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

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STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

JESSE J. JENNERJOHN,

Defendant-Appellant.

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

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# REPLY BRIEF OF DEFENDANT-APPELLANT JESSE J. JENNERJOHN

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## STATEMENT OF THE CASE

Jesse Jennerjohn adopts his Statement of the Case in his initial brief. The following are among errors and inconsistencies in the State's brief:

1. The State claims it is undisputed that Police entered Jennerjohn's home without investigatory intent. (State's brief, p. 2.) This is not true. Officer Hall's body cam video was played on day two of the motion hearing; in that video he states that he is going to Jennerjohn's house to look for drugs. R. 32, p. 67, l. 17-18 *and* p. 69, l. 11-15.
2. The State's brief makes it seem unclear whether Officer Bankenship was told by neighbor Lisa that Jennerjohn lived alone. (States brief, p. 3) Officer Blankenship very clearly testified that "[Lisa] told me that he did live alone." R. 32, p. 48, l. 17-18.
3. The State represents that Office Rohm testified that Dawn De Guelle did not tell him that Jennerjohn was alone. (State's brief, p. 5). When asked, Office Rohm actually testified that, "She could have, I don't remember." (R. 32, p. 54, l. 8-17).

## ARGUMENT

Jennerjohn adopts his argument as set forth in his initial brief, as if restated fully herein.

### THE CIRCUIT COURT ERRED BY DENYING DEFENDANT'S MOTION TO SUPRESS BASED ON THE "PROTECTIVE SWEEP" AND "COMMUNITY CARETAKER DOCTIRNES".

It is undisputed that officers searched Jennerjohn's home without consent. Also, there was no discussion among officers of getting a warrant before entering and searching Jennerjohn's home. (R. 31, p. 4-, l. 14-25.) No marijuana was found before officers entered and searched Jennerjohn's home. *Id.* at p. 41, l. 17-p. 42, l. 3. The State argued at the motion hearing that the protective sweep and community caretaker exceptions to the search warrant requirement applied. In its' brief to this court, the State only argues that the community caretaker exception applies. Neither exception applies to the facts of this case.

The state concedes what it refers to as "... two Fourth Amendment searches here, but only one that matters" Officer Meyer opening the door and the search thereafter that revealed drug evidence. (State's brief, p. 9). Both were warrantless.

## I. THE CIRCUIT COURT ERRED BY DENYING DEFENDANT'S MOTION TO SUPPRESS BASED ON THE "PROTECTIVE SWEEP" EXCEPTION.

Jennerjohn adopts his argument in section I of his argument as if restated full herein.

The State's brief does ***not*** refute Jennerjohn's first argument of his brief; that the court erred when it ruled that the warrantless search of Jennerjohn's home was permissible under the protective sweep exception to the warrant requirement. Arguments not refuted are deemed admitted. *Charolais Breeding Ranches vs. FPC Securities*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, the State has admitted Jennerjohn's argument that the protective sweep doctrine does not provide an exception to the warrant requirement on the facts of this case, and does not support the court's decision to deny the motion to suppress.

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

Jennerjohn adopts his argument in section II of his argument as if restated full herein.

The officers in the present case had no objectively reasonable basis to believe there was

anyone besides Jennerjohn in his house before he came out and was arrested. To the contrary, everything the officers observed and were told left no doubt that Jennerjohn was alone in his house:

- Officers observed Jennerjohn go into his house alone. (R. 31, p. 8, l. 15 – p. 9, l. 14.)
- Neighbor Lisa, at the scene, told officers that Jennerjohn lived alone. (R. 32, p. 7, l. 15-16.)
- Dawn De Guelle was speaking to Jennerjohn on her way to the scene and gave officers real time information that Jennerjohn was alone in his house. (R. 32, p. 34, l. 6-21.)
- Officer Meyer could see Jennerjohn 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. (R. 31, at p. 61, l. 4-14.)
- Jennerjohn himself was asked and told officers that there was nobody else in the house. *Id.* at p. 17, l. 11-17.

- Officers were told that Jennerjohn's plan was to go back to Grumpy's bar to confront a dude; they were not told about any other person or confrontation at Jennerjohn's house. *Id.* at p. 14, l. 10-12.
- The State even argues "The officers had no specific information indicating there was anyone else inside of Jennerjohn's home. Rather, they admit that Lieutenant del Plaine decided to enter the home due to Jennerjohn's escalated behavior outside. (State's brief, p. 13).

There simply was ***no*** basis, much less an objective one, for their new "motion hearing" concern that someone else might be in the house. At the scene, Officers 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 Bar. Officers never mentioned a concern for anyone else being in the house during their discussions. R. 31, p. 9, 5-21. The

State's argument, that anything is possible, is rank speculation without any factual basis.

The State goes on to argue that the officers were exercising a bona fide community caretaker function because of Jennerjohn's mental instability and dangerousness. Any community caretaker function related to Jennerjohn's mental instability or dangerousness, ended when he was arrested. There was no reason to enter Jennerjohn's home once he had come outside, shut his door and was tased and arrested. Nevertheless, the State argues that the search was reasonable because Jennerjohn was a danger to himself and others. (State's brief at p. 13.) With these concerns, taking him into custody and initiating a 72 hour hold is a reasonable response; entry and search of his home is not.

The State wraps up this portion of their argument with a "catch all" paragraph claiming the community caretaker function required that they secure Jennerjohn's residence and firearms because he was an individual "... who is behaving erratically, dangerous to himself and others, and who is not facing

any criminal charges ..." *Id.* at p. 8. Jennerjohn was arrested more than 10 meters outside his house. Just because someone happens to own a firearm and could be suicidal, does not mean police can enter their house without a warrant to secure their firearms – clearly not when he is in custody outside his house.

If police want to secure firearms in such a situation, Wisconsin Statutes, Cahapter 51 sets out the procedures they must follow to do so. The individual is entitled to a hearing with notice and an attorney. The court then makes the determination as to the individual's dangerousness to himself or others. Only then can the court order the seizure of any firearms owned by the individual, pursuant to Wis. Stats. 51.20(13)(cv)1. Officers cannot enter a house for the purpose of seizing firearms without a warrant unless that finding has been made.

The state next addresses the four part public interest analysis under the community caretaker exception. First, the State argues that the public would be outraged if officers ignored the level of dangerousness Jennerjohn exhibited at the scene.

However, the officers took Jennerjohn into custody and had him taken to the hospital. They obviously did not ignore the level of dangerousness he was exhibiting. On the contrary, the public would be outraged if courts allowed the police to enter their homes and confiscate their guns without a warrant or without following the procedure listed in Wis. Stats. Chapter 51.

The State next addresses the second factor of the balancing test; time and location, but only addresses time. This part of the test is not just about timing, but location as well. The entry and search was to Jennrjohn's home. The warrantless search of a home is presumptively unreasonable. *State vs. Horngren*, 238 Wis.2d 347, 617 N.W.2d 508 (Ct. App. 2000).

The State addresses the forth factor arguing that the "...police had no feasible alternative to entering and sweeping Jennerjohn's home." (State's brief p. 14.) Actually, there is an alternative, set out by statute that, officers must follow if they want to enter an individual's home without a warrant and seize his

guns. That alternative is to follow the procedures set out in Wis. Stats. Chapter 51. Only after these procedures have been followed, may officers secure the individuals firearms. If there was a concern about his friends and neighbors entering his house, the officers also could have simply locked the door to Jennerjohn's house to keep others out. The State then acknowledges that "[t]here was no fact that would establish that Jennerjohn's home probably contained evidence of a crime." *Id.* This concedes that they had no reason to believe there was anyone, such as a crime victim, in the house needing a community caretaker.

The State next argues that it would have been a dereliction of duty had the officers not performed the warrantless search. This is absurd. It is not a dereliction of duty to follow the constitutional mandate for a warrant; to the contrary, it is required. It is not a dereliction of duty to follow the procedures laid out in Chapter 51 before confiscating firearms; to the contrary, it is required.

## III. THE EXCLUSIONARY RULE REQUIRES THAT THE EVIDENCE DISCOVERED DURING THE WARRANTLESS SEARCH MUST BE SUPPRESSED.

The State finally argues that, even if officers illegally entered and searched the defendant's house, that suppression of the illegally obtained evidence would deter officers from their community caretaker function. Officers were not deterred at all. When Jennerjohn came outside and exhibited dangerousness, he was arrested and transported to the hospital. Officers successfully performed their community caretaker function.

The State seems to be arguing this case as if the Jennerjohn had stayed inside his home and they needed to enter the house to detain him. This is not that case. Officers did not have to enter Jennerjohn's home to perform the caretaker function of detaining him. Officers performed their community caretaker function when they arrested Jennerjohn outside his residence and transported him to the hospital for an evaluation. They were not at all deterred from exercising their community caretaker function.

The State cites *State v. Felix*, for the proposition that the exclusionary rule is not universally applied and that the illegally seized evidence should not be suppressed in the present case. (State's brief at p. 15 *citing State v. Felix*, 339 Wis.2d 670, 811 N.W.2d 775 (2012)) In *Felix*, the defendant was arrested, inside his home, for a murder. Officers arrested Felix inside his home without a warrant. Felix filed a motion to suppress statements he made when he was arrested, and statements and evidence later collected when he was in custody.

The parties in *Felix*, agreed that the warrantless entry and arrest of Felix inside his home constituted a Fourth Amendment violation. The question remained whether suppression of the evidence subsequently obtained outside his home, was necessary under the Fourth Amendment. Citing the U.S. Supreme Court in *Payton*, the *Felix* court agreed that an arrest of an individual inside his home required a warrant. *Citing Payton v. New York*, 445 U.S. 590 (1980). The *Felix* court went on to apply the U.S. Supreme Court's rule

in its' *New York v. Harris,* 495 U.S. 14 (1990) decision. The *Felix* court stated as follows:

> There, the Court held that even if an arrest violated *Payton*, evidence obtained from the defendant outside of the home while in lawful police custody is not the product of the illegal arrest, so long as police had probable cause to arrest.

*Felix*, 811 N.W.2d at 786. Unlike *Felix* and *Harris*, Jennerjohn was arrested outside his home. Officers illegally entered and searched Jennerjohn's home after he was in custody and taken to the hospital. Unlike *Felix and Harris,* therefore, officers in the present case were not in Jennerjohn's home pursuant to probable cause to arrest him there.

The Felix court went on to note that:

> the *Harris* rule is based on the Supreme Court's conclusion that suppressing evidence and statements obtained from a defendant outside of the home following a *Payton* violation does not further the purpose of the *Payton* rule: "the rule in Payton was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protections for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime." The *Payton* rule is vindicated through the suppression of any evidence or statements obtained from the defendant

> while officers are still inside the defendant's home unlawfully. The Fourth Amendment does not require courts to exclude all evidence or forgo prosecuting a defendant following unlawful police conduct, even if doing so might have some deterrent effect. Under the *Harris* rule, police are sufficiently deterred from violating *Payton* because "the principle incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home." There is no compelling reason to go further and suppress evidence lawfully obtained from a defendant outside of the home.

*Felix*, 811 N.W.2d at 788 *citations omitted.*

The *Felix* court addressed the same "social costs" of suppression raised by the State in its' brief, stating that the "*Harris* rule appropriately balances the purposes of the exclusionary rule and the *Payton* rule with the social costs associated with suppressing evidence." *Id.* The exact same cases relied on by the State in its' brief, therefore, do not support its' argument against suppression on these facts where Jennerjohn was arrested outside his home and officers subsequently conduct an illegal search inside his home. The warrantless search of a home remains

presumptively unreasonable. *State vs. Horngren*, 238 Wis.2d 347, 617 N.W.2d 508 (Ct. App. 2000).

The State wraps up by arguing again, that officers needed to get in the house to seize Jennerjohn's guns. The State opines that it is unclear whether officers would initiate a Chapter 51 detention. (State's brief, p. 16.) As argued above, Wis. Statutes Chapter 51 provides the procedure for handling just such a situation. Here, officers did detain and hospitalize Jennerjohn; they opted out of the rest of Chapter 51's requirements. Officers also opted out of the search warrant requirement of the Fourth Amendment. These are requirements, not options.

**CONCLUSION**

For the foregoing reasons, Jennerjohn requests this court reverse the circuit court's ruling on the motio to suppress, reverse Jennerjohn's conviction and remand this matter back to the circuit court for further proceedings.

Dated this 22nd Day of March, 2019

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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:

_____ Monospaced font: 10 characters per inch; double spaced 1.5 inch margin on left side and 1 inch margin on the other three sides. The length of this brief is __ pages.

__X__ Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2997 words.

Dated: March 22, 2019

LAW OFFICE OF CAREY J. REED

By: 

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## CERTIFICATION OF SERVICE

I hereby certify that on March 22, 2019, 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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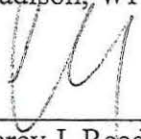

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## CERTIFICATION OF E-FILING

I certify that I have submitted an electronic copy of this Brief on March 22, 2019. 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: March 22, 2019

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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: March 22, 2019.

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