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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 BRIEF AND APPENDIX

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STATEMENT OF THE ISSUE PRESENTED

Did law enforcement conduct an illegal search of the defendant's garage due to an erroneous application of the community caretaker doctrine?

The trial court said "no".

STATEMENT ON PUBLICATION

Publication is not requested.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court believes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE

1. The Allegations and Conviction

The criminal complaint alleges as follows: On 12/04/16, Vernon Mickey reported a possible homicide at 100 We Go Trail in Fox Lake, Dodge County, WI. (R.1 at 2) Mickey stated he lived at the residence with his girlfriend, Marjorie Jones, and her son, Laverne Ware Jr. *Id.* Mickey reported seeing a lot of blood in the garage of the residence, but he did not see a body. *Id.* Mickey stated that Ware's girlfriend was missing since "last night", and he believed it was her blood. *Id.* Ware's girlfriend was subsequently identified as S.D.¹ *Id.*

Deputy Kevin Homan and Sergeant Joseph Nicholas of the Dodge County Sheriff's Office both responded to the residence. *Id.* S.D.'s body was found in a blue Ram pickup truck parked in the residence's attached garage. *Id.* S.D. appeared to have died several hours earlier as some of the blood inside the vehicle had dried. *Id.* at 3. Significant efforts were taken to conceal the truck in the garage. *Id.*

Mickey later gave additional statements to law enforcement. He stated there was a family gathering (at the residence) after a funeral. *Id.* at 5. After the gathering ended, Ware and S.D. left the residence. *Id.* Mickey stated he later saw the truck in the garage with blood under it. *Id.* Mickey described a conversation between him, Jones, and Ware. *Id.* Ware stated "he ain't going to leave no witnesses." *Id.* Mickey said Ware made numerous comments and threats which implicated Ware as the murderer. *Id.* at 5 – 10. Mickey described Ware's relationship with S.D. as volatile. *Id.* at 8. Mickey stated Ware and S.D. were cousins. *Id.*

¹ S.D. was sometimes referred to as S.J. in the record. Some of her loved ones referred to her using a different last name.

The complaint charged Ware with one count of Hiding a Corpse. However, the Information added four additional counts; First Degree Intentional Homicide, Incest, and two counts of Possession of a Firearm by a Felon. (R.17 at 1 – 2) Ware’s attorneys filed a motion to suppress nearly all the evidence in the case, arguing that S.D.’s body was discovered after an illegal search of the garage. (R.99 at 1 – 19) The court held a motion hearing on 02/28/28. (R.563 at 107 – 247) The court scheduled a second hearing to finish the witness testimony, but Ware’s attorneys withdrew from the case. (R.591 at 1 – 17) This caused a significant delay. The second part of the evidentiary hearing was held on 09/19/18. (R.565 at 1 – 108) After further briefing the court denied Ware’s motion to suppress in an oral decision dated 11/02/18. (R.566 at 5 – 21) The court also denied Ware’s motion to reconsider in a written decision issued on 12/11/18. (R.208 at 1 – 2)

After a two-week jury trial Ware was convicted on all counts. The court essentially sentenced Ware to life imprisonment, allowing him to petition for extended supervision on 12/04/76. (R.530 at 1 – 5) The court sentenced Ware to an additional 18 years of consecutive initial confinement on the other counts. *Id.*

Ware appeals his conviction and sentence, arguing that nearly all the evidence in this case should have been suppressed as fruit from the poisonous tree after an illegal search due to improper application of the community caretaker doctrine. Additional facts are provided below. All of the briefs plus the transcript of the court’s oral decision are attached in the appendix.

2. The Suppression Motion

Ware's motion to suppress asserted Sgt. Joe Nicholas conducted an illegal search of Ware's garage and sought to suppress all primary and derivative evidence obtained as a result of the search. (R.99 at 1) In his initial 911 call, Mickey reported there was a possible body in the garage. *Id.* at 2. However, he never checked for an injured person after he saw the blood. *Id.* There was no other corroborating evidence, such as a cry for help, to support a claim that anyone needed immediate medical assistance. *Id.*

Deputy Kevin Homan responded to the scene. *Id.* He noticed one set of footprints from around the front door. *Id.* He looked in the window and saw a person watching television. *Id.* Homan knocked on the door and Jones answered. *Id.* Jones was cooperative, but seemed very confused, and had no information about the blood in the garage. *Id.* There was no indication that anyone needed assistance. *Id.* There were no signs of a struggle, nor were there any cries for help, nor any indication that anything was out of order. *Id.* In an attempt to get more information, Homan went to Kwik Trip to meet with Mickey and Officer Jason White. *Id.* at 2 – 3. Mickey told the officers he believed the blood was S.D.'s and that he hadn't seen her since the prior night. *Id.* at 3.

Sgt. Nicholas waited outside the residence while Homan attempted to get more information from Mickey. During this time Nicholas did not hear any unusual sounds or see any evidence indicating someone in the house needed immediate assistance. *Id.* Mickey and the other two officers soon returned, and Jones let them all back in the residence. *Id.* However, Jones did not give permission for anyone to look in the garage. *Id.* She insisted on a warrant. *Id.*

Nicholas informed Jones they were going to secure the home and that everyone had to leave while a warrant was obtained. *Id.* At this point, the only information officers had for a warrant was an uncorroborated claim there might be blood in the garage. *Id.*

Nicholas exited the home to speak with Sheriff Dale Schmidt. *Id.* Nicholas reported that “given the circumstances”, he would check to see whether he needed to render first aid. *Id.* Yet after Nicholas reentered the home, Ware came out from a hallway and was detained in a squad car. *Id.* Nicholas walked in the kitchen to see the door which Mickey has reportedly looked through to the garage. *Id.* at 3 – 4. Nicholas noted there was only a metal windowless door. *Id.* at 4. Nicholas instructed Mickey to show him where he looked to see the blood. *Id.* Mickey complied, went to the door, unlocked the deadbolt, and opened it. *Id.* Nicholas looked through a large-windowed storm door and saw blood dripping from the passenger door of the truck. *Id.* Nicholas subsequently discovered S.D. and immediately recognized she was deceased. *Id.*

The motion argued that Nicholas was not exercising a bona fide community caretaker function and that he did not have an objectively reasonable basis to believe a member of the public needed assistance. *Id.* at 5. Additionally, the motion argued there were no exigent circumstances to justify the warrantless search. *Id.* at 11. Furthermore, the motion argued that all physical and testimonial evidence from the unlawful search, as well as derivative evidence tainted by the search must be suppressed. *Id.* at 11 – 12. When Nicholas finally sought a warrant, he testified that he saw the blood and a deceased female. *Id.* at 15. The judge granted the warrant based on the information gained from the unlawful search. *Id.* at 18. Without this unlawfully gained evidence, Mickey’s

uncorroborated claims were not sufficient to provide probable cause for the search warrant. *Id.*

3. The Suppression Hearings and the Court's Decision.

At the initial evidentiary hearing on 02/28/18, the court ruled that Ware had standing to challenge the search based on Ware's testimony and the preliminary hearing. (R.563 at 123:25 – 124:2) Ware testified that he owned the property and was present at the property during the search. *Id.* at 119:8 – 13. Ware did not consent to the search. *Id.* at 119:14 – 16.

Homan testified that on 12/04/16, he was dispatched to 100 We Go Trail due to a possible homicide. *Id.* at 142:16 – 143:8. Homan arrived at 4:16 pm approximately 10 – 12 minutes after being dispatched. *Id.* at 145:18 – 147:21. Homan was surprised when Jones answered the door because he expected whoever was supposed to be there was dead. *Id.* at 149:18 – 150:10. Jones was cooperative and answered Homan's questions. *Id.* at 150:11 – 16. Jones indicated she was alone and was described as super nice. *Id.* at 150:17 – 23. Jones indicated that Ware was not present and did not live at the residence. *Id.* at 151:5 – 18. Homan left the residence, encountered Nicholas, and went to Kwik Trip to meet with White and Mickey. *Id.* at 151:20 – 24. After he returned to the residence, Jones let all three officers and Mickey inside, although Nicholas stayed outside initially due to a phone call. *Id.* at 154:25 – 155:15. Ware then came around the corner down the hallway. *Id.* at 155:18 – 24. Ware had his arms outstretched, palms forward, with a cigarette in one hand. *Id.* at 156:10 – 25. Homan testified he was extremely surprised because Jones had stated she was the only one there. *Id.* at 157:5 – 14.

Homan recalled receiving information indicating Ware and his girlfriend had recently been going at it, meaning having difficulties. *Id.* at 157:15 – 158:10. Homan stated that Jones was clearly not agreeing to a search of the residence and she wanted the officers to get a warrant. *Id.* at 158:11 – 17. Ware had appeared at the point they were securing the residence. *Id.* at 158:18 – 159:6. Homan testified he was concerned as Jones had not been truthful to him. *Id.* at 159:7 – 17. This made Mickey's statements appear to be more true. *Id.* at 159:18 – 20.

On cross, Homan stated that he was the first law enforcement officer at the scene. *Id.* at 161:17 – 24. When he arrived, there were no tire tracks in the snow in the driveway. *Id.* at 161:25 – 162:2. Homan saw one set of footprints, and they were not coming down the driveway. *Id.* at 163:14 – 20. There was no blood on the ground, nor was there blood splatter on the garage door. *Id.* at 164:19 – 22. There were no signs of any struggle. *Id.* at 165:7 – 14. There were no reports of any gunshots from dispatch. *Id.* at 166:8 – 10. Homan heard nothing noteworthy. *Id.* at 165:25 – 166:4. While inside the residence, Homan did not see any blood, weapons, or contraband. *Id.* at 168:11 – 18. He did not smell any gunpowder. *Id.* at 168:19 – 24. Homan stated he never heard any cries for help during the time he was in the home. *Id.* at 180:24 – 181:2. Homan did not ask Ware for permission to search the residence. *Id.* at 181:3 – 5.

Officer White testified he responded to the Kwik Trip to meet with Mickey. *Id.* at 189:8 – 24. Mickey stated that he believed something had happened to S.D., adding he saw blood, but not a body. *Id.* at 190:3 – 13. White saw nothing out of the ordinary when he arrived at the residence. *Id.* at 205:13 – 206:17.

Sheriff Dale Schmidt testified that he spoke with Nicholas on the radio; and Nicholas stated they were trying to get in the residence but not getting consent. *Id.* at 212:5 – 20. Schmidt asked Nicholas if there were community caretaker issues. *Id.* at 213 at 2 – 13. Nicholas responded something to the effect of “we’ll use that.” *Id.* at 213:14 – 16. On cross, Schmidt stated he made the statements about community caretaker without the benefit of being present at the residence. *Id.* at 218:11 – 19.

Sgt Joe Nicholas testified about his conversation with Schmidt. Nicholas testified that Schmidt said there was no community caretaker issue. *Id.* at 234:3 – 16. When Nicholas hung up with Schmidt, he did not feel there was sufficient information to conclude there was somebody in the residence that was harmed. *Id.* at 235:20 – 24. Additionally, Jones did not want law enforcement walking around her house. *Id.* at 236:21 – 23. Nicholas stated Mickey’s information seemed very concrete and there was a safety concern when Ware suddenly came around the corner. *Id.* at 238:14 – 22. Ware was removed from the residence. *Id.* at 239:2 – 3.

Nicholas asked Mickey to show him where he had seen the blood from his vantage point. *Id.* at 240:22 – 25. Mickey opened the doorway that led into the garage and Nicholas saw the blood. *Id.* at 241:1 – 11. Nicholas went up to the vehicle, found S.D., and then secured the residence. *Id.* at 241:12 – 242:1

The hearing was continued to 09/19/18. (R.565 at 1 – 108) On cross, Nicholas stated Jones had denied consent to search her residence at least two times. *Id.* at 33:8 – 13. While at the scene, Nicholas did not hear any screaming or yelling. *Id.* at 33:14 – 17. Nicholas did not see any blood nor

any signs of a physical struggle. *Id.* at 33:14 – 34:11. Jones’ demeanor was friendly and cooperative. *Id.* at 34:18 – 35:1. Nicholas admitted he did not ask Jones where S.D. was. *Id.* at 38:1 – 4. Nicholas did not ask Jones to put him in touch with someone who may know where S.D. was, nor did he ask for a phone number to call her. *Id.* at 38:5 – 10. Nicholas further testified that when he spoke with Schmidt about the community caretaker function, Nicholas said “we’ll definitely use that.” *Id.* at 41:4 – 42:11. Ware’s attorney questioned Nicholas on his police report, which stated that after his call with Schmidt, Nicholas intended to check the garage to see if he needed to render first aid. Nicholas testified he was formulating what he would be doing. *Id.* at 46:8 – 24. A few seconds after his call with the sheriff, Ware appeared at the house. *Id.* at 51:4 – 8. On redirect, Nicholas testified after his call with the sheriff, he intended to get a warrant. *Id.* at 57:10 – 58:2. Yet that plan changed when Ware presented himself. *Id.* at 58:3 – 8.

Finally, the defense recalled Homan as a witness. Homan testified that during his initial contact with Jones, Homan did not make any phone calls or contact S.D.’s family. *Id.* at 81:14 – 19. Homan did not ask dispatch for any information to see if S.D. had had a vehicle, or other address. *Id.* at 81:20 – 23. Homan testified that when Ware appeared, he was cooperative, made no threats, and had no weapons. *Id.* at 82:14 – 25. Ware did not seem agitated and he did not appear to have any injuries. *Id.* at 83:12 – 22.

Judge Pfitzinger made his oral decision on 11/02/18. (R.566 at 5:6 – 21:13). He made multiple findings of fact consistent with the above-stated testimony. *Id.* at 8:10 – 14:22. The court relied on the fact that Jones gave false information to the sheriff’s deputies. *Id.* at 15:10 – 12. Additionally, the sheriff’s department knew that guns had

been in the home and at some point earlier, Ware and S.D. had been involved in a domestic dispute. *Id.* at 15:13 – 16. The sheriff's deputies were not aware of the nature and / or the extent of the injuries that S.D or another individual may or may not have been received in the garage. *Id.* at 15:25 – 16:7. Upon Ware's appearance, there was reason to be suspicious of the information which Jones had provided. *Id.* at 16:8 – 12.

The court ultimately found that all three prongs of the community caretaker analysis had been met and that the circumstances pointed to exigent circumstances. *Id.* at 16:13 – 21:13. The court found that the intrusion was minimal given the safety concern. *Id.* at 19:24 – 20:11. The court was concerned about the discussion between Nicholas and Schmidt prior to the search. *Id.* at 20:21 – 23. However, the court did not believe that Nicholas or Schmidt had any preconceived intent to thwart the Fourth Amendment. *Id.* at 20:23 – 21:4. The court stated it did not appear that Nicholas was actually moving towards a search under the community caretaker theory until Ware appeared.

Ware's attorneys filed a motion to reconsider. (R.204 at 1 – 4) The motion argued that Nicholas made the decision to make a search immediately after his call with Schmidt and before Ware's appearance. *Id.* at 2. Nicholas testified that once Ware presented himself, it concreted that decision. *Id.* Nicholas' own police report indicated that he made the decision to search right after his call with Schmidt. *Id.* at 2 – 3. The court denied the motion to reconsider in a written decision. (R.208 at 1 – 2). The court relied on Nicholas' testimony that after the call with Schmidt, he did not form the intent to search the residence and that his actions after the call supported this testimony. *Id.* Ware appeals.

ARGUMENT

The trial court erred in denying the defendant's motion to suppress evidence after an illegal search.

1. Standard of Review

In reviewing the denial of a motion to suppress evidence, the Court of Appeals will uphold a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Fonte*, 2005 WI 77, ¶ 11, 281 Wis. 2d 654, 698 N.W.2d 594. However, the Court of Appeals will independently review a circuit court's application of constitutional principles to those facts. *State v. Arias*, 2008 WI 84, ¶ 11, 311 Wis. 2d 358, 752 N.W.2d 748.

2. The search was not reasonable under the community caretaker doctrine.

The United States and Wisconsin Constitutions protect against unreasonable searches and seizures in their homes and provide requirements for a warrant. U.S. Const. Amend. IV; Wis. Const. art. I, § 11. “the federal and state constitutions do not protect against all searches and seizures, but only unreasonable searches and seizures.” *State v. Pinkard*, 2010 WI 81, ¶ 13, 327 Wis. 2d 346, 785 N.W.2d 592 (internal quotations omitted). Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the Fourth Amendment. *Id.* To meet the requirements of the Fourth Amendment, the community caretaker function must have been “reasonably exercised under the totality of the circumstances of the incident under review.” *Id.* at ¶ 20.

Wisconsin uses a three-part test to determine if a search was reasonable under the community caretaker doctrine. (1) Did a search or seizure within the meaning of

the Fourth Amendment occur; (2) if so, were the police exercising a bona fide community caretaker function; and (3) if so, does the public interest outweigh 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 ¶ 29. The State bears the burden of proof. *Id.*

The first test is met, and it was never contested. Neither Jones nor Ware gave consent for the search, yet a search clearly occurred. The court stated “It does – or does not appear that there is any dispute that the search we are dealing with, specifically the search by Sergeant Nichols (sic), is in fact a search within the meaning of the Fourth Amendment.” (R.566 at 7:8 – 24)

a. Nicholas did not have an objectively reasonable basis to believe a member of the public needed assistance and therefore was not exercising a bona fide community caretaker function.

The second test requires the officer to articulate an objectively reasonable belief that entry into a home is necessary to prevent harm. *Pinkard*, 2010 WI 81, ¶ 78. It is during the application of this second test that the court considers whether police conduct is “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *State v. Kramer*, 2009 WI 14, ¶ 23, 315 Wis. 2d 414, 759 N.W.2d 598, citing *Cady v. Dombrowski*, 413 U.S. 433 at 441, 93 S.Ct.2523, 37 L. Ed. 2d 706 (1973). An officer’s “subjective intent does not alone dictate the result.” *State v. Maddix*, 2013 WI App 64, ¶ 30, 348 Wis. 2d 179, 831 N.W.2d 778. However, this subjective intent is relevant toward the analysis. *Id.*

In this case, there was no objectively reasonable basis to believe that S.D. or any member of the public needed assistance. Mickey's initial 911 call reported a possible homicide, not an ongoing medical emergency. He did not see a body. He did not report hearing a cry for help. He did not report hearing a gunshot. He did not report witnessing a struggle. He did not say he witnessed a homicide or the events that led to a homicide. Clearly, a 911 call reporting a suspected homicide is a serious event. But Mickey's call, plus his initial statements to law enforcement officers before the search, are remarkable for their lack of detail. Yet even if the officers believed every word of Mickey's uncorroborated statements, then there was still no evidence of an ongoing medical emergency.

Additionally, after law enforcement arrived at the scene, there was no evidence that supported a community caretaker search. Three officers were present at various points before the search and from their testimony the following facts are uncontested.

1. There were no signs of any disturbance outside of the residence. There was no blood or blood splatter by the garage. There was no indication of recent activity by the garage door such as tire tracks or footprints.
2. There were no signs of any disturbance inside the residence. Again, there was no blood. There was no overturned furniture or broken glass or anything indicating there was a struggle.
3. After Homan first arrived at the residence, he saw through a window a single female (Jones) watching television. When Jones interacted with the officers, she was pleasant, seemingly cooperative, and "super nice". There was no indication that she was injured or

was aware that anyone else in the residence was injured.

4. At no point did any of the officers hear a cry for help, or moaning, or any sound which would indicate a medical emergency.
5. Prior to the search, Mickey's claim of a window looking into the garage was uncorroborated. When Nicholas entered the kitchen without consent, he saw a metal windowless door.

Admittedly, the officers would have cause to be suspicious after Ware suddenly appeared at the scene. It was clear at this point that either Jones lied, or she was inexplicitly unaware that Ware was at the residence. Yet the mere presence of Ware alone did not give rise to a bona fide community caretaker search.

Ware voluntarily made his presence known to the officers. He was not seen hiding under a table or otherwise concealing himself. He had his arms outstretched with his palms showing. He was calm and cooperative both when he first appeared and when he was detained. He did not have any weapons. There were no signs that he was involved in any struggle. Ware did not make any statements which indicated that S.D. or anyone else needed medical care.

State v. Maddix, 2013 WI App 64, is instructive in the community caretaker analysis. In *Maddix*, law enforcement officers responded to a call reporting a domestic disturbance. *Id.* at ¶ 2. When the officers arrived, they heard a female yelling in the upper portion of the residence. *Id.* The officers went to the upstairs unit and heard a female screaming. The officers forced entry based on concerns for the screaming female. *Id.* at ¶ 3. The officers climbed a set of stairs and

entered the apartment. *Id.* at ¶ 4. Upon entry, they found Maddix and a female, whom they promptly separated for interviews. *Id.*

Maddix stated the female was his girlfriend and they were the only people in the apartment. *Id.* at ¶ 5. Maddix stated they were arguing because she thought he was cheating on her. *Id.* Meanwhile, a second officer interviewed the female. *Id.* at ¶ 6. She stated that she was having an argument with Maddix. *Id.* She admitted to screaming and when asked why, she responded it was because she was scared. *Id.* However, she could not explain why she was scared. *Id.* The officer's conversation with the female lasted about 15 – 20 minutes. *Id.*

The officers on the scene did not believe the female's explanation of the screaming made sense. *Id.* at ¶ 7. They then performed a protective sweep to make sure that nobody else was present who could attack the officers and to determine whether a possible victim was in the apartment. *Id.* There was no evidence of any consent for this search. *Id.* The officers eventually found six marijuana plants in a lit closet in a dark room. *Id.* at ¶ 8.

The Court of Appeals concluded that the officers' search did not fall within the community caretaker exception. *Id.* at ¶ 38. While acknowledging the officer's subjective beliefs, the Court concluded there was no objectively reasonable basis for the search. *Id.* at ¶ 30. The Court noted that the record lacked any evidence supporting that a third person was present, such as noises or statements from the occupants. *Id.* at 28.

Although the facts in the instant case are not identical, there are crucial similarities. During the time which the officers spoke with Jones, and later Ware, there was no

indication that a third party needed any medical assistance or even was present at the residence. There was only an uncorroborated claim of blood in the garage. Like in *Maddix*, the officers had good cause to be suspicious of what they heard from Jones. However, that suspicion did not lead to an objective basis for a community caretaker search. The differences between the cases are even more instructive. In *Maddix*, there was clearly evidence of an ongoing incident. The officers could hear a female yelling and screaming. Yet there in the instant case, there were no notable sounds and there was no claim of an ongoing incident.

Given the uncontested facts and the relevant case law, there was no objectively reasonable basis for Nicholas to conduct his warrantless search.

b. The community caretaker function was not reasonably exercised under the totality of the circumstances.

The third step of the community caretaker analysis is “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. *Pinkard*, 2010 WI 81, ¶ 29. Four factors are considered when analyzing the third prong. (1) The degree of the public interest in the exigency of the situation. *Id.* at ¶ 42. (2) The attendant circumstances surrounding the search, including time, location, and the degree of overt authority and force displayed. *Id.* (3) Whether an automobile is involved. *Id.* (4) The availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished. *Id.*

Regarding the first factor: clearly there is a public interest in investigating a 911 call of a possible homicide. However, there were no attendant exigent circumstances.

There was no cry for help. There were no signs of a struggle. Mickey's uncorroborated claims did not imply an ongoing situation but instead referred to a possible crime that occurred in the past tense. The lack of exigency is clearly shown when Homan arrived at the residence, found no evidence of an emergency, and then left to speak with Mickey. Furthermore, Ware's appearance did not provide any additional evidence of an ongoing medical emergency.

Regarding the second factor: the search, absent exigent circumstances and clearly without consent, was an overt unjustified display of authority. There were three armed officers with squad cars parked at the residence. They immediately detained Ware without any evidence that he committed any offense. Ware was cooperative throughout the process, yet he also did not consent to a search. Then Nicholas went to the kitchen without consent. He instructed Mickey to open the door even though there was no window in plain view.

Regarding the third factor: there was an automobile present. Yet this vehicle was not on a public roadway but instead in a private garage behind a locked windowless door. In *Pinkard*, the court acknowledged a heightened privacy interest in preventing intrusions in one's homes. *Id.* at 56. This heightened privacy concern clearly exists in the instant case.

Regarding the fourth factor: there were numerous alternatives to the warrantless search. There was no attempt to call S.D. or to contact dispatch to see if S.D. was associated with any other residence. There was no attempt to determine if any neighbors reported gunshots or other noise complaints. The officers could have yelled to see if anyone responded with a cry for help. There is no record that the

officers even asked Ware where his presumed girlfriend, S.D. was. There was no attempt to secure a warrant, even though by this point there was ample time for law enforcement to attempt to obtain one.

All of these four factors argue against the contention that the community caretaker function was reasonably exercised under the totality of the circumstances.

Finally, there were no other exigent circumstances justifying a search. As discussed above, there was no evidence of an ongoing medical emergency. Additionally, there was no hot pursuit involved in this case. Since the police were clearing the house, there was no feasibility that evidence was about to be destroyed. Finally, there was no chance that the suspect in this matter, Ware, was about to flee. He voluntarily made his presence known to law enforcement and was immediately detained without incident.

3. All physical, testimonial, and derivative evidence tainted from the search must be suppressed because it is tainted “fruit from the poisonous tree.”

The exclusionary rule prohibits admissibility of both tangible and intangible evidence and also excludes derivative evidence via the fruit of the poisonous tree doctrine, if it “is the product of the primary evidence, or that it is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint. *Murray v. United States*, 487 U.S. 533, 536 – 537, 108 S. Ct. 2529 (1988). The fruit of the poisonous tree doctrine “in its broadest sense, can be regarded and has been in fact applied as a device to prohibit the use of any secondary evidence which is the product of or which owes its discovery to illegal government activity.” *State v. Schlise*, 86 Wis.2d 26, 45, 271

N.W.2d 619 (1978) and *Wong Sun v. United States*, 371 U.S. 471 (1983). Information used as probable cause to obtain a search warrant must be “wholly unconnected” from the illegal search. *Murray*, 487 U.S. at 535. Thus, if “information gained from the illegal entry affected either the law enforcement officers’ decision to seek a warrant or the magistrate’s decision to grant it,” all of the evidence, “both seen and unseen,” must be suppressed. *Id.*, at 540.

In the instant case, the officers did not make any attempt to obtain a search warrant prior to the illegal search. Although the testimony indicates they were securing the house, there was no attempt to draft a warrant or any supporting documents prior to the illegal search.

Moreover, even had they sought to obtain a search warrant, there was not enough evidence for it to be granted. Again, there was only Mickey’s uncorroborated claim that he saw blood. He did not see a body. Mickey did not make an attempt to look to see whether there was a body. Moreover, the statements which Mickey provided prior to the illegal search did not provide crucial details which could have supported a warrant. For example, Mickey did not make any statement indicating he saw or heard any disturbance, much less a gunshot. He merely speculated that something must have happened to S.D.

When the officers arrived, there was no indication that any crime had occurred at the residence. The mere appearance of Ware alone, absent any other evidence, did not provide probable cause for a search absent any consent.

Of course, a search warrant for the vehicle was obtained. But that was a direct and immediate consequence of the illegal search. Once the body was discovered, there was probable cause for any number of warrants. Yet at that point, any testimony or affidavit in support of the warrant(s) was unquestionably tainted by the fruits of the illegal search of the garage. Since Mickey's claims did not provide probable cause for the search warrant, all primary and derivative evidence obtained as a result of Nicholas' unlawful search of the garage are "fruits of the poisonous tree" and must be suppressed under *Wong Sun v. United States*, 371 U.S. 471 (1983).

CONCLUSION

There were no exigent circumstances that justified the illegal search of Ware's garage. The State did not meet its burden to show that Nicholas engaged in a proper community caretaker function. Moreover, there was no probable cause to support a warrant even if one had been attempted prior to the illegal search. Therefore, Ware moves this Honorable Court to vacate the conviction and sentence, reverse the circuit court's denial of the suppression motion, and remand the matter back to the circuit court.

Respectfully submitted this 28th day of January, 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 6299 words as counted by the commercially available Microsoft Word Processor.

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.

Attorney for the Defendant-Appellant

CERTIFICATION OF APPENDIX CONTENT

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 s. 809.19(2)(a) and contains at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

Attorney for the Defendant – Appellant

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