November 28, 2017 and asked her if she was someone Jesse trusted; Dawn stated that she was. Dawn was told about the bar fight and was asked if she would

make contact with Jesse, “because they just wanted to talk to him and make sure he was okay.” *Id.* at p. 32, l. 4-24. Dawn told Officer Rohm that she and Jesse’s brother Larry would be on their way. *Id.*

Dawn De Guelle testified that she knew Jesse as the custodian of the elementary school that she taught at. R. 32, p. 30, l. 22 – p. 31, l. 20. Dawn and other teachers had taken Jesse under their wing. *Id.* Jesse was both working at their school and attending college. *Id.* Dawn tutored Jesse and her family took him to church and on family vacations. *Id.* Dawn and the other teachers were aware of Jesse’s life history and wanted to be a positive influence and make a difference in his life. *Id.*

Dawn and Larry talked to Jesse while on the way to his residence. *Id.* p. 33, l. 1- p. 34, p. 10. Dawn also communicated with the police while in route. *Id.* Dawn specifically asked Jesse if he was alone:

. . . I asked if he was alone, and he said, “Of course I’m alone, who the F would I be with?,” and I said, “Well, I just wanted to make sure that you didn’t take anybody from the bar back with you,” he said, “No, I didn’t take anybody back from the bar, I am alone, I just want to go to

sleep, I don't want all these people bothering me.”

Id. at p. 33, l.24 – p.34, l. 5. Dawn relayed her conversation with Jesse to the police and told them he was alone. *Id.* at p. 34, l. 6-10.

Dawn testified that the officer she spoke to on the phone was the same officer she spoke to regarding Jesse previously in August. *Id.* p. 37, l. 7-p. 38, l. 10. She specifically identified Officer Rohm as an officer she spoke to in the prior August incident. *Id.* p. 39, l. 13-18. In that incident, she informed officer Rohm that Jesse did not have kids. *Id.* p. 37, l. 7-p. 38, l. 10. Officer Rohm did not ask her again if Jesse had kids, on this November, 2017 incident. *Id.* In addition, Dawn was not asked if Jesse had a girlfriend. *Id.* at p. 35, l. 24 – p. 36, l. 4. Dawn did testify, however, that Jesse did not have a girlfriend at the time of the November 28-29, 2017 incident. *Id.* at p. 35, l. 1-3.

Jesse voluntarily came out of his house between a half hour and an hour after officers arrived. R. 31, p. 14, l. 23 – p. 15, l. 3. Jesse was outside his house when Dawn and Larry arrived at the scene. R. 32, p.

38, l. 12-16. Dawn and Larry saw Jesse get tased and then taken into custody. *Id.* Dawn talked to the officers on the scene before they entered Jesse's house. *Id.* p. 38, l.17-p. 39, l. 6. There was no further discussion from the officers about whether there was anyone else in Jesse's house. *Id.*

Larry, Jesse's brother who arrived in the car with Dawn, was also questioned by officers at the scene at Jesse's house. *Id.* p. 41, l. 4-p. 43, l. 4. Larry told officers that Jesse lived alone, that Jesse did not have a girlfriend and that nobody else was in Jesse's house at that time. *Id.*

Sgt. Rohm testified that he never asked Dawn if Jesse lived alone, but that she could have told him that on the phone while she was on the way to Jesse's house. *Id.* 53, l. 6 – p. 54, l 17. Sgt. Rohm testified that he does not recall if any officer asked if Jesse lived alone, and that he did not recall any officer at the scene saying Jesse had someone in the house. *Id.* at p. 55, l. 15- p. 56, l. 2. Sgt. Rohm stated "The only thing I could say for certain is to my knowledge Jesse owned the house by himself." *Id.* at p. 55, l. 21-23. Sgt.

Rohm stated that he would have remembered if someone had told him that there was someone else in Jesse's house – no one did. *Id.* at p. 56, l. 6-21. In fact, he stated that he did not recall anyone saying they were even unsure if there was someone else in Jesse's house. *Id.* Nevertheless, he said that he believed that this issue of someone else being in the house was the basis for the "protective sweep". *Id.*

Officer Hall testified that his concern when approaching Jesse's house, when he initially arrived on the scene, was whether Jesse would retaliate against the bartenders at Grumpy's Pub. R. 31, p. 7, l. 19 – p. 8, l. 12. As they approached Jesse's house, officers saw Jesse talking to a female across the street – the female was identified as Jesse's neighbor, Lisa. *Id.* at p. 8, l. 15 – p. 9, l. 21. At that time, Jesse quickly moved to his front door. *Id.* Jesse ignored commands to stop, and entered his house. *Id.* Officer Hall stated that at this time, the officer's purpose was to issue Jesse a "no trespass warning to Grumpy's Pub". *Id.* at p. 9, l. 18-19.

Officers knocked on Jesse's door and got no response from Jesse. *Id.* at p. 11, l. 17-p. 12, l. 4. Officers observed Jesse walk back and forth from a back room in his house to the front window several times; once with nothing in his hands, and another time with a phone appearing to record the officers. *Id.* Officer Meyer had the best vantage point to see into Jesse's house. *Id.* p. 12, l. 5-7.

Officer Meyer saw Jesse run into his house as the officers initially approached. R. 31 at p. 50, l. 22. Officer Meyer positioned himself behind Jesse's car in his driveway. *Id.* p. 51, l. 3-9. Officer Meyer had a view inside Jesse's house via the front bay window; he was positioned 15 feet from the window. *Id.* p. 62, l. 21-p. 63, l. 8. He could see Jesse moving around inside the residence:

From my vantage point I did have a view inside the residence, to a certain extent, from a bay window, I could see the defendant moving around inside the residence, he would walk around often going back into what I assume at the time was a bedroom and laying on a bed, he also appeared to be holding a cell phone and holding it in such a manner that would suggest that he was recording us through the window.

Id. at p. 51, l. 13-21. Officer Meyer relayed his observations to the other officers on the scene. *Id.* at p. 52, l. 10-12.

Officer Meyer did not see anyone besides Jesse in the house. *Id.* p. 60, l. 14-24 and p. 69, l. 7-9. He was not told there was anyone else in the house. *Id.* He testified that there was sufficient light for him to observe Jesse inside the house, and that if there was another person, he would have seen them too – he did not see anyone else in the house. *Id.* Officer Meyer testified he did not see Jesse with any weapons; either in the house or when Jesse eventually came out of his house. *Id.* at p. 70, l. 9-p. 71, l. 5.

Officer Meyer's body camera recorded Jesse exiting his house. Officer Meyer testified that his concerns at that time – after observing him in the house – were Jesse's erratic behavior and not listening to commands. *Id.* at p. 53, l. 20-p. 54, l. 2. Officers did not observe any weapons in Jesse's possession when he came out of the house. *Id.* at p. 73, l. 7-p. 74, l. 22. Officer Meyer was able to verify that Jesse did not have a weapon when he exited the house. *Id.* Jesse

did have what was determined to be venison in his left hand; officers did not believe this to be a weapon at any time. *Id.*

Jesse exited his house about a half hour after officers initially approached his residence. R. 31, p. 14, l. 23-p. 15, l. 3. Jesse approached officers stating “Just shoot me”. *Id.* at p. 16, l. 25-p. 17, l. 3. Jesse was tased and arrested more than 10 meters outside of his front door. *Id.* at p. 31, l. 3-p. 32, l. 4.

Officer Meyer’s body camera shows that Jesse had shut the door when he exited his residence. *Id.* at p. 55, l. 9-20. Officer Meyer opened the door to Jesse’s house to enter the house after Jesse was arrested. *Id.* It wasn’t until after Jesse was arrested that Officer Meyer observed two framed pictures of small children in the living room. *Id.* p. 70, l. 2-8. Officer Meyer provided the following testimony about the pictures:

- Q. And what observations up to the point when you did the protective sweep gave you concern about what was in the residence.
- A. So it would have been totality of various circumstances . . . and also, when I do approach the door that was left open,

observing inside of the residence from that doorway I also observed a few pictures of young children, which also caused concern that there could possibly be children that also resided at that residence that could have been victims of the erratic behavior.

Q. I am going to start again from 06:41 seconds

(WHEREUPON, a portion of Exhibit 1 is played.)

MR. HAHN: Stopped it at 8:45.

Q. This is your body cam, correct?

A. Correct.

Q. So, it actually shows you opening the door, correct?

A. Correct.

Q. And you just testified that you believed that it was open. Does this refresh your memory that it was actually closed when you approached?

A. Correct.

R. 31, p. 54, l. 11 – p. 55, l. 20. Officer Meyer testified that he did not see the pictures of children until after Jesse was arrested and taken into custody, when he had a clear view of the living room. *Id.* p 69, l. 17 – p. 70, l. 8. His testimony was as follows:

Q. All right. So when you could see him, you could see him fairly clearly?

A. Depending on where he was inside the residence, yes.

Q. Okay. You were able to see clear enough to see that there were pictures and that those pictures were pictures of a kid or two kids, correct?

A. That was not at that time; that was when we approached the residence after he was taken into custody and had a more clear view of the living room there.

Id. Officer Meyer was one of the officers who entered the house to do what he called the protective sweep. R 32, p. 17, l. 1-5. His testimony is that he saw the pictures of children after Jesse was arrested when the front door was open, that door was closed until Officer Meyer opened the door to enter Jesse's house to conduct the "protective sweep". *Id.*

Officer Hall testified that he did not ask Jesse if he had children. *Id.* p. 28, l. 3 – p. 29, l. 2. Officer Hall did not recall any other officer expressing concern about children being in the house. *Id.* Officer Hall stated that there was nothing other than the photo Officer Meyer saw, there was nothing to suggest there were children in the house. *Id.*

Officer Hall testified that Jesse was arrested outside his house, and that the "protective sweep" took place inside Jesse's residence. *Id.* at p. 34, l. 19- p. 35,

1. 1. Officer Hall testified that there was no protective sweep done in the ten meter circle around Jesse. *Id.* p. 36, l. 10-16. Officer Hall testified that there was no need for a protective sweep around Jesse after he was arrested. *Id.* Officer Hall talked to Jesse after he was taken into custody about the “nights events”, at which point Jesse was taken by ambulance to the hospital, due to a concern for his well-being. *Id.* at p. 38, l. 19 – 25. Officer Hall also asked Jesse if there was anyone else in his house. *Id.* at p. 17, l. 11-17. Jesse told Officer Hall that there was nobody else in the house. *Id.*

When Jesse was taken away, Officer Hall went inside Jesse’s residence where officers were conducting the “protective sweep.” *Id.* at p. 38, l. 19 – 25. Officer Meyer showed Officer Hall the closet in Jesse’s house where the green leafy substance was found. *Id.* p. 39, l. 1-15. Officer Hall testified that the closet was located in Jesse’s home as follows:

Generally speaking, if you were to move through the front door, walk several paces with the living room on your left, there would be a small hallway to the right where I believe Jesse’s bedroom and another bedroom were

positioned in the house, and the closet was across that small hallway from the bedroom.

Id. at p. 39, l. 7-15.

Officer Hall testified that he was not aware of any discussion of getting a warrant before entering Jesse's house. *Id.* at p. 40, l. 14-25. Officer Hall's body camera recorded a conversation officers had before Jesse exited the house. R. 32, p. 27, l. 13-p. 28, l. 8. The officers did not mention any concern that anyone else might be in the house. *Id.* at p. 23, l. 23-p. 24, l. 20. In fact, Lieutenant del Plaine is heard stating that officers "have no charges at this time for Mr. Jennerjohn." *Id.*

Lieutenant Carlos del Plaine was the supervisor in charge of the scene at Jesse's house the night of the incident. R. 32, p. 63, l. 10-p. 64, l. 1. Lt. del Plaine coordinated the "major aspects of the incident." *Id.* p. 64, l. 5-15. In that capacity, Lt. del Plaine was receiving information from other officers on the scene. *Id.* Lt. del Plaine did not have any information that there was anyone besides Jesse in the house. *Id.* at p. 70, l. 18-p. 71, l. 8. Lt. del Plaine confirmed that

Jesse was taken into custody outside his house. *Id.* at p. 71, l. 9-11.

Lt. del Plaine made the decision to do what he called a “protective sweep” of Jesse’s house after the arrest. *Id.* p. 71, l. 16-18. He testified his decision making was as follows:

Then, because Mr. Jennerjohn’s behavior was so over the top, from just being potentially intoxicated, being upset, and not wanting to come out of the house or make contact with us to talk to us, to escalating to such a point that he was yelling for us to shoot him, he was advancing on officers, he was not listening to commands to the point of what happened, happened, that, you know, just making the protective sweep of the house, just to make sure there was, you know, not somebody else in there, that his, you know, behavior wasn’t, you know caused by, you know -- maybe there was somebody else in there? Maybe, you know, was there firearms in there that would need to be secured? Would the, you know, ultimately his brother and the staff member, you know, were not, you know, were not in any way be detained, would they be walking into some situation that would be unsafe for them? -- Because once we left, you know, they would certainly be free to go in the house or, you know, secure the residence. So that was my decision that because there was this extreme escalation in his behavior that that was just a prudent thing to do.

Id. at p. 73, l. 20 – p. 74, l. 17. Lt. del Plaine was one of the officers that conducted what they called the “protective sweep” of Jesse’s home. *Id.* at p. 74, l. 18-24.

Officer Meyer was the first to enter the home. *Id.* p. 75, l. 15-20. Officer Meyer's body camera recorded him entering the bathroom and opening a hall closet of the house. R. 31 at p. 56, l. 3-p. 57, l. 7-21. Officer Meyer testified that other than coordinating movements with other officers, he does not recall any officer saying anything else in the house. R. 32, p. 19, l. 5-17. Nobody, therefore, called out to see if anyone else was in the house or in need of any assistance. In the closet, Officer Meyer found 12 mason jars containing what was later determined to be marijuana. R. 31 at p. 56, l. 3-p. 57, l. 7-21.

Officer Hall testified that he was not aware of any discussion of getting a warrant before entering Jesse's house. *Id.* at p. 40, l. 14-25. No marijuana was found before the protective sweep. *Id.* at p. 41, l. 25 – p. 42, l. 3. Officer Hall initially testified that he did not recall if any green leafy substance was found prior to the “protective sweep”. *Id.* at p. 41, l. 11-16. The circuit court then questioned Officer Hall as follows:

THE COURT: There was no pot found before the sweep, was there?

THE WITNESS: Correct, Your Honor.

Id. at p. 41, l. 25 – p. 42, l. 3.

The state argued, at the end of the evidentiary hearing, that officers were exercising the “community caretaker” and “protective sweep” exceptions to the search warrant requirement. (*beginning* R. 32 at p. 76, l. 11.) The circuit court agreed.

The court held that there was a three prong test for the community caretaker exception to the requirement for a search warrant. *Id.* at p. 97, l. 19-2. The court found that law enforcement had searched Jesse’s home without a warrant and that Jesse had “a right to ensure that his home is free from unreasonable searches.” *Id.* As such, the court concluded that the first prong of the community care taker exception had been established.

The court identified the second prong as, “whether or not the police were exercising a bona fide community caretaker function.” *Id.* at p. 98, l. 10-12. The court concluded that there were multiple reasons that officers had for going into Jesse’s house, which it listed as follows:

- “There was concern that there perhaps would be other individuals”
- “their concern perhaps of small children in the home”
- “a concern of firearms”
- Information that the incident at Grumpy’s Pub resulted in information that the defendant had made threats at the bar and individuals at the location were concerned that Jesse would act on those threats.
- “concern that he was going to come back to the bar and shoot, quote, “the dude”
- “concern with him having access to firearms.”
- “there was a rifle case in the back of the defendant’s vehicle.”
- “concern about the defendant’s mental health, mental illness”
- “concern about his level of intoxication”
- “concern about whether or not he was driving while intoxicated, whether that be under the influence of drugs or alcohol, or a combination of the two.”
- “concern about what he had in his hand, at the time that he came out of the residence”
- “concern that was testified to by Lieutenant del Plaine that his friend and brother may enter into the residence and then be subject to perhaps someone else that was inside the residence.”
- “The defendant did show behaviors that were unusual, were concerning, and perhaps could be construed as suicidal when he said, “Just shoot me” to the officers when he exited the residence.”

R. 32, p. 98, l. 12 – p. 99, l. 24.

The court acknowledged that officers had information that Jesse lived alone. The court concluded, however, that because they didn’t have confirmation that there was no one else in the house, that the second prong of the community caretaker-search warrant exception had been satisfied. *Id.* at p.

99, l. 25 – p. 100, l. 24. The court stated that, “I think all they have to do is show that is a possibility, it’s a reasonable possibility” *Id.* at p. 100, l. 13 – 15. The court again relied on the above list of reasons for its conclusion.

The court next addressed the “final leg [.] whether or not the public interest outweighs the intrusion upon the privacy of the individual such that the community care taker function was reasonably exercised within the context of a home.” *Id.* at p. 100, l. 25-p. 101, l. 4. Citing *State v. Maddix*, for that court’s analysis of a “protective sweep”, the circuit court stated as follows:

The case I looked at was relatively recent, from 2013, *State v. Madeix*, spelled M-A-D-E-I-X, and that’s found at 12 AP 1632, involved a domestic type case similar to the case that Mr. Reed alluded to, but in that case the parties involved had been identified and the sweep was made well after that investigation, I believe almost an half hour later, and there was really no basis at that point for community caretaker provision or protective sweep.

In this case, protective sweep is done relatively close to the time of the custodial situation of the defendant, and I believe was made in a reasonable fashion, and was done in what was called a protective sweep; however the protective sweep did not involve just a search for weapons, the sweep was made with the community caretaker exception in mind to carry

out that exception, and it was done in a reasonable fashion.

Id. at p. 101, l. 15-16 (*see State v. Maddix*, 348 Wis.2d 179, 831 N.W.2d 778 (Ct. App. 2013)). The court stated its conclusion as follows: “... given the behaviors by the defendant, I believe the police exercised that community caretaker exception in a reasonable manner.” *Id.* p. 102, l. 19-25. The court went on to state, “And, therefore, I do deny the motion, I will not suppress any of the evidence that came out of the search.”

PROCEDURAL HISTORY

The relevant procedural history is as follows:

- Criminal Complaint filed on January 9, 2018. R. 2.
- Defendant’s motion to suppress filed on March 14, 2018. R. 7.
- Evidentiary hearing, day 1: May 2, 2018. R. 31.
- Evidentiary hearing, day 2: June 6, 2018. R. 32.

- Judgment of Conviction. August 3, 2018. R. 21.
- Notice of Appeal. September 13, 2018. R. 25.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION OF OPINION

The issues are subject to well settled law and, therefore, there is no need for oral argument. Publication, however, is recommended to provide guidance on the issue of search warrants and the community caretaker exception to the requirement.

STATEMENT OF ISSUES

1. Did officers' warrantless search, which they called a "protective sweep", of the defendant's home constitute a valid exception to the search warrant requirement? Answered by the circuit court in the affirmative.

2. Do the facts of this case support the community caretaker exception to the warrant requirement?

Answered by the circuit court in the affirmative.

STANDARD OF REVIEW

Motions to suppress evidence are questions of constitutional fact that require a two-step analysis. *State v. Matalonis*, 366 Wis. 2d 443, 875 N.W. 567, 576 (2016). The court outlined the process as follows: “First, we review the circuit court’s findings of historical facts under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts.” *Id.* citing *State v. Robinson*, 327, Wis.2d 302, 786 N.W.2d 463 (2010).

ARGUMENT

THE CIRCUIT COURT ERRED BY DENYING DEFENDANT’S MOTION TO SUPPRESS BASED ON THE “PROTECTIVE SWEEP” AND “COMMUNITY CARETAKER DOCTRINE”.

“The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. Warrantless searches are considered ‘per se unreasonable’ subject to ‘a few well-delineated exceptions.’” *State vs. Maddix*, 348 Wis.2d 179, 831

N.W.2d 778, 782, 783 (Ct. App. 2013)(citations omitted).

I. THE CIRCUIT COURT ERRED BY DENYING DEFENDANT’S MOTION TO SUPPRESS BASED ON THE “PROTECTIVE SWEEP” EXCEPTION.

The United States Supreme Court carved out the “Protective Sweep” exception to the search warrant requirement of the Fourth Amendment. *Maryland v. Buie*, 494 U.S. 325 (1990). “A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” *Id.* at 494 U.S. 325, 327. The protective sweep is limited to “*spaces immediately adjoining the place of arrest from which an attack could be immediately launched.*” *Id.* (emphasis added).

The Wisconsin Supreme Court has held that the “protective sweep” exception applies when officers are inside an area to be searched, such as a home. *State v. Sanders*, 752 N.W.2d 713, 719 (2008). Officers may

perform a warrantless search, when in an area, incident to an arrest and for the purpose to protect their own safety. *Id.* The “protective sweep” can only last long enough to address the danger, but “... no longer than it takes to complete the arrest and depart the premises. *Id.* The *Sanders* court also relied on the rule set forth by the United States Supreme Court in *Chimel v. California*, which held that police officers arresting someone at home may not search the entire home without a warrant, but they may search the area within immediate reach of the person where the arrestee may grab a weapon. *Id.* citing *Chimel v. California*, 395 U.S. 752 (1969). The *Sanders*’ court noted that while the *Chimel* rule allows for a warrantless search near the arrestee, the exception “does not permit a warrantless search of an area so broad as to be unrelated to the protective purposes of the search.” *Id.*

In the present case, it is undisputed that Jesse was arrested outside, not in, his home. R. 31, p. 32, l. 1-4. In fact, he shut his door as he exited his home - before he was arrested. *Id.* at p. 55, l. 12-20. He was arrested more than 10 meters outside the front door of

his house. *Id.* at p, 32, l. 1-11. He was tased and hand-cuffed. *Id.* No officer searched the 10 meter perimeter around Jesse. *Id.* at p. 36, l. 2-16. No officer was concerned, much less suspicious, of Jesse having access to a weapon anywhere near where he was arrested. *Id.* Officers had Jesse safely in custody and hand cuffed well before they decided to open his front door and enter his residence and conduct a warrantless search. In fact, Jesse was loaded up and hauled away in an ambulance while officers were in his house conducting the warrantless search. R. 31, p. 38, l. 19-25. This is not a protective sweep under *Buie*, or *Sanders*, and the entry and search of Jesse's home was not near the arrest, so as to fall within the search incident to arrest exception of the *Chimel* rule.

The protective sweep exception to the search warrant requirement does not allow police to search an arrestee's home when he is arrested outside of the home and there is no reason to believe there is anyone in the house who would attack or pose a risk to them.

The circuit court erred applying these constitutional principles to the facts of this case.

Accordingly, the court's ruling on Jesse's motion to suppress must be reversed.

II. THE CIRCUIT COURT ERRED BY FINDING THAT OFFICERS WERE EXERCISING THE COMMUNITY CARETAKER EXCEPTION TO THE WARRANT REQUIREMENT.

The United States Supreme Court carved out the "community caretaker" exception to the search warrant requirement stating:

Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cody v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523 (1973). Wisconsin courts have expanded the "community caretaker" exception from vehicles to homes. *State v. Pinkard*, 327 Wis.2d 346, 785 N.W.2d 592 (2010). Warrantless searches are considered 'per se unreasonable' subject to 'a few well-delineated exceptions.'" *State vs. Maddix*, 348 Wis.2d 179, 831 N.W.2d 778, 782, 783 (Ct. App. 2013)(citing *State v. Pinkard* infra). The community

caretaker is one of these exceptions *Pinkard*, 327 Wis.2d 346. Warrantless searches of homes under the community caretaker exception, however, require a heightened scrutiny to pass Fourth Amendment muster. *State v. Ultsch*, 331 Wis.2d 242, 793 N.W.2d 505. (Ct. App. 2010). It is the State's burden to show that a warrantless entry into a home is permitted under one of these exceptions. *State v. Leutenegger*, 275 Wis.2d 512, 685 N.W.2d 536 (Ct.App. 2004). Under *Ultsch*, a warrantless "community caretaker" search can only occur when officers reasonably believe the search is necessary to protect them or others. A court must determine whether there was an objectively reasonable basis to conclude that there was someone else in need of assistance. *Maddix* 831 N.W.2d at 784. This requires an examination of the totality of the circumstances for the warrantless search. *State v. Gracia*, 345 Wis.2d 488, 826 N.W.2d 87 (Ct. App. 2013).

Wisconsin courts have outlined a three step test to determine whether a warrantless search is justified under the community caretaker exception. *State v.*

Matalonis, 366 Wis.2d 443, 875 N.W.2d 567 (2016).

The three step analysis is as follows:

(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 within the context of a home.

Id. at p. 577. The third, public interest step has its own four-step analysis as follows:

(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 p. 578.

In *Maddix*¹, officers responded to a domestic dispute in the upper level of a duplex. *Maddix*, 831 N.W.2d 778, 780. They heard a female yelling from the upstairs. *Id.* at p. 781. Officers knocked on the upper apartment door, but there was no answer. *Id.* After hearing additional screams, officers forced entry

into the upper apartment and found Maddix and his girlfriend. *Id.* Maddix stated he and his girlfriend were the only ones there and that they had been arguing. *Id.* The girlfriend stated that she had screamed because she was scared, but did not know why. Officers did not observe anyone else in the apartment during this questioning. *Id.* After conferring for ten minutes, officers determined the girlfriend's reason for screaming did not make sense and that this made them concerned that there may be another victim or aggressor in the home. *Id.* One of the officers testified that "a 'protective sweep' of the residence was executed to make sure that there [were] no other people in the apartment, nobody that could either launch an attack against [the officers] or another possible victim in the apartment,'" *Id.* Officers checked various rooms during the sweep and found no one in need of assistance. *Id.* at pp. 781-782. Thereafter, officers again conferred and determined they had not checked a closed door across from one of the bedrooms. Officers found the room dark, but noted

¹ This is the case relied on by the circuit court in its ruling. R. 32, 1.5.

that closet light was on. *Id.* Officers asked and Maddix consented to them opening the closet, where they found six marijuana plants. *Id.*

The *Maddix* court was concerned with the search of the “overlooked” room where the marijuana was found in the closet.² The Maddix trial court found that:

both officers “sincerely believed” that a third person was involved and “had they not searched and had they left at that point and it turned out that someone had been injured or hurt or killed in that room, that would have been a dereliction of their duty.”

Id. at p. 782. The trial court denied Maddix’ motion to suppress the evidence from the search of the “overlooked room”. The appellate court reversed. The *Maddix* appellate court concluded that the search of the “overlooked room” was a continuation of the initial apartment search, that was conducted because the female failed to explain the reason for her screams. *Id.* at 784. Applying the three part test, the existence of a search was not disputed. The court reviewed a line of Wisconsin cases in their analysis of step two,

² Maddix did not appeal the initial entry into his home.

whether officers were performing a bona fide community caretaker function when searching the “overlooked room”. *Id.* at pp. 784-787. The court stated as follows:

The facts demonstrate that the officers responded to an apparent domestic disturbance involving only Maddix and the female. Based on the circumstances with which they were presented, the officers, in lawfully entering the apartment and separately interviewing the two persons who appeared to be the only persons in the apartment, properly exercised their community caretaker function and achieved the purpose for which they were dispatched. Both persons gave the same basic account and the female acknowledged screaming. The female’s failure to explain why she was afraid did not provide a basis to objectively conclude, based on the totality of the facts known to the officers at the time, that anyone else was in the apartment so as to require the officers to engage in their community caretaker function.

Id. at p. 787. The court acknowledged that the trial court found the officers’ belief that there might be another person in the apartment to be credible. *Id.* Citing *Gracia*, the court further acknowledged that the officers’ subjective intent is relevant. *Id.* The *Maddix* court, nevertheless, concluded that the officers did not have an objective basis to believe there was anyone else in the home. *Id.* The court stated as follows: “However, police subjective intent does not alone dictate the result, and in any case an officer must have

an objectively reasonable basis to conclude that there is a need to render assistance.” *Id.*

The court went on to state that even if the search had been determined to be a bona fide community caretaker function, it still would not have passed the third, public policy step of the test. *Id.* at pp. 788, 789. Examining the fourth prong of the public policy step, alternatives to the warrantless search, the *Maddix* court noted that officers did not, but could have asked if anyone else was in the house. *Id.* They could have probed the topic further, assuming the officers believed Maddix and his girlfriend were not telling the whole truth. *Id.* That did not occur. *Id.*

Like the officers in *Maddix*, officers in the present case had no objectively reasonable basis to believe there was anyone besides Jesse in his house before he came out and was arrested. The officers in the present case had information from neighbor Lisa at the scene (*see* R. 32, p. 7, l. 15-16.) and real time intel from Jesse’s friend Dawn (*see* R. 32, p. 34, l. 6-21.) that there was no one else in the house. Jesse himself

was asked and told officers that there was nobody else in the house. R. 31, p. 17, l. 11-17. Officers own observations inside the house confirmed what they had been told, that there was no one else in the house. Officer Meyer could see Jesse in the house, he said the lighting was good and that he would have seen someone else if there was anyone else in the house – he did not. *Id.* at p. 61, l. 4-14. The officers in the present case did not need to just rely Jesse’s assurance that no one else was in his home. The officers actually had the benefit of “probing the topic further”, the officers own observations in the house, as well as their information from the neighbor, the friend and the brother, all told them that there was no one else in the house – nothing told them otherwise.

Even if their motion hearing testimony, regarding their concern that someone else might be in the house is believed to be credible, Like that concern in *Maddix*, there was no objective basis for this concern in the present case. As in the *Maddix* case,, the officers actions in the present case fail to pass the 2nd step of the community caretaker test, whether the

police were exercising a bona fide community caretaker function within the context of Jesse's home, as he was arrested more than ten meters outside his home with its door closed and with no information to suggest there was anybody besides Jesse in the house.

In addition to failing the 2nd step, the officers' actions fail to pass the 3rd step of the community caretaker test. The public policy interest must outweigh the privacy right of the individual, such that the community caretaker function is reasonably exercised in the home. The four part analysis for step three of the community caretaker test is as follows:

(1) 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.

State v. Matalonis, 366 Wis.2d 443, 875 N.W.2d 567, 578 (2016).

The officers conferred before Jesse came out of his house and concluded they had nothing to charge him with. R. 32, p. 66, l. 18-22. They clearly did not believe there was an exigent situation. The parties do

not dispute Jesse was tased, cuffed and arrested outside his home before the search inside his home (the door of which was closed before the search); the officers degree of authority was not in issue; they tased, cuffed and arrested Jesse outside his home. There was no automobile involved – this search of Jesse’s home required stricter scrutiny pursuant to *State v. Ultsch*, 331 Wis.2d 242, 793 N.W.2d 505 (Ct. App 2010). Clearly there were readily available, feasible and effective alternatives to the warrantless search. As is argued below, all of officers concerns at the scene could have and should have been satisfied by securing the residence and applying for a search warrant. The totality of the circumstances present at the time are fatal to the public interest/individual interest Fourth Amendment analysis of step three of the community caretaker test; officers were not reasonably exercising the community caretaker role within the context of Jesse’s home.

In *Matalonis*, officers were dispatched to a medical call at an upper unit; upon arrival they observed “blood all over the door” of the apartment.

Id. At 570. The individual who answered the door appeared beaten and bloody, was drunk and told officers he had been beat up by anywhere from four groups of people to just four individuals at a bar. *Id.* Officers were subsequently told this individual lived with his brother down the street. *Id.*

Officers observed a blood trail leading to the brother's residence down the street. *Id.* There was also a significant amount of blood on the screen door and wooden door to the residence. *Id.* Officers could hear a loud commotion inside the residence. *Id.* Officers knocked and Matalonis answered. *Id.* at p. 571. He stated he and his brother got in a fight and his brother left. *Id.* Officers observed blood in the house and asked Matalonis if they could come in to make sure there were no other injured people inside. *Id.* Matalonsi let the officers in. *Id.*

Officers conducted a search of the home and found blood leading to the upstairs, a broken mirror and a locked door upstairs that had blood spatter on it. *Id.* at 572. Officers told Matalonis that they wanted to check the room for bodies; Matalonis became

noticeably nervous and refused to consent to the officer's entry into the locked room. *Id.* at 573. Officers subsequently found the key to the door, opened it and found a large marijuana plant inside. *Id.* at 574.

The *Matalonis* court concluded that there was a search of the locked room, that the officers were exercising a bona fide community caretaker function by searching the locked room and that public interest outweighed Matalonis' privacy rights with regard to the search of the room. In so doing, the court noted the following:

- The victim provided inconsistent accounts of how many people beat him – either way, it was multiple people.
- Matalonis insisted it was just he and the victim that fought – despite a large amount of blood.
- There was a trail of blood to the searched residence.
- There was blood on the searched residence door.
- There was blood inside the searched residence.
- There was a blood trail leading to and on the locked door.
- Matalonis became noticeably nervous when questioned about the door.
- As such, the court concluded the officers were indeed performing a bona fide community caretaker function when they searched the locked room.

Id. at p. 578-579.

The present case differs in all respects from the *Matalonis* case. Jesse was arrested 10 meters outside his residence. R. 31, p. 32, l. 1-4. Unlike *Matalonis*, there was no blood observed outside Jesse's residence. There is no blood leading to his residence, and no blood on his door way. There was no blood inside his residence and there was no blood leading to, or on any of the doors the officers opened inside Jesse's home. None of the facts that lead the *Matalonis* court to find a bona fide community caretaker exception exist in the present case.

The officers in the present case had no reason to believe there were any injured people in Jesse's house. The officers themselves said their concern was that Jesse would go back to Grumpy's Pub and "shoot the dude" that he fought with earlier in the evening. *Id.* at p. 7, l. – p. 8, l. 2. Officers had real time "intel" that Jesse was alone from Jesse's close friend Dawn, who was talking to Jesse and simultaneously relaying her communication to officers. R. 32, p. 33, l. 4- p. 34, l. 10. Officers contacted Dawn because they knew she could help based on their prior work with her. *Id.* p.

52, l. 21 – p. 53, l. 3. Officers saw Jesse – and no one else – go into his residence. They observed Jesse – and no one else – inside Jesse’s residence. R. 31, p. 60, l. 14-15. Officer Meyer testified the lighting in Jesse’s house was such that he would have seen others if they were in the house – he did not. *Id.* at p 61, l. 3-14. Officers even discussed strategy amongst themselves and came to the conclusion they did not have any basis to arrest Jesse – they were just there to give him a “no trespass” warning for Grumpy’s – officers never mentioned a concern for anyone else in the house during their discussions. R. 31, p. 9, 5-21. At best, Officer Meyer saw pictures of children in the living room of Jesse’s house during the so-called “protective sweep. *Id.* p. 54, l. 11 – p. 55, l. 20 and p. 69, l. 17 – p.70, l. 8. *Id.* Officer Meyer testified that he saw the pictures of children after the arrest and through the opened door. *Id.* Officers had to open Jesse’s door to enter and perform the protective search. *Id.* Officers never called out for anyone as they were doing their “protective sweep” inside Jesse’s house. R. 32, p. 19, l. 5-17. Clearly pictures of children observed

during the protective sweep, with the complete absence of any other indication that children were present, cannot form the basis for the warrantless search.

Officers admit that they had no information that someone besides Jesse was in the house. R. 32, p. 70, l. 18-p.71, l. 8. Rather, they acknowledge Dawn told them he was alone, neighbor Lisa provided information that no one lived with Jesse; and, their own observations confirmed that Jesse was alone. R. 31, p. 60, l. 14-24. The officers own words tell it best: Lieutenant del Plaine, the officer who gave the search order, described his rationale as follows:

Then, because Mr. Jennerjohn's behavior was so over the top, from just being potentially intoxicated, being upset, and not wanting to come out of the house or make contact with us to talk to us, to escalating to such a point that he was yelling for us to shoot him, he was advancing on officers, he was not listening to commands to the point of what happened, happened, that, you know, just making the protective sweep of the house, just to make sure there was, you know, not somebody else in there, that his, you know, behavior wasn't, you know caused by, you know -- maybe there was somebody else in there? Maybe, you know, was there firearms in there that would need to be secured? Would the, you know, ultimately his brother and the staff member, you know, were not, you know, were not in any way be detained, would they be walking into some situation that would be unsafe for them: -- Because once we

left, you know, they would certainly be free to go in the house or, you know, secure the residence. So that was my decision that because there was this extreme escalation in his behavior that that was just a prudent thing to do.

R. 32, p. 73, l. 20-p. 74, l. 17.

Lt. del Plaine testified that he ordered the protective sweep because Jesse was intoxicated, was telling officers to shoot him and Jesse did not listen to commands to stop. *Id.* These are not reasons to leave the arrest scene and search a closed house more than 10 meters away from the arrest scene. These behaviors would not form probable cause to get a warrant, much less a justification for a warrantless search.

Lt. del Plaine went on to testify that he wanted to make sure no-one else was in the house - this is not what he said at the scene. *Id.* (*see also* R. 32, l. 65, l. 1-66, l. 22). He also testified that wanted to keep others (Jesse's brother and friend, Dawn) from going in the house and he wanted to secure any firearms that might have been in the house. *Id.* Again, officers did not mention any concern about anyone else in the house at the scene the night of the incident. They stated their

concerns at the scene were that Jesse wasn't listening to commands and that he would go back to the bar and "shoot the dude" – not that there were any "dudes" or any other person in the house. R. 31, p. 16, l. 6-14. If the officers stated concerns are to be believed, then they were not concerned about anyone else in Jesse's house.

As shown by the facts and arguments above, there is no basis to believe there was anyone else in Jesse's house. Also, if there truly was a concern for firearms in the house, such that officers believed there was a basis for their seizure, they could have secured the house and applied for a search warrant to look for weapons, since Jesse was already arrested well outside his house – and hauled away. It is standard police procedure to secure a scene while they obtain a search warrant. Officers had been keeping the brother and friend Dawn away from the house up until, and even after the arrest; they could have continued to keep them out of the house until they obtained and executed a warrant. Accordingly, there is no basis for a so-called "protective sweep", and all of Lieutenant del

Plaine's and the other officers' concerns would have and should have been addressed with a warrant.

If officers were truly concerned with protecting others who might enter the house after Jesse's arrest, officers could have simply locked the door. They didn't need to execute a search of the house to keep others out. Just because someone is a firearm owner, does not mean that they lose their Fourth Amendment right to be free from unreasonable searches when they are arrested outside of their homes.

The court mirrored Lt. del Plaine's reasoning in its ruling on the motion to suppress, relying on the following bulleted reasons:

- "There was concern that there perhaps would be other individuals"

R. 32, p. 98, l. 10-p. 99, l. 24. Officers had no information to even suggest that there was anyone else in Jesse's house. They had "real time" intel from Dawn De Guelle and their own observations that told them that no one else was in the house. They never mentioned a concern for other individuals in the house that night at the scene.

- “their concern perhaps of small children in the home”.

Id. Officer Meyer did not have any reason to think that there were small children in Jesse’s house. Dawn and neighbor Lisa told officers that Jesse was alone. Officer Meyer did not see pictures of kids until after Jesse was arrested, and he was approaching the house to go conduct the protective sweep. R. 32, p. 70, l. 2-8. Pictures discovered in the house, after officers had already decided to enter the house, cannot possibly justify a warrantless search of a home; clearly not a protective sweep after an arrest more than 10 meters outside the home.

- “a concern of firearms”

R. 32, p. 98, l. 10-p. 99, l. 24. As stated above, there was no basis for a “concern of fire arms”. Even if there had been, Jesse was under arrest more than 10 meters outside his house, officers could have applied for a warrant to search for fire arms, but they clearly had no justification to do a warrantless search for fire arms.

- Information that the incident at Grumpy’s Pub resulted in information that the defendant had made threats at the bar and individuals at the

location were concerned that Jesse would act on those threats.

Id. R. 32, p. 98, l. 10-p. 99, l. 24. Any concern that Jesse would act on threats to employees or patrons of Grumpy's Pub ended when he was arrested. He was not in a position to go back to the bar once he was tased, hand cuffed and arrested more than 10 meters outside his house. Threats to others not at the house, that result in the arrest of the defendant, do not form the basis for a warrantless entry to and search of the defendant's house.

- “concern that he was going to come back to the bar and shoot, quote, “the dude”

Id. R. 32, p. 98, l. 10-p. 99, l. 24. As with the previous concern, any concern Jesse was going back to the bar ended when he was arrested. Whatever the concern about Grumpy's Pub, it ended when Jesse was arrested 10 meters outside his home. The Grumpy's concern does not form a basis for a warrantless search of Jesse's home.

- “concern with him having access to firearms.”

Id. R. 32, p. 98, l. 10-p. 99, l. 24. Again, this concern, though not based on anything the officers observed,

was alleviated when Jesse was tased and hand cuffed, more than 10 meters outside of his house. Clearly the officers were not concerned with Jesse getting access to weapons inside a closed house more than 10 meters away from where they arrested him.

- “there was a rifle case in the back of the defendant’s vehicle.”

Id. This, while true, does not form the basis for a warrantless search of Jesse’s home. The car was parked outside the home in Jesse’s driveway.

- “concern about the defendant’s mental health, mental illness”
- “concern about his level of intoxication”
- “concern about whether or not he was driving while intoxicated, whether that be under the influence of drugs or alcohol, or a combination of the two.”

Id. Whether Jesse had mental health issues, was intoxicated or drove intoxicated earlier, has no bearing on whether the warrantless search of Jesse’s house was necessary to protect the police or others, which is the basis for the community caretaker exception.

- “concern about what he had in his hand, at the time that he came out of the residence”

Id. Officers determined that Jesse had venison in his hand. No officer testified that the deer meat had them concerned about a possible other person or persons in

Jesse's house. The officers stated their concerns, and the venison in Jesse's hand was not one of them. The venison was not mentioned at the scene as a basis for a warrantless search of Jesse's house.

- "concern that was testified to by Lieutenant del Plaine that his friend and brother may enter into the residence and then be subject to perhaps someone else that was inside the residence."

Id. Officers had been keeping Dawn and Jesse's brother away from the house throughout the whole incident. It is unreasonable for officers to believe that anyone else was in the house, much less someone that would attack Dawn and Jesse's brother. Officers could have secured the house and continued to keep them away after the arrest while they applied for a search warrant. In any case, a desire to keep people out of a house is not a basis to search the house without a warrant.

- "The defendant did show behaviors that were unusual, were concerning, and perhaps could be construed as suicidal when he said, "Just shoot me" to the officers when he exited the residence."

Id. Jesse's "just shoot me" comment may or may not have been suicidal; either way, it was not a justification for a warrantless search. Suicidal people,

who are arrested outside their home, do not lose or give up their right to be free from warrantless searches of their homes.

Lieutenant del Plaine's reasons for ordering the "protective sweep" – the same reasons the trial court cited for denying Jesse's motion to suppress - do not form the basis for a warrantless entry into, and search of Jesse's home. Most of the reasons they relied on do not even apply to the community caretaker three step test. There was no one else in Jesse's house; officers were told and observed this. Officers' stated concerns at the scene did not include a concern that anyone else was in the house.

The parties do not dispute that a search within the Fourth Amendment occurred. The facts clearly do not support a "community caretaker function" exception to the warrant requirement. Even if we are to believe officers' stated concerns at the scene, then the state cannot satisfy the third, public policy step, of the community care taker test; whether his privacy rights are trumped by public interest. Jesse's behavior/failure to listen to commands did not justify a

warrantless search of his home – 10 meters from where he was arrested, and officers could have secured the home to apply for a warrant and keep Jesse’s brother and friend out, as they had during the whole altercation.

The case is similar to *Maddix*. The *Maddix* court concluded that the facts did not support a reasonable basis for officers to conclude that there was anyone else besides Maddix and the female in his home. As such, the officers warrantless search of the “overlooked room” in Maddix’ house was not within the community caretaker exception. Similarly, officers in the present case had no reason to believe anyone besides Jesse was in his house. They were told by the neighbor, the friend and Jesse that he was alone in the house. They could see clearly in the house and saw only Jesse – Officer Meyer said if there was anyone else in the house, he would have seen them, did not. R. 31, p. 61, l. 8-14. Sgt. Rohm didn’t recall any officer at the scene saying there was anyone else in Jesse’s house. R. 32, p. 55, l. 24 – p. 56, l. 2. In fact, Lt. del Plaine admitted that the body cam video depicts

officers discussing amongst themselves that they had no charges for Jesse – nowhere in the video do they mention a concern that there was anybody besides Jesse in his house. *Id.* at p. 65, l. 1 – p. 67, l. 15.

At best, the trial court erred in its application of the relevant constitutional principles to the foregoing facts. At worst, the trial court was clearly erroneous in concluding the facts support officers being concerned that anyone besides Jesse was in his house. The court’s denial of Jesse’s motion to suppress the evidence from the warrantless search, therefore, must be reversed.

CONCLUSION

Both the circuit court and officers use the phrases “protective sweep” and “community caretaker” interchangeably. Under either exception, the reasons the officers give for the warrantless search – the same reasons the court relied on – do not justify a warrantless entry into and search Jesse’s home after he was tased, cuffed and arrested more than 10 meters outside his closed house. The officers were not performing a valid protective sweep and were not

performing a bona fide community caretaker function.

The circuit court's ruling and judgment, therefore,
must be reversed.

Electronically signed by Carey J. Reed

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CERTIFICATION

I certify that this Brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief using the following font:

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Dated: November 30, 2018

LAW OFFICE OF CAREY J. REED

By:

Electronically signed by Carey J. Reed

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CERTIFICATION OF SERVICE

I hereby certify that on November 29, 2018, I caused three (3) copies of Appellant's Brief and Appendix to be served upon counsel for the State of Wisconsin and ten (10) copies to be filed with the Court of Appeals at the following addresses:

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CERTIFICATION OF E-FILING

I certify that I have submitted an electronic copy of this Brief on November 30, 2018. I further certify that this 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: November 30, 2018

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains:

- (1) a table of contents;

- (2) relevant trial court record entries;
- (3) the findings or opinion 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 regarding those issues.

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 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: November 30, 2018

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