STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

CASE No. 2020AP001559 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

LAVERNE WARE JR.,
Defendant-Appellant

APPEAL FROM THE CONVICTION AND SENTENCE AFTER A JURY TRIAL

THE HONORABLE JUDGE BRIAN PFITZINGER PRESIDING

Dodge County Case 16CF408

DEFENDANT'S REPLY BRIEF

Respectfully submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin cases

Federal cases

SUMMARY OF THE ISSUES

On 01/28/21, Ware filed a brief alleging that no exigent circumstances justified the warrantless search of his garage, which led to the discovery of the victim's body. Ware argued that the State did not meet its burden under the community caretaker doctrine.

On 03/31/21, the State responded arguing the search was valid under three doctrines: community caretaker, consent, and inevitable discovery. On 05/17/21, the United States Supreme Court abrogated Wisconsin's community caretaker case law in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021). The State filed a letter of supplemental authority acknowledging *Caniglia*, but argued the search was still justified under the emergency aid doctrine.

Ware respectfully disagrees for the reasons explained below.

ARGUMENT

1. The United States Supreme Court invalidated Wisconsin's community caretaker doctrine.

In *Cady v. Dombrowski*, the United States Supreme Court held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). The Court reached that conclusion observing that police officers who patrol the public highways are often called to discharge noncriminal "community caretaking functions". *Id.* at 441, 93. S. Ct. 2523, 37 L. Ed. 2d 706.

In *State v. Pinkard*, the Wisconsin Supreme Court held that the community caretaker doctrine applied to searches inside homes. *State v. Pinkard*, 2010 WI 81, ¶ ¶ 20, 28, 327 Wis. 2d 346, 785 N.W.2d 592. That precedent was overturned in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021). The Court held that an officer's caretaker duties did not by itself justify warrantless searches and seizures in the home. *Id.* at 1598. The Court argued "What is reasonable for vehicles is different from what is reasonable for homes." *Id.* at 1600. The State correctly conceded in the instant case that "…under *Caniglia*, the community caretaking doctrine cannot justify the officer's entry into Ware's garage." (State's supplemental letter page 2)

2. The search was not valid under the emergency aid doctrine.

The State argues that the emergency aid doctrine still justifies the search of Ware's garage. *Id.* at page 3. *Caniglia* did not overrule this doctrine. In fact, several Justices expressly stated that warrantless searches of the home can

occur for the purpose of rendering medical attention. *Caniglia v. Strom*, 141 S. Ct. at 1600 – 1602. Yet in Ware's case, there was not enough evidence to justify the search under the emergency aid doctrine.

In *Brigham City v. Stuart*, the United States Supreme Court held that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). In *Brigham*, officers responded to a loud house party complaint at about 3:00 a.m. *Id*. at 400 – 401. Officers observed two juveniles drinking beer in the back yard. *Id*. at 401. Officers saw through a screen door an altercation taking place in the kitchen, where four adults were attempting to restrain a juvenile. *Id*. During the melee, one of the adults was spitting blood in a sink while the juvenile was held up against the refrigerator with enough force to move the appliance across the floor. *Id*.

In the instant case, none of the officers saw anything amiss when they arrived at Ware's residence. There was no sign of any disturbance. There was no yelling or screaming. (R.565 at 33:14 -17) There was no blood or signs of a physical struggle. *Id*. at 33:14 – 34:11. There were no signs of any recent activity by the garage door such as tire tracks or foot prints. (R.563 at 161:25 – 162:2) No one had reported any gunshots. *Id*. at 166:8 – 10. Even when Ware appeared, he was cooperative, made no threats, and carried no weapons. (R.565 at 82:14 – 25) Ware did not seem agitated and he did not appear to have any injuries. *Id*. at 83:12 – 22. In sum, even with the surprise appearance of Ware at the scene, there was no indication of any ongoing medical emergency that would justify the application of the emergency aid doctrine.

3. The search of the garage occurred prior to the discovery of the victim's blood.

The State asserts that Ware's arguments are not persuasive because they essentially ignore the blood in the garage. (State's Br. at 13) Admittedly, if prior to the illegal search officers had seen a pool of blood, then that would justify an immediate entry into the garage under the emergency aid doctrine. However, the illegal search occurred when Officer Nicholas asked Mickey to show him where he had seen the blood from his vantage point. At this point in time, law enforcement could not see inside the garage. They were inside Jones' kitchen, and the garage was behind a metal, windowless, deadbolted door. The illegal search occurred when this door was opened against Jones' wishes.

The State asserts that Nicholas did not perform a search for Fourth Amendment purposes by looking through the doorway into the garage. (State's Br. at 12) In support of its position, the State cites *Schill v. State*, 50 Wis. 2d 473, 477, 184 N.W.2d 858 (1971) where a police officer had an unobstructed view of heroin packets through an open door; and *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018), holding that looking into a home's curtilage, without entering it, is not a search. (State's Br. at 12 – 13) Yet Ware's case is distinguishable from these cases. In *Schill*, the defendant opened the door to his residence voluntarily and law enforcement immediately saw the contraband. *Schill v. State*, 50 Wis. 2d at 476 – 479. There was no plain view inside the garage in the instant case. Also, the officers were not on the house's curtilage looking inside. Instead, they were inside the kitchen asking to search into another area of the house blocked by a windowless metal door. The house's curtilage is not relevant as both the kitchen and the door from the kitchen to the garage were inside the residence. Both Jones and Ware

would have had a much greater expectation of privacy in the instant case than if officers were looking into an open window or door from a driveway.

4. Mickey did not have the authority to give the officers permission to conduct a search.

The defense concedes that Mickey consented to opening the garage door and that this consent was voluntary. (State's Br. at 24 – 28) Mickey never would have called 911 in the first place if he had not wanted the garage to be searched. It is also undisputed that Jones unequivocally denied permission for officers to search the residence. (R.563 at 158:11 – 17) The question is whether Mickey had the apparent authority to grant the consent and override Jones' refusal.

The United States Supreme Court, in *Georgia v. Randolph*, held that "…a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Georgia v. Randolph*, 547 U.S. 103, 122-23, 126 S. Ct. 1515, 164 L. Ed. 2d 208. Under *Randolph*, Jones refusal to consent to a search controlled. There is no indication that Mickey had any ownership rights to the house or was even on a formal lease. All three law enforcement officers present knew that Jones had refused consent. There is no testimony from the record showing that any of the officers felt that Mickey had apparent authority to overrule Jones' refusal. None of the officers asserted, nor did the District Attorney, that this was a consent search. Officer Nicholas testified that they were trying to get into the residence but not getting consent. (R.563 at 212:5 – 20)

However, the State argues that *Randolph's* protections apply only to Jones, not to Ware. (State's Br. at 29) The

State cites *State v. Lathan*, 2011 WI App 104, 335, Wis. 2d 234, 801 N.W.2d 772 arguing that *Randolph* does not apply when the objecting person is someone besides the defendant. (State's Br. at 31)

In *Lathan*, officers received express permission to conduct a search from the recognized owner of the house, the defendant's grandmother. *State v. Lathan*, 2011 WI App 104 ¶ 5. This overruled the wishes of the defendant's mother, who was not a resident of the house. *Id*. The officers were searching for a third party, the defendant, who was not present to object to the search when the permission was given. *Id*. *Lathan* presents a significantly different fact set than the instant case, where Jones expressly denied consent and had the authority to do so. Also, Ware was present in the residence moments before the search. However, he was immediately arrested and taken out of the residence as soon as his presence became known. Ware did not consent to the search, nor was he ever asked.

The State argues that Ware's lack of consent is irrelevant because he was not removed from the house as a pretext and therefore the search could occur regardless of Ware's desires. Yet whatever the officers' motives, removing Ware did not invalidate Jones' refusal to allow the consent. If law enforcement did not feel the need to ask Ware for consent, then they were still prohibited from searching the residence under *Randolph* by Jones' refusal.

The State also relies on *State v. Martin*, 2011 WI 44, 334 Wis. 2d 290, 800 N.W.2d 858, and *State v. Pirtle*, 2011 WI App 89, 334 Wis. 2d 211, 799 N.W.2d 492 to support the argument that the *Randolph* rule does not apply when the defendant fails to object to a search. In *Martin,* 2011 WI 44 ¶ 9, the defendant was outside the residence when he objected

to the search. However, the other tenant, was both inside the residence and she expressly consented to the search. *Id*. at ¶ 8 – 9. In *Pirtle*, 2011 WI App 89 ¶ 2, the defendant was not arrested, unlike Ware, and was asked to wait outside. The other tenant present gave express permission for the search of the residence. *Id*. at ¶ 14. Neither of these cases had a figure like Jones, who was both present and who legally asserted her refusal to a warrantless search.

Moreover, even if law enforcement did not know it at the time, Ware was the owner of the residence. He had bought it for his mother to live at. (R.563 at 119:8 – 13) Due to Ware owning the house, the State conceded that Ware had standing to challenge the search, yet denies Ware had any remedy due to *Randolph*. (State's Br. at 32)

The State seems to want it both ways. On one hand, the State argues that *Randolph's* protection only applies to Jones. Jones refused the search. Law enforcement thought that the house belonged to Jones. Implicit in the State's argument is that law enforcement therefore did not have the authority under *Randolph* to search the residence. Yet on the other hand, the State also argues that Ware has no remedy under *Randolph* because even though it was his house, Ware was arrested immediately and was never asked for consent. Was Ware, who is not an attorney, obligated to deny consent as he was being arrested and led out the residence? If so, how could he have known that? The State interprets *Randolph*'s protections too narrowly in this situation.

5. The evidence would not have been inevitably discovered absent the illegal search.

The State argues that even if the search of the garage was illegal, this court should still affirm the conviction because of the inevitable discovery rule. It is true that prior to

the search, the officers were intending to get a warrant. (R.565 at 57:10 – 58:2) However, Ware disagrees with the State's assertion that a warrant, absent evidence obtained from the illegal search, would have been granted. (In the instant case, the judge granting the search warrant was already informed that a body had been recovered.)

Mickey did not see a body before he called 911. He did not enter the garage when he allegedly saw the blood. As explained above, when law enforcement arrived, nothing seemed amiss at the residence. There was no blood or blood splatter outside of the house. (R.563 at 164:19 – 22) There was no signs of struggle at the residence. *Id*. at 165: 7 – 14 and 205:13 – 206:17.

Ware's sudden appearance was suspicious but did not give probable cause for a warrant. Ware was cooperative, made no threats, and had no weapons. (R.565 at 82:14 – 25) Ware was not agitated and he did not appear to have any injuries indicating a struggle. *Id*. at 83:12 – 22. There was no corroborating evidence to support Mickey's claims. There was no probable cause for a search warrant. Consequently, it was not inevitable that the evidence would have been discovered.

CONCLUSION

The illegal search of Ware's garage was not justified under the now abrogated community caretaker case law. Moreover, prior to the officer improperly directing Mickey to open the garage door against Jones' consent, there was not enough evidence to show that anyone needed emergency medical assistance. Furthermore, absent the evidence discovered illegally, there was not enough corroboration of Mickey's claims to support a valid search warrant.

Therefore, Ware moves this Honorable Court to vacate the conviction and sentence, to reverse the circuit court's denial of the suppression motion, and to remand the matter back to the circuit court.

Respectfully submitted this 14th day of June 2021.

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CERTIFICATION OF THE BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 2719 words as counted by the commercially available Microsoft Word Processor.

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Attorney for the Defendant-Appellant

CERTIFICATION OF ELECTRONIC FILING

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

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Attorney for the Defendant-Appellant