COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2072

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

MARY NELL MATZDORF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

NETTESHEIM, J. Mary Nell Matzdorf appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) contrary to § 346.63(1)(b), STATS. Matzdorf argues on appeal that the trial court erroneously denied her motion to suppress evidence. Specifically, she contends that police officers entered the home in which she was staying without consent and without probable cause to believe that she committed a crime. We

conclude that Matzdorf has the requisite standing to assert a Fourth Amendment claim. We further conclude that the officers' warrantless entry into the home was justified community caretaker activity. Therefore, the trial court properly denied Matzdorf's motion to suppress evidence. We affirm the judgment.

FACTS

On June 21, 1996, Officer Joel Clark responded to a call regarding a possible hit-and-run accident in the 2600 block of North 9th Street in Sheboygan. The accident was reported by an off-duty officer, Steven Lockwood. After Clark arrived at the scene, Lockwood informed Clark that he had heard a crash from inside his residence and then, upon looking out of his window, had seen a Volkswagen Fox pulling away from "an area in extremely close proximity" to a pickup truck. Lockwood observed the driver of the car park the vehicle in the driveway at 2621 North 9th Street and enter the residence approximately seven minutes prior to Clark's arrival.

After talking briefly with Lockwood, Clark checked the pickup truck and observed damage to the license plate and bumper. Clark then checked the Volkswagen and observed "minor damage indicative of an accident." He ran a registration check on the Volkswagen and ascertained that the vehicle was registered to Matzdorf who did not reside at the 9th Street address. Clark then requested that the dispatcher attempt to make contact with someone at the residence and ask that someone step outside to speak with him. The dispatcher's attempts at contact were apparently unsuccessful.

Clark then approached the front door of the residence, knocked several times and rang the doorbell at least twice. Although Clark received no response, he heard music playing in the front room of the residence and observed

that lights were on. Clark then went to the side door. Because this door was blocked by a bag of salt, he determined that the driver had not entered through this door. Clark then approached the back door. After looking for a doorbell, Clark opened the outer screen door in order to knock on the inner wooden door. Clark testified that when he knocked on the inner door it swung at least halfway open. Clark noticed a pair of shoes and a large amount of wet grass on the interior floor indicating that someone had recently entered the residence.

Clark announced himself as a police officer and requested that someone come to the door. After receiving no response, and "due to the fact it was apparent that somebody was home and had recently entered the residence," Clark stepped into the residence about four to five inches and knocked on the internal wall. Clark testified that he "felt there was the possibility for an injury, and … with the door being left open, the lights on, music playing, and no one answering, [he] felt maybe someone was injured and indeed was unable to answer the door."

After approximately twenty seconds, a male resident, Patrick Sheridan, descended the stairs and began yelling and screaming. Clark testified that he attempted to explain that he needed to speak to somebody involved in the accident. When Sheridan continued to yell, Clark stepped outside. However, Clark testified that at this point Sheridan requested the phone number of Clark's supervisor and the badge number of Clark and his accompanying officer, Officer Messerschmidt. Without invitation, Clark and Messerschmidt reentered the residence to provide the requested information. Messerschmidt followed Sheridan towards a telephone while giving him their supervisor's number. At this time, Matzdorf descended the stairs and immediately stepped outside with Clark.

While outside, Clark questioned Matzdorf regarding the accident. Matzdorf admitted to consuming alcohol and being involved in the accident. Clark requested that Matzdorf retrieve her driver's license. However, when Matzdorf reentered the residence she did not get her license but rather joined Sheridan in yelling and screaming. After a "minor physical confrontation" with Matzdorf, Clark was able to take her back outside. Clark transported Matzdorf to the Sheboygan police department where he performed field sobriety tests. After Matzdorf failed each of the tests, Clark issued her a citation for operating a motor vehicle while intoxicated (OWI) contrary to § 346.63(1)(a), STATS. Clark then administered an intoxilyzer test which showed a prohibited alcohol concentration. Matzdorf was issued a citation for PAC contrary to § 346.63(1)(b).

On July 2, 1996, Matzdorf entered a plea of not guilty and a demand for a jury trial. Prior to trial, Matzdorf filed a motion to suppress evidence, contending that Clark had neither consent to enter the home nor a warrant. In the absence of exigent circumstances, Matzdorf argued that Clark's entry violated the Fourth Amendment to the United States Constitution as well as Article 1, Section 11 of the Wisconsin Constitution. The City opposed Matzdorf's motion on the grounds that Clark's actions were justified as related to his "community caretaker" function.

At the conclusion of the hearing, the trial court ruled that Clark's entry into the residence was lawful under the community caretaker function as analyzed in ***State v. Anderson***, 142 Wis.2d 162, 417 N.W.2d 411 (Ct. App. 1987), *rev'd on other grounds,* 155 Wis.2d 77, 454 N.W.2d 763 (1990). The court stated that "intentions to attempt to determine whether injury had been sustained by the operator of the vehicle and upon the receipt of additional information to make a determination as to whether or not the person who had gained entrance to the

residence was doing so with permission, as well as the obligation to investigate the facts and circumstances of the accident is bona fide community caretaker activity." The trial court denied Matzdorf's motion.

After a trial to the court on stipulated facts, Matzdorf was found guilty of both OWI and PAC. A conviction was subsequently entered upon the PAC. Matzdorf appeals, challenging the court's denial of her suppression motion.

DISCUSSION

Standing

As a threshold matter, we address the City's assertion that Matzdorf lacks the requisite standing to raise a Fourth Amendment claim.[1] We conclude that Matzdorf, an "overnight guest" at Sheridan's residence, had a legitimate expectation of privacy while there. As such, Matzdorf has standing to assert a Fourth Amendment claim.

Whether an individual has the capacity to assert a Fourth Amendment claim depends "'not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.'" ***State v. Whitrock***, 161 Wis.2d 960, 973, 468 N.W.2d 696, 701 (1991) (quoting ***Rakas v. Illinois***, 439 U.S. 128, 143 (1978)). "[T]his expectation of privacy must not only be actual (subjective), but also 'one that society is prepared to recognize as "reasonable."'" ***Whitrock***, 161 Wis.2d at 973, 468 N.W.2d at 702 (quoting ***Katz v. United States***, 389 U.S. 347, 353 (1967)).

[1] Although the City raised this issue in the trial court, the court did not expressly address this argument.

Factors to be considered in determining whether the defendant has a legitimate expectation of privacy are:

> (1) whether the defendant had a property interest in the premises; (2) whether he was legitimately (lawfully) on the premises; (3) whether he had complete dominion and control and the right to exclude others; (4) whether he took precautions customarily taken by those seeking privacy; (5) whether he put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

State v. Rewolinski, 159 Wis.2d 1, 17-18, 464 N.W.2d 401, 407 (1990). Applying these factors to this case, we conclude that Matzdorf had a reasonable expectation of privacy while at Sheridan's home.

Although Matzdorf did not have a property interest in Sheridan's home, Sheridan testified that Matzdorf comes over to his residence approximately five nights per week and stays overnight approximately three of those nights. On the night in question, Matzdorf arrived at Sheridan's residence at approximately 10:00 p.m. Sheridan was already asleep and did not awaken, except to notice Matzdorf's presence when she came into his bedroom. It is evident from Sheridan's testimony that Matzdorf's presence in his home was legitimate and expected.

The third factor, like the first, does not support Matzdorf's Fourth Amendment claim. Matzdorf did not have a legal interest in the residence, complete dominion and control over the residence nor the right to exclude others. However, as the United States Supreme Court observed in ***Minnesota v. Olson***, 495 U.S. 91, 99 (1990):

> That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy. The houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest…. The host may admit or

> exclude from the house as he prefers, but it is unlikely that he will admit someone who wants to see or meet with the guest over the objection of the guest…. The point is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.

Sheridan's attempt to exclude the police from his residence comports with these observations demonstrating that Matzdorf's privacy expectation was not unreasonable.

The City argues that pursuant to ***State v. Fillyaw***, 104 Wis.2d 700, 715, 312 N.W.2d 795, 803 (1981), it is not reasonable "for a paramour whose access is at the whim of his lover to claim an expectation of privacy in those premises." The facts of ***Fillyaw*** are distinguishable from those presented here. In ***Fillyaw***, the police conducted a search of Fillyaw's girlfriend's apartment when Fillyaw was not there. Fillyaw was suspected of murdering her. The court concluded that because Fillyaw was "nothing more than a paramour of [the victim] and a part-time babysitter for her children," his "expectation of privacy was limited by that relationship." ***Id***. at 714, 312 N.W.2d at 802. The court stated: "While he may have had a limited expectation of privacy while he was present in the apartment baby-sitting, the searches in question were conducted while he was absent from the apartment…. Thus, Fillyaw no longer retained any control or dominion over the apartment which he might have asserted as a part-time baby-sitter." ***Id***. Here it is undisputed that Matzdorf was present in Sheridan's residence at the time of entry. Our holding is not in conflict with that of ***Fillyaw***.

As to the fourth factor, we view Matzdorf's entry into the home and further entry into the upstairs bedroom as sufficient evidence that she took

precautions customarily taken by those seeking privacy. Additionally, Sheridan testified that the inner back door of the house was partially open in order to allow circulation of air, not to abandon any privacy interests or expectations.

The fifth factor similarly supports Matzdorf's privacy interests at Sheridan's residence in that Matzdorf slept in the residence thereby putting the residence to private use.

Finally, we look to the sixth factor: whether Matzdorf's claim of privacy is consistent with historical notions of privacy. We conclude that it is. In ***Olson***, the Court concluded that "[the defendant's] status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." ***Olson***, 495 U.S. at 96-97. In so holding, the Court observed that:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society…. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Id. at 98.

Based on the factors set forth in ***Rewolinski*** as applied to this case, we conclude that Matzdorf had a legitimate expectation of privacy at Sheridan's home. As such, Matzdorf has the requisite standing to assert a Fourth Amendment claim. We therefore turn to whether the police officers' warrantless entry was constitutional under one of the exceptions to the Fourth Amendment protections.

Motion to Suppress Evidence

A trial court's ruling on a motion to suppress evidence presents a mixed question of fact and law. We show great deference to the trial court's factual findings and will not reverse unless they are clearly erroneous. *See* ***State v. Guzy***, 139 Wis.2d 663, 671, 407 N.W.2d 548, 552 (1987). The legal determination of whether those facts warrant suppression of the evidence is a matter which we review de novo. *See* ***id***.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. "'[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***State v. Douglas***, 123 Wis.2d 13, 17, 365 N.W.2d 580, 582 (1985) (quoting ***United States v. United States Dist. Court***, 407 U.S. 297, 313 (1972)). The warrantless search of a house is presumptively unreasonable. *See* ***Welsh v. Wisconsin***, 466 U.S. 740, 748-49 (1984).

"Evidence seized during a warrantless search of one's home is inadmissible unless there is a well-delineated, judicially recognized exception to the warrant requirement." ***State v. Phillips***, 209 Wis.2d 559, 567, 563 N.W.2d 573, 576 (Ct. App. 1997). Two recognized exceptions to this clear rule against admitting evidence seized from a warrantless search are exigent circumstances and consent. *See* ***id***. Matzdorf argues, and the City does not dispute, that neither exception applies in this case. Instead, the City argues that the officers' actions were justified as "community caretaker" activity. We agree.

In ***Bies v. State***, 76 Wis.2d 457, 471, 251 N.W.2d 461, 468 (1977), our supreme court recognized that the police have a "community caretaker"

function which may justify certain police actions, such as a warrantless search of a vehicle. The key question when evaluating community caretaker activity is whether the police had a right to be where they were, make their observations and take their responsive action. *See* ***Anderson***, 142 Wis.2d at 167, 417 N.W.2d at 413. When a community caretaker action is asserted as justification for a warrantless search the trial court must make the following determinations:

> (1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.

Id. at 169, 417 N.W.2d at 414. Applying these factors to this case, we conclude that the officers in this case were justified in entering the house in order to make contact with a resident.

Here, it is undisputed that a warrantless entry of Sheridan's residence occurred in this case. As to the second consideration, the trial court determined that:

> [I]n light of the officer's stated intentions to attempt to determine whether injury had been sustained by the operator of the vehicle and upon the receipt of additional information to make a determination as to whether or not the person who had gained entrance to the residence was doing so with permission, as well as the obligation to investigate the facts and circumstances of the accident is bona fide community caretaker activity.

After reviewing the record, we are skeptical that the officers needed to be concerned about injury following a very minor parking accident and in light of Lockwood's observation that the driver of the automobile was able to proceed in parking the vehicle and entering the residence. However, it is the driver's entry

into the residence upon which we base our ruling that the officers' actions were justified as a "community caretaker" function.[2]

The trial court found that the officers determined that the vehicle in question was registered to a person with an address other than the residence into which the operator of the vehicle entered. Thus, the court found that the officers approached the residence in an attempt to determine whether the driver was lawfully upon the premises.[3] In light of the officers' testimony, this finding is not clearly erroneous. We also conclude, as did the trial court, that the officers' entry into the home to knock on the internal wall just inside the door, after attempting to gain contact with the residents by ringing the doorbell and knocking on the outer door, was justifiable community caretaker activity. The vehicle registration information revealed that the owner of the vehicle did not live at the address which the driver had entered. The dispatcher's telephone efforts to reach someone within the home were unsuccessful as of the time of the entry. Equally unproductive were Clark's ringing of the doorbell, his knocking at both the front and rear doors, and his announcement of himself as a police officer before he entered. These circumstances presented a clear risk that the person who had entered the home did not belong there and was taking refuge. The officers were entitled to further investigate under their community caretaker function.

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[2] We therefore need not address the City's argument that the officers' actions were justified under the "emergency doctrine." *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

[3] Matzdorf additionally points to testimony from Lockwood that he had frequently seen Matzdorf's vehicle at Sheridan's residence and recognized her car. However, Clark testified that Lockwood had not informed him that Matzdorf was a "resident" at the home. Instead, Clark testified that Lockwood informed him that Matzdorf had pulled in the driveway and entered the home.

That does not fully answer the question, however. The court must also must balance the public need and interest furthered by the police conduct against the degree and nature of the intrusion upon the privacy of the individual. *See* ***Anderson***, 142 Wis.2d at 168, 417 N.W.2d at 413. "This test requires an objective analysis of the circumstances confronting the police officer, including the nature and reliability of his information, with a view toward determining whether the police conduct was reasonable and justified." ***Id***. Relevant considerations in making this determination are:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, 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. at 169-70, 417 N.W.2d at 414 (footnotes omitted).

The trial court found that (1) the officers received information from an off-duty officer of a hit-and-run accident at 10:15 in the evening, (2) the officers attempted to make contact with an occupant of the residence by knocking and yelling and then making a "minimal intrusion" into the residence, (3) the officers attempted to vacate the premises when requested to do so, (4) the officers did not seek to utilize overt authority or force and (5) other alternatives would have been ineffective or would have constituted potentially greater intrusions.

Matzdorf challenges the trial court's findings that the officers attempted to vacate the premises and that the officers did not have an effective alternative to entering. Although Matzdorf points to Sheridan's testimony that the officers did not attempt to leave until after he requested the number of their supervisor, the officers' testimony was to the contrary. The credibility of

witnesses and the weight to be accorded their testimony are matters for determination by the finder of fact. *See* ***Greenwald v. Greenwald***, 154 Wis.2d 767, 781, 454 N.W.2d 34, 39 (Ct. App. 1990). Insofar as there is testimony to support the trial court's findings, we conclude that they are not clearly erroneous.

As to the trial court's finding that there were no effective alternatives available, Matzdorf suggests that the officers could have knocked on windows, the side door or the steel surrounding the screen on the back door. Matzdorf further suggests that Clark should have waited to hear back from the dispatcher as to whether contact had been made by telephone with the residents. However, the officers testified that attempts to make contact with a resident of the household by knocking were not successful. Clark additionally testified that he assumed the dispatcher's attempts were unsuccessful because the dispatcher had not contacted him to report otherwise. Again, the trial court found this testimony to be credible. Again, this finding is not clearly erroneous.

We conclude that the public has an interest in having the police ascertain whether a person involved in an offense, albeit minor, who is seen entering a residence which the objective data reveals not to be his or her own, has the consent of the owner to be there. Based on the trial court's findings and our review of the record, we further conclude that the minimal intrusion which resulted in this particular case does not outweigh that public interest.

CONCLUSION

We therefore conclude that Matzdorf, as an "overnight guest" in Sheridan's home, has standing to challenge the officers warrantless entry. However, we reject Matzdorf's argument that the evidence resulting from the warrantless search should have been suppressed. Instead, under the unique

circumstances of this case, we conclude that the police were involved in bona fide community caretaker activity at the time they entered the home and made contact with Matzdorf. The trial court properly denied Matzdorf's motion to suppress. We affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* Rule 809.23(1)(b)4, STATS.