STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Circuit Court Case No. 2017CT000033
Appeal Court Case No. 2019AP000523-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

SHANNON G. POTOCNIK,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR TAYLOR COUNTY,
THE HONORABLE ANN KNOX-BAUER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

KRISTI S. TLUSTY
Taylor County District Attorney
State Bar No. 1055842

Attorney for Plaintiff-Respondent

Taylor County Courthouse
224 South Second Street
Medford, WI 54451
(715) 748-1450
kristi.tlusty@da.wi.gov

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ISSUES PRESENTED

I. Sergeant Schuett entered Potocnik's curtilage and residence without a warrant but did so to determine whether there was someone within the residence who needed emergency medical attention as the result of a severe traffic accident that he was investigating. Was Schuett's entry into Defendant-Appellant Potocnik's curtilage and residence permissible under the community caretaker exception to the warrant requirement?

The circuit court answered yes.

II. When Potocnik was finally taken to the local hospital, Sergeant Schuett suspected that Potocnik had been operating a motor vehicle while under the influence and directed medical personnel to draw Potocnik's blood for analysis without a warrant. Was the warrantless blood draw permissible under the exigent circumstances exception to the warrant requirement?

The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent, State of Wisconsin, does not request oral argument or publication.

STATEMENT OF THE CASE AND FACTS

On May 15, 2017, at approximately 1:28 a.m., Sergeant Anthony Schuett of the Taylor County Sheriff's Department was assigned to investigate a one-vehicle accident in the Town of Holway, Taylor County, Wisconsin. (R. 34:2-3). A passerby had called the sheriff's department to report that he had come upon a vehicle in the north ditch and he further stated that there was no one else present at the accident scene. (R. 34:12-14). Sergeant Schuett responded to the scene of the accident and observed a pickup truck positioned on the driver's side that had sustained severe damage. (R. 34:3). The vehicle had struck several large pine trees, causing one to break off approximately six to eight feet above ground level. (R. 34:3). The front and back driver's side doors had been sheared off of the vehicle. The passenger side door was stuck shut. The passenger side windows and the windshield were intact. The rear window was broken out and the extended

cab portion of the truck and the bed of the truck had smashed into the cab. Based upon Sergeant Schuett's training and experience, he believed that the occupant of the vehicle had been ejected. (R. 34:4). Schuett then learned that the registered owner of the vehicle was Shannon Potocnik. (R. 34:4).

Schuett then traveled to Potocnik's residence and observed lights on inside the home when he arrived over an hour later. (R. 34:5). Schuett knocked on the door and announced "Sheriff's Department" several times. (R. 34:6). Schuett then observed a male walk in front of the window, so he knocked on the door continuing to try to make contact. (R. 34:7). Schuett entered the unlocked entry door and again announced himself loudly several times, receiving no answer. (R. 34:6, 18). Schuett then climbed onto the railing of the porch and looked into a window and observed a male laying on a bed. (R. 34:18-19). Schuett recognized the male to be Potocnik. (R. 34:19). Schuett opened the entry door and announced himself again and heard Potocnik moaning and yelling as if he was in pain. (R. 34:7, 20). At that point, Schuett entered the residence to check on Potocnik's welfare and asked Potocnik if he was "ok." Schuett smelled a strong odor of intoxicants. (R. 34:8). Potocnik stated that his whole body hurt and when asked if he would like an ambulance, Potocnik responded, "Sure, whatever, man." (R. 34:9). Potocnik was taken by ambulance to the hospital, arriving at approximately 3:59 a.m., and Schuett directed hospital staff to complete a warrantless blood draw. (R. 34: 9-11).

A motion hearing was held on April 5, 2018 pursuant to Potocnik's motion to suppress the blood draw results alleging that Schuett's entry into Potocnik's curtilage and residence was an unlawful warrantless search and further that the warrantless blood draw was also unlawful. (R. 34). The Honorable Ann Knox-Bauer issued a written Decision on Motion to Suppress on June 22, 2018. (R. 14). The Court denied Potocnik's motions. (R. 14). On January 31, 2019, Potocnik pled no contest to Operating a Motor Vehicle With a Prohibited Alcohol Concentration, as a second offense, contrary to Wis. Stat. § 346.63(1)(b) and he was sentenced. (R. 24). Potocnik now appeals the circuit court's order denying the motion to suppress.

STANDARD OF REVIEW

"A circuit court has 'broad discretion to admit or exclude evidence,'" and a reviewing court will overturn that exercise of discretion only if it was erroneous. *State v. Kandutsch*, 2011 WI 78, ¶ 23, 336 Wis.2d 478, 799 N.W.2d 865 (quoting *State v. Nelis*, 2007 WI 58, ¶ 26, 300 Wis.2d 415, 733 N.W.2d 619.) A reviewing

court upholds a decision to admit or exclude evidence "if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *Id.* (quoting *Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis.2d 67, 629 N.W.2d 698). This case presents a question of constitutional fact. See *State v. Dearborn*, 2010 WI 84, ¶ 13, 327 Wis.2d 252, 786 N.W.2d 97. While the trial court's factual findings must be upheld unless clearly erroneous, the application of constitutional principles to those facts is a question of law subject to de novo review. *State v. Oberst*, 2014 WI App 58, 354 Wis.2d 278, 847 N.W.2d 892.

ARGUMENT

I. Sergeant Schuett's entry into Potocnik's curtilage and residence was permissible under the community caretaker exception to the warrant requirement.

The entry to Potocnik's property was permissible under the community caretaker exception to the warrant requirement. The three-part test utilized to determine whether an officer's conduct appropriately qualifies as a community caretaker exception is articulated in *State v. Pinkard*, 2010 WI 81, 785 N.W.2d 592, 327 Wis.2d 346 as follows:

> When a community caretaker function is asserted as the basis for a home entry, the circuit court must determine: (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 The State bears the burden of proof. *Id.* at ¶ 29.

The State concedes that Sergeant Schuett entered Potocnik's curtilage and ultimately his residence without a warrant, so we next examine whether Schuett engaged in a bona fide community caretaker function. In the case before us, Schuett responded to a very violent motor vehicle accident scene and was not able to locate the driver of the automobile. Schuett concluded that the only way the driver would have exited the vehicle is to have been ejected during the accident. The vehicle sustained severe damage and officers diligently searched the surrounding area for the driver. Once determining that Potocnik was the registered owner, Schuett drove to Potocnik's residence to determine if he had

been involved in the accident and whether he needed medical attention. Lights were on inside the residence and Schuett knocked and announced repeatedly, receiving no response. Given the nature of the accident scene, noticing lights on within the residence and not receiving any response from his repeated attempts to knock and announce, he did enter the unlocked garage and did look into a window. Only when he heard an occupant moaning and yelling as if in pain, did Schuett enter the residence and, as he did so, he announced that he was entering to check the occupant's welfare.

The federal and state constitutions do not protect against all searches and seizures, but only "unreasonable searches and seizures." *State v. Arias*, 2008 WI 84, 311 Wis.2d 358, ¶ 25, 752 N.W.2d 748. Warrantless searches of private residences are per se unreasonable, subject to a few well-delineated exceptions. *State v. Faust*, 2004 WI 99, ¶ 11, 274 Wis.2d 183, 682 N.W.2d 371. An exception to the warrant requirement is the community caretaker function, when the officer discovers someone who is in need of assistance. *Cady v. Dombrowski*, 413 U.S. 433, 448, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) and *State v. Kramer*, 2009 WI 14, 315 Wis.2d 414, ¶ 32, 759 N.W.2d 598. "Whether a given community caretaker function will pass muster under the Fourth Amendment so as to permit a warrantless home entry depends on whether the community caretaker function was reasonably exercised under the totality of the circumstances of the incident under review." *Pinkard* at ¶ 20. "A court may consider an officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker; however, if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, . . ." *Pinkard* at ¶ 31, citing *Kramer*.

The defense cites *State v. Davis*, 2011 WI App 74, and *State v. Popp*, 2014 WI App 100, to support its argument that Schuett violated the Fourth Amendment. However, neither of those cases involved law enforcement officers exercising their community caretaker function. In *Davis*, officers were attempting to speak with a suspect in a theft complaint and when they arrived at his trailer they entered a garage through an open overhead door. In *Popp*, officers were at the suspect's residence, peering in windows in response to an anonymous drug complaint. The defense suggests that the State should have obtained a warrant to enter the curtilage or the residence. However, warrants are only issued when there is probable cause to believe that a crime has been committed. At that point of entry, Schuett had no evidence that a crime had been committed and was only worried about the health and welfare of the driver. In *State v. Horngren*, 2000 WI App

177, 238 Wis.2d 347 ¶ 18, 617 N.W.2d 508, the court cautioned against taking a "too-narrow view" of the community care taker function:

> Without a warrant, the police are powerless. In the future police will tell such concerned citizens, 'Sorry. We can't help you. We need a warrant and can't get one.'

Schuett engaged in a bona fide community caretaker function. The nature of the accident scene, the reasonable inference that the registered owner had been driving at the time of the accident, and the reasonable inference that the driver had been ejected during the violent crash, supports a rational basis for an officer to continue to look for the driver to check his/her welfare. Schuett testified that he "felt it was our responsibility to make sure that the driver was okay." (R. 34:8). The defense argues that the State's reliance on the community caretaker exception is based purely on speculation. However, the circuit court determined that due to the damage at the accident scene, it was reasonable for Schuett to believe that the driver had been injured and was in need of medical care and that Schuett's entry upon observing Potocnik lying in bed and moaning was reasonable. These findings of facts are not clearly erroneous.

The final step in the caretaker analysis is whether Schuett exercised the bona fide community caretaker function reasonably. This analysis involves a balancing test between the public interest or need that is furthered by the officer's conduct against the degree and nature of the intrusion on the citizen's constitutional interest. *Pinkard* at ¶ 40. There are four factors to consider when conducting this analysis: "1) the degree of the public interest and the exigency of the situation; 2) the attendant circumstances surrounding the search, including time, location, and 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 ¶ 42.

The record contains ample evidence to satisfy the public interest and exigency of the entries in this case. It is common sense that individuals who have been ejected during a violent motor vehicle accident sustain serious injuries, often life-threatening. In those situations, time is of the essence to obtain emergency medical attention. "When police cannot ascertain a home occupant's condition and they reasonably conclude that assistance is needed, the public has a substantial interest that police ensure the safety of the occupant." *State v. Matalonis*, 216 WI 7, ¶ 59, 366 Wis.2d 443, 875 N.W.2d 567. Schuett made every possible attempt to determine if there was an injured driver within the residence before he entered.

He knocked and announced multiple times. He didn't just barge in through the front door immediately, but instead progressively attempted minimal intrusions to determine whether his ultimate full entry into the residence was necessary and justified. There were no other alternatives to the type of intrusion that was actually accomplished. There was no basis to seek a warrant. The defendant did not answer the door, so there is no reason to believe that he would answer a telephone call to the residence, either. Because three of the four factors weigh in favor of concluding that the officer reasonably performed his community caretaker function, the third step of the test is satisfied. The circuit court found that Schuett made every possible attempt to determine whether there was an injured driver inside the home and that Schuett took progressive, minimally intrusive steps in order to respond to someone that he reasonably believed needed assistance. Further the court found that it would not have been reasonable for Schuett to have just walked away from the residence without verification as to Potocnik's condition. These findings of fact are not clearly erroneous.

The defense also cited *State v. Ultsch*, 2011 WI App 17, 331 Wis.2d 242, 793 N.W.2d 505, to support its argument that the community caretaker exception does not apply to the case bar However, *Ultsch* is easily distinguishable from the case at bar. In *Ultsch*, officers were called to a vehicle collision involving a Durango and a brick building. The vehicle left the scene and was found at the end of a driveway about two or three miles away. When officers arrived at the vehicle, a vehicle came down the driveway from the residence driven by an individual who identified himself as the owner of the property and he stated that the driver of the damaged vehicle was his girlfriend and that she was in the house, possibly asleep. In that situation, the damage to the vehicle was not close to the same level of damage sustained by the Potocnik vehicle. The *Ultsch* vehicle was still drivable and there was less indication that the driver was injured. Furthermore, the police in *Ultsch* had contact with the owner of the residence and could have asked him either for consent to enter and check on the driver or could have asked more questions about the medical condition of the driver.

Schuett's actions were reasonable under the circumstances. To hold otherwise will have a detrimental effect on how law enforcement officers respond to emergent situations and ultimately upon the health and safety of citizens. Since there was no basis for a search warrant in this situation, the defense is ultimately suggesting that the officer should have just walked away and left Potocnik remain in his residence with potentially life-threatening injuries. If Schuett had walked away and Potocnik had died from his injuries, it is practically certain that Potocnik's family and the public would have been outraged at Schuett's inaction.

II. The warrantless blood draw of Potocnik's blood was permissible under the exigent circumstances exception to the warrant requirement.

An exception to the warrant requirement is the exigent circumstances doctrine, which holds that a warrantless search complies with the Fourth Amendment if the need for a search is urgent and insufficient times to obtain a warrant exists." *State v. Tulllberg*, 2014 WI 134, 359 Wis.2d 421, ¶ 30, 857 N.W.2d 120. "There are four well-recognized categories of exigent circumstances . . . 1) hot pursuit of a suspect, 2) a threat to the safety of the suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee." *State v. Richter*, 2000 WI 58, 235 Wis.2d 524, ¶ 29, 612 N.W.2d 29. The burden is on the government to establish that its actions fit into one of the well-recognized exceptions. *State v. Phillips*, 2009 WI App 179, ¶ 7, 322 Wis.2d 576, 778 N.W.2d 157. The test for determining the existence of exigent circumstances is an objective one. *State v. Robinson*, 2010 WI 80, 327 Wis.2d 302, ¶ 30, 786 N.W.2d 463. The concern with destruction of evidence in OWI cases is reflected in Wisconsin law, which establishes a three-hour window for the automatic admissibility of blood test evidence. Wis. Stat. § 885.235(1g) After the three hour window, the evidence is only admissible "if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony. Wis. Stat. § 885.235(3). In *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), the United States Supreme Court explained that "longer intervals may raise questions about the accuracy of the [blood alcohol concentration] calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process." *Id.* at 1563.

It is clear that the defendant created the existent circumstances by leaving the scene of the accident. Schuett was dispatched to the accident scene at approximately 1:28 a.m. and arrived at the hospital at approximately 3:59 a.m., thus at least 2.5 hours had already elapsed from the time of driving. Since it would take much longer than 30 minutes to apply for the search warrant, Schuett's response was reasonable under the circumstances. Furthermore, since Potocnik was injured, Schuett did not know whether Potocnik would be available if a search warrant was obtained, i.e. he was going to be treated for his injuries and could have possibly been transferred to another medical facility. Had the defendant remained at the scene of the accident, there would have been ample time to apply for a warrant, but due to his own actions, he created the exigent circumstances that justify the warrantless blood draw in this case.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the order denying the motions to suppress and affirm the judgment convicting Potocnik of operating a motor vehicle with a prohibited alcohol concentration, as a second offense.

Dated this 27th day of June, 2019,

Respectfully submitted

6/27/2019

X Kristi S. Tlusty

Kristi S. Tlusty

Signed by: Tlusty, Kristi

KRISTI S. TLUSTY
Taylor County District Attorney
State Bar Number 1055842
Attorney for Plaintiff-Respondent

Taylor County Courthouse
224 South Second Street
Medford, WI 54451
(715) 748-1450
kristi.tlusty@da.wi.gov

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19 8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is eight (8) pages.

Dated this 27th day of June, 2019.

6/27/2019

X Kristi S. Tlusty

Kristi S. Tlusty

Signed by: Tlusty, Kristi

Kristi S. Tlusty
Taylor County District Attorney

CERTIFICATION REGARDING ELECTRONIC BRIEF

PURSUANT TO SECTION 809.19(12)(f), STATS.

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

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 with the court and served on all opposing parties.

Dated this 27th day of June, 2019.

6/27/2019

X _____

Kristi S. Tlusty

Signed by: Tlusty, Kristi

Kristi S. Tlusty
Taylor County District Attorney