STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

RECEIVED
MAY 01 2019
CLERK OF COURT OF APPEALS
OF WISCONSIN

Circuit Court Case No. 2017CT33

Appeal No. 2019AP000523 CR

STATE OF WISCONSIN

Plaintiff – Respondent

-vs-

SHANNON G. POTOCNIK

Defendant – Appellant

ON APPEAL FROM TAYLOR COUNTY CIRCUIT COURT, BRANCH I,
THE HONORABLE ANN KNOX BAUER, PRESIDING,
DENYING THE DEFENDANT-APPELLANT'S MOTIONS TO SUPPRESS

BRIEF OF DEFENDANT-APPELLANT

SHANNON G. POTOCNIK
Defendant-Appellant

By: SHANNON G. POTOCNIK

TABLE OF CONTENTS

TABLE OF AUTHORTIES

Statutes

Constitution

STATEMENT OF ISSUES

I. WHETHER WHEN DEPUTY SCHUETT ENTERED THE CURTILAGE OF AND THE HOME OF MR. POTOCNIK WITHOUT A SEARCH WARRANT AND WITH NO EVIDENCE A CRIME HAD BEEN COMMITTED, DEPUTY SCHUETT VIOLATED THE U.S. AND WISCONSIN CONSTITUTIONS AND COMMON LAW.

The trial court answered: No.

II. WHETHER WHEN DEPUTY SCHUETT SEIZED MR. POTOCNIK'S BLOOD WITHOUT A SEARCH WARRANT, DEPUTY SCHUETT VIOLATED THE U.S. AND WISCONSIN CONSTITUTIONS AND COMMON LAW.

The trial court answered: No.

STATEMENT OF ORAL ARGUMENT

The defendant-appellant believes that oral argument is unnecessary in this case because the relevant facts are generally uncontroverted and easily gleaned from the record and the law is readily discernible. Oral argument, therefore, would do little to enhance the Court's decision on the merits of the issues.

STATEMENT ON PUBLICATION

The defendant-appellant does not expect that the Court's ruling will require explanation, modification, or rejection of existing law or policy and, therefore, defendant-appellant does not believe the Court's ruling merits publication.

STATEMENT OF THE CASE

On June 20, 2017, the State of Wisconsin filed a complaint in the Taylor County Circuit Court charging Mr. Potocnik with operating while intoxicated (2nd Offense), contrary to Wis. Stat. § 346.63(1)(a). (R. 1). On July 6, 2017, Mr. Potocnik pleaded not guilty. (R. 2).

On September 20, 2017, Mr. Potocnik filed a Motion to Suppress Fruits of Search of Defendant's Home. (R .7). On December 1, 2017, Mr. Potocnik filed a Motion to Suppress Warrantless Blood Draw – Fruits of an Illegal Arrest. (R. 8). Accordingly, a motion hearing was held on April 5, 2018. (R. 10; App. 2-39). On June 5, 2018, the State filed a brief with the circuit court. (R. 11). On June 11, 2018, Mr. Potocnik filed a brief with the circuit court. (R. 12). On June 22, 2018, the circuit court filed a written decision denying Mr. Potocnik's motions. (R. 14).

At the April 5, 2018, motion hearing, officer Schuett testified under oath that he was unable to determine the time of vehicle operation. (R. 34 at 15-16; App. 15-16). Given that officer Schuett did not know the time the vehicle was last operated, on September 14, 2018, Mr. Potocnik filed an "automatic admissibility" motion to prohibit the State from making any reference at trial to the blood test since it could not be established that the blood sample was taken within three (3) hours of operation of the vehicle as required by § 885.235(3). (R. 15). At the "automatic admissibility" motion hearing heard on September 18, 2018, the circuit court and State agreed that there was no established time of driving and, thus, the court granted the defendant's motion and indicated that the blood test could not be automatically admitted at the trial. (R. 35 at 4; App. 40).

Following the circuit court's ruling denying Mr. Potocnik's motions to suppress (heard on April 5, 2018), a plea and sentencing hearing was held on January 31, 2019. (R. 18). Mr. Potocnik was found guilty of operating with a prohibited alcohol concentration (2nd Offense). (R. 24). The Judgment of Conviction was entered on February 1, 2019. (R. 24). This is an appeal from a judgement, entered in Taylor County Circuit Court, the Honorable Ann Knox Bauer presiding, in which the Defendant-Appellant, Shannon G. Potocnik, was found guilty of operating with a prohibited alcohol concentration (2nd offense). (R. 24).

STATEMENT OF FACTS

At the outset, the State concedes that when officer Schuett entered the curtilage of and the home of Mr. Potocnik, officer Schuett did so without a search warrant and with no evidence a crime had been committed. (R.11 at 2-3). A criminal complaint was filed on June 20, 2017, charging Mr. Potocnik with operating while intoxicated (2nd Offense) (R. 1). According to the police dispatch log, on May 15, 2017, at 1:25 a.m., a passerby (Robert A. Durbin) called to report that he had come upon a truck that was in an accident and there was no one present at the accident scene (R.10; App. 11-12). No citizen observed who the operator of the truck was or the time the truck was last operated (R.34 at 15; App. 15). Officer Anthony Schuett was assigned to the truck accident at approximately 1:28 a.m. (R.34 at 12-13; App. 12-13). Officer Schuett did not observe who last drove the truck or when the truck was last operated (R.34 at 15-16; App. 15-16). When law enforcement arrived at the scene, no attempt was made to ascertain the temperature of the truck engine to determine the time the truck was last operated. We do not know or have a time of vehicle operation (R.34 at 15-16; App. 15-16). There was damage to the truck. However, the passenger side window was intact. (R.34 at 16; App. 16). Also, the windshield was intact. (R.34 at 16; App. 16). In addition, the air bags did not deploy. (R.34 at 16; App. 16). At the scene, there was no blood inside the truck. (R.34 at 16; App. 16). Outside the truck, there was no blood evidence or any evidence that the defendant was injured (R.34 at 16; App. 16). No witness at the scene indicated that the defendant was injured. No private citizen or family member expressed any concern to law enforcement that Mr. Potocnik could have been injured. Officer Schuett testified that he has investigated accidents where there was extensive damage to a vehicle and minor or no physical injury. (R.34 at 14-15; App. 14-15). Officer Schuett testified that he has investigated accidents where there was little or minor damage to a vehicle and serious

physical injuries (R.34 at 14-15; App. 14-15). Prior to leaving the scene of the accident, officer Schuett never called the local hospitals. (R.34 at 17; App. 17).

After investigating the scene and not finding the operator of the truck or knowing who the operator of the truck was or when the truck was last operated, officer Schuett decided to drive approximately 8 miles to Mr. Potocnik's home (R.34 at 17; App. 17). Once at Mr. Potocnik's home, officer Schuett did not observe any blood outside the home or any evidence on the exterior of the home or land that would indicate Mr. Potocnik was injured (R.34 at 17; App. 17). After peering into the lower level windows and opening the entry door, officer Schuett used the porch railing as a ladder and climbed up on the porch railing to peer into a second level window to Mr. Potocnik's home (R.34 at 18-19; App. 18-19). Upon peering into the upper level window, officer Schuett observed Mr. Potocnik was home and was undressed and walking naked in the privacy of his home (R.34 at 19-20; App. 19-20). After peering into Mr. Potocniks's upper level home window and seeing that Mr. Potocnik was home, had undressed himself and was walking naked in the privacy of his home, officer Schuett opened the entry door to the home and made contact with Mr. Potocnik (R.34 at 20; App. 20). Only after officer Schuett opened Mr. Potocnik's door did he hear moaning or yelling. (R.34 at 20; App. 20). Once the officer was inside the home, Mr. Potocnik yelled at officer Schuett several times to leave and told officer Schuett he did not want an ambulance. (R.34 at 21; App. 21).

STANDARD OF REVIEW

The questions of whether law enforcement legally entered a home and legally seized a sample of Mr. Potocnik's blood are grounded in constitutional principles. The application of constitutional principles by a trial court to the facts is a question of law to be decided by the reviewing court without deference to the finding of the trial court. State v. Patricia A.P., 195 Wis. 2nd 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

ARGUMENT

I. LAW ENFORCEMENT ENTERED THE CURTILAGE AND HOME OF MR. POTOCNIK WITHOUT A SEARCH WARRANT AND WITH NO EVIDENCE THAT A CRIME HAD BEEN COMMITTED, CONTRARY TO THE U.S. AND WISCONSIN CONSITUTIONS AND COMMON LAW.

The State concedes that law enforcement entered the curtilage and the defendant's home without a search warrant. (R.11 at 2-3). An attached garage is protected curtilage and peering into the windows of a residence is unconstitutional. Florida v. Jardines, 569 U.S. 1, 133 S.Ct. 1409 (2013), State v. Popp, 357 Wis.2d 696, 713-714, 855 N.W.2d 471, 480 (2014), State v. Davis, 333 Wis.2d 490, 501, 798 N.W.2d 902, 908, (2011). As the United State Supreme Court noted in Jardines:

> For me, a simple analogy clinches this case – and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying a super-high-powered binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, this uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? Yes, of course, he has done that too. Id. 569 U.S. 1, 7, 133 S.Ct. 1409, 1418.

As the Wisconsin Court of Appeals stated in Davis:

> As a general matter, it is unacceptable for a member of the public to enter a home's attached garage uninvited. We do not think this premise is subject to reasonable disagreement. This premise is true regardless whether an overhead or entry door is open. Thus, generally, ... an attached garage will never be impliedly open to public, i.e., police entry. Id. 333 Wis.2d 490, 501, 798 N.W.2d 902, 908, (2011).

The State also concedes that at the time law enforcement entered the curtilage and home of Mr.

Potocnik, they could not have obtained a warrant because the State had "...no evidence that a crime had been committed..." (R.11 at 2-3). The Fourth Amendment to the United States Constitution provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Constitution, amendment IV.

The Court declares it "axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Welsh v. Wisconsin, 466 U.S. 740, 748 (1984). That is, at the "very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusions." Payton v. New York, 445 U.S. 573, 589-90 (1980). A basic principle of the Fourth Amendment law is that any entries, or search and seizures, inside the home without a warrant are presumptively unreasonable. Payton v. New York, 445 U.S. 573, 586 (1980). The police bear a heavy burden when trying to establish an urgent need justifying warrantless searches and seizures. *See* Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984). The State justifies the warrantless entry to the curtilage and home with one argument. The argument the State puts forth justifying the warrantless entry is the community caretaker exception to the warrant requirement.

Our courts have adopted a three-part test for determining whether a law enforcement officer's conduct is properly within the scope of the community caretaker exception:

> (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. State v. Pinkard, 2010 WI 81, ¶29, 327 Wis.2d 346, 785 N.W.2d 592.

In examining the third step, the courts balance 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. The four factors courts consider in this balancing test are 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., 2010 WI 81 ¶42.

The burden of proof is on the State. State v. Pinkard, 2010 WI 81, ¶29, 327 Wis. 2d 346, 785 N.W.2d 592. In the present case, the State's community caretaker justification is based on speculation. First, we must speculate that the defendant was the driver of the truck in question. Without a vehicle operator, under the community caretaker function, just who is the State attempting to help? Second, since no one observed the truck being operated and the temperature of the truck engine was not determined, we must speculate about the time of driving. As noted above under number (2) of the court's balancing test, "time" is an important "attendant circumstance". In general, the cases where the courts have found it constitutionally permissible for the police to enter a home under the community caretaker exception to the warrant requirement, someone witnesses the accident/bad driving and, thus, there is an established time of driving. Without a time of operation of the truck in question, the required exigency factor to a community caretaker argument becomes stale or mute. From the record at hand, we do not know and cannot ascertain how much time passed from the accident occurring to the accident being noticed. Taylor county is a very rural county, with some roads that are infrequently traveled. We do not know when, prior to the accident, law enforcement last traversed the road the accident occurred on: was it a month prior, a week prior, days prior? With the record at hand, all conclusion with regard to "time" is speculation. One can speculate

in favor of Mr. Potocnik and one can speculate in favor of the State, but the State does not meet its burden via speculation. Third, there being no blood at the scene or any other physical evidence of bodily injury (i.e., human hair, torn cloth, lost shoe..., etc), the State speculates that, based on how the truck was damaged, the defendant must have been injured. However, we know that the force of the impact was not sufficient to deploy the air bags. In addition, we know the windshield was still intact. Further, we know the passenger side window was still intact. From this evidence, it is more logical to assume the operator was not injured. Moreover, officer Schuett testified that damage to a vehicle is not an accurate gauge to determine bodily injury. Officer Schuett testified he has investigated accidents with minor damage to a vehicle and serious physical injuries. Officer Schuett testified that he has investigated accidents where there was extensive damage to a vehicle and no physical injuries. At this point, before leaving the scene, a rational next step would be for officer Schuett (or dispatch) to make a telephone call to Mr. Potocnik's house in an effort to determine whether Mr. Potocnik knew who was driving the truck and whether Mr. Potocnik knew when the truck was last operated. Law enforcement never attempted to telephone Mr. Potocnik.

In addition, as noted above under number (2) of the court's balancing test, "location" is another important "attendant circumstance". In general, the cases where the courts have found it constitutionally permissible for the police to enter a home under the community caretaker exception to the warrant requirement, there is a damaged vehicle parked in the general location of the home which is subsequently searched: location wise, the vehicle is either in the driveway or parked next to the house/garage. In State v. Ultsch, 331 Wis.2d 242, 254 (2011), the driver of a Dodge Durango hit a building and drove home. In Ultsch, the Durango hit the building hard enough to cause the building's brick wall to cave in and cause structural damage to the building. The Durango was found in a long private driveway, two miles from the home that

was subsequently searched. The Court of Appeals in Ultsch found the search of the home unconstitutional. Absent in the present case is any proximity of the damaged vehicle to Mr. Potocnik's house. In the present case, the location of the damaged truck is eight miles from Mr. Potocnik's home. Further, in the present case, officer Schuett driving approximately 8 miles to Mr. Potocnik's home is in itself inconsistent with Mr. Potocnik being injured. Arguably, the further a person is located from the scene of the accident, the less likely that person received serious injury. How would the driver of the truck come to be 8 miles from an accident site? Answer: (1) either the driver was transported by vehicle 8 miles from the accident or (2) the driver walked 8 miles from the accident. In the first scenario, it is logical to assume that if the driver was transported home, an assessment was made that the driver did not need medical aid. In the second scenario, the driver was healthy enough to walk 8 miles. Is it not more logical to assume that a person who has traversed 8 miles from the scene of an accident and has arrived home and is inside his home made it home safely?

Even if one assumes, for the sake of argument, that a community caretaker argument exists, the community caretaker argument fails once we learn that the officer entered the home after seeing the defendant was home walking upright in his home. Once the officer uses the outside porch railing as a ladder to peer in the upper level window and sees the defendant walking naked in the privacy of his own home, the officer knows the defendant is home safe and well. How does the officer know the defendant is home safe? The officer sees this and the reasons are several: (1) there is no blood or external evidence of injury on the house or land, (2) the defendant is home and was well enough to walk upstairs, (3) the defendant is home and well enough to take his clothes off (undress himself), (4) the defendant is walking upright in his home and (5) the officer views the defendant's naked body and does not observe any blood or injuries on the defendant's naked body. Once the officer sees the defendant is home, has

walked upstairs, has undressed himself, that he is walking upright in his own home and that he has no blood or injuries on his naked body, under the community caretaker argument there was no need for the officer to make further contact with the defendant and no need to open the defendant's house door. Only after officer Schuett opened Mr. Potocnik's door did he hear moaning or yelling. (R.34 at 20; App. 20). Thus, any attempt by the State to create a "moaning" argument for entry to the home is mistaken. Further, any "moaning" argument is negated by the above referenced physical evidence. That Mr. Potocnik was yelling at the officer to leave and not moaning is supported by the fact the officer was looking in the house window at Mr. Potocnik's naked body: people do not moan in such a situation, they yell. Yelling is further supported by the fact that, once the officer was inside, Mr. Potocnik yelled at the officer several times to leave and told the officer he did not want an ambulance. (R.34 at 21; App. 21). It is difficult to imagine a scenario with a greater invasion of privacy than a stranger peering through an upper window viewing another walking naked in the privacy of their home. As the court of appeal said in State v. Ultsch, 331 Wis.2d 242, 254 (2011), the community caretaker exception fails in this case because "the public's interest in the intrusion was minimal, at best, and did not outweigh the substantial intrusion on [Mr. Potocnik's] privacy."

II. LAW ENFORCEMENT SEIZED MR. POTOCNIK'S BLOOD WITHOUT A SEARCH WARRANT AND CONTRARY TO THE U.S. AND WISCONSIN CONSTIUTIONS AND COMMON LAW.

Finally, the State argues that there was exigency in that alcohol in the bloodstream dissipates over time. It is axiomatic that every exigency or emergency must have a starting and ending point. No citizen observed who the operator of the truck was or the time the truck was last operated (R.34 at 15; App. 15). Officer Schuett did not observe who last drove the truck or when the truck was last operated (R.34 at 15-16; App. 15-16). When law enforcement arrived at

the scene, no attempt was made to ascertain the temperature of the truck engine to determine the time the truck was last operated. We do not know or have a time of vehicle operation (R.34 at 15-16; App. 15-16). Further, the State acknowledged it does not know the time of vehicle operation: at the "automatic admissibility" motion hearing heard on September 18, 2018, the circuit court and State agreed that there was no established time of driving and, thus, the court granted the defendant's "automatic admissibility" motion and indicated that the blood test could not be automatically admitted at the trial. (R. 35 at 4; App. 40). Simply put, in this case, since there is no known time of operation of the vehicle in question, we do not have a starting point for any exigency. Any "exigency" is speculation. The burden of proof is on the State. State v. Pinkard, 2010 WI 81, ¶29, 327 Wis. 2d 346, 785 N.W.2d 592. The State cannot meet its burden of proof via speculation.

Assuming, for the sake of argument, we knew the time of vehicle operation, the United States Supreme Court indicated: "[w]e hold that in drunk driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *See* Missouri v. McNeely, 133 S.Ct. 1552 (2013). Further, as the Wisconsin Court of Appeals stated in State v. Larson, 203 WI App 150, 266 Wis.2d 236, 251, 668 N.W.2d 338, 345:

> Arguably, because blood rapidly metabolizes alcohol after a person ceases drinking, an exigent situation may have existed. See State v. Bentley, 92 Wis.2d 860, 864 N.W.2d 153 (Ct.App.1979). Without an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the State's proof of Larson's alleged violation of Wis. Stat. § 346.63(1)(a) would be destroyed. However, as expressed in Welsh, a warrantless home arrest cannot be upheld simply because evidence of Larson's blood alcohol level might have dissipated while the police obtained a warrant. See Welsh, 466 U.S. at 753, 104 S.Ct. 2091.

The arresting officer testified he could have applied for a warrant but was told not to by the

District Attorney. (R. 34 at 26; App. 26). The District Attorney is not a neutral and detached magistrate and should never be the arbiter of 4th Amendment Constitutional liberty. "Search warrants are ordinarily required for dwellings and, absent an emergency, no less could be required where intrusions into the human body are concerned, even when the search was conducted following a lawful arrest. The importance of requiring authorization by a neutral and detached magistrate before allowing a law enforcement officer to invade another's body in search of evidence of guilt is indisputable and great." *See* Missouri v. McNeely, 133 S.Ct. 1552, 1558 (2013).

Assume, again, for the sake of argument, the officer knew the time of vehicle operation. The arresting officer testified that he knew what a blood alcohol curve argument was. The arresting officer testified that if there is a blood test, an expert can extrapolate back in time to determine what a subject's blood alcohol concentration would have been at the time of driving. (R. 34 at 24-25; App. 24-25). In fact, Wisconsin is a state with a long history of allowing an expert to do what are called retrograde extrapolations. *See* State v. Vick, 104 Wis. 2d 678 (1981). In addition, for purpose of the trier of fact determining the amount of alcohol in a subject's blood at the time of driving, Wisconsin has a long history of allowing the use of a blood alcohol chart for males into evidence. See State v. Hinz, 121 Wis.2d 282 (1984), WIS JI-CRIMINAL 234, WIS JI-CRIMINAL 237. The problem in this case is there is no time of operation to extrapolate back to.

Assuming, again, for the sake of argument, there was a known time of vehicle operation, had the State taken the time to follow the warrant requirement in the U.S. Constitution and obtained a blood sample via a neutral and detached magistrate, an expert could have provided the trier of fact with the defendant's blood alcohol level at any proposed time of driving (even if the blood test was obtained outside the three hour window). Thus, in consideration of Missouri v.

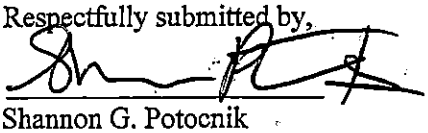
McNeely and Wisconsin case law, there really was no exigency in the present case.

CONCLUSION

Had the evidence as a result of the unlawful entry and unlawful seizure of blood been suppressed, Mr. Potocnik would have not been convicted. For the foregoing reasons, it is respectfully requested that the Court of Appeals reverse the circuit court's ruling denying Mr. Potocnik's motions to suppress evidence. Mr. Potocnik respectfully requests that this Court remand the matter for further proceedings.

Dated this 26 day of April, 2019.

Respectfully submitted by,



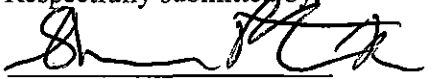
Shannon G. Potocnik

Certification

I hereby certify that this brief conforms to the from and length contained in Wis. Stat. §809.19(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,846 words.

Dated this 26 day of April, 2019.

Respectfully submitted by,



Shannon G. Potocnik

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Circuit Court Case No. 2017CT33

Appeal No. 2019AP000523 CR

STATE OF WISCONSIN

Plaintiff – Respondent

-vs-

SHANNON G. POTOCNIK

Defendant – Appellant

ON APPEAL FROM TAYLOR COUNTY CIRCUIT COURT, BRANCH I,
THE HONORABLE ANN KNOX BAUER, PRESIDING,
DENYING THE DEFENDANT-APPELLANT'S MOTIONS TO SUPPRESS

APPENDIX OF DEFENDANT-APPELLANT

SHANNON G. POTOCNIK
Defendant-Appellant

By: SHANNON G. POTOCNIK

TABLE OF CONTENTS