COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1969-CR **Cir. Ct. No. 2014CF324**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SANDRA D. NOREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 REILLY, P.J. This appeal addresses the emergency exception to the Fourth Amendment prohibition against warrantless searches.[1] Sandra D. Noren appeals from a judgment of conviction for possession of narcotic drugs under WIS. STAT. § 961.41(3g)(am) (2013-14).[2] Police responded to a 911 call of an overdose at Noren's residence. When police arrived they found Noren unconscious on her kitchen floor. In an effort to assist in her emergency care, one of the officers searched Noren's bedroom for the cause of her overdose, where he found heroin, pills, and drug paraphernalia. The officer promptly provided the information to emergency personnel who were treating Noren. Noren moved to suppress the evidence of the search, arguing that the officer's search of the wardrobe in her bedroom exceeded the scope of what was permitted under the emergency exception. The circuit court denied the motion, finding that the officer's search was limited in scope and it was reasonable for the officer to search for evidence of the cause of Noren's overdose to assist medical personnel. We affirm.

[1] The State argues that the search was justified under the community caretaker exception or, in the alternative, under the emergency exception. In ***State v. Pinkard***, 2010 WI 81, ¶26 n.8, 327 Wis. 2d 346, 785 N.W.2d 592, our supreme court took care to explain the difference between the community caretaker exception and the emergency exception to the warrant requirement of the Fourth Amendment. Noting that the exceptions are not one and the same, the court explained that "[t]he community caretaker exception does not require the circumstances to rise to the level of an emergency to qualify as an exception to the Fourth Amendment's warrant requirement." ***Id.*** According to the court, "[e]ven though police conduct that falls within the emergency exception constitutes one of the many community caretaking functions, 'it must be assessed separately and by a distinct test, as all such functions are not 'judged by the same standard.'" ***Id.*** (citation omitted). As we agree with the circuit court that the emergency exception applies, we will decide the issue on this exception alone. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on narrowest possible grounds).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

BACKGROUND

¶2 City of Lake Geneva Police Officer Glen Nettesheim responded to a 911 call at the home of Noren for a possible overdose on November 26, 2013.[3] Noren's nephew let Nettesheim into the home and Nettesheim found Noren on the kitchen floor unresponsive. Her nephew told Nettesheim that Noren may have used heroin. Nettesheim began "first responder" medical care by applying oxygen and rolling Noren into the "recovery position."

¶3 Emergency Medical Service (EMS) providers arrived approximately ten to fifteen minutes after Nettesheim arrived. Once EMS assumed care of Noren, Nettesheim searched Noren's bedroom to see if he could determine the reason for Noren's overdose. Nettesheim had previously been told by EMS and medical staff that it is helpful for the medical treatment of an overdose victim to know what drugs were possibly taken by the victim.

¶4 Nettesheim acknowledged that he did not have a warrant to search Noren's bedroom, including the wardrobe and purse within the bedroom. As soon as Nettesheim found a pill bottle with various pills, and what appeared to be heroin, he shared that information with the EMS providers who were still on the scene stabilizing Noren in the ambulance. Nettesheim also found drug paraphernalia. Noren was charged with possession of narcotic drugs and possession of drug paraphernalia. Noren moved to suppress the drugs and paraphernalia on the grounds that Nettesheim did not have a warrant to search her home. The trial court found that the emergency exception to the Fourth

[3] Nettesheim had responded to a 911 call a week earlier to Noren's home when Noren had overdosed on pills.

Amendment requirement of a warrant applied and denied Noren's motion. Noren appeals.

DISCUSSION

¶5 Both the Fourth Amendment to the United States Constitution and the Wisconsin Constitution, article 1, section 11, prohibit unreasonable searches and seizures. Warrantless searches "are per se unreasonable," subject only "to a few carefully delineated exceptions" that are "jealously and carefully drawn." ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983) (citations omitted). The emergency exception to the warrant requirement was first recognized in Wisconsin in ***State v. Pires***, 55 Wis. 2d 597, 604, 201 N.W.2d 153 (1972).

¶6 In ***State v. Prober***, 98 Wis. 2d 345, 297 N.W.2d 1 (1980), *overruled on other grounds by* ***State v. Weide***, 155 Wis. 2d 537, 455 N.W.2d 899 (1990), our supreme court addressed the emergency exception, finding "[t]here must be a direct relationship between the area to be searched and the emergency." ***Prober***, 98 Wis. 2d at 362 (citing ***People v. Mitchell***, 347 N.E.2d 607 (N.Y. 1976)). Further, "the protection of human life or property in imminent danger must be the motivation for the search rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding." ***Prober***, 98 Wis. 2d at 363.

¶7 The court developed a two-part test for the emergency exception. The first, subjective part, states that "the search is invalid unless the searching officer is actually motivated by a perceived need to render aid or assistance." ***Id.*** at 365. The second, or objective part, states that "even though the requisite motivation is found to exist, until it can be found that a reasonable person under

the circumstances would have thought an emergency existed, the search is invalid." ***Id.*** Both the subjective and objective tests must be met. ***Id.***

¶8 Other Wisconsin Supreme Court decisions have also analyzed the emergency exception and applied the two-part ***Prober*** test. In ***State v. Kraimer***, 99 Wis. 2d 306, 314, 316, 298 N.W.2d 568 (1980), the court explained that "[t]he element of reasonableness … is supplied by the compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection." ***Id.*** at 315. The court positively cited ***Prober***, finding that the emergency exception allowed police to enter a home where the police received an anonymous call from a man confessing that he had shot his wife. ***Kraimer***, 99 Wis. 2d at 316-29.

¶9 In ***Boggess***, our supreme court again restated and applied the ***Prober*** two-part test in an emergency exception context. ***Boggess***, 115 Wis. 2d at 450-51. There, a social worker received an anonymous call that the welfare of two children was in danger, and the court held that the social worker's and the police officer's warrantless entry into the home for the purpose of determining the safety of the children was reasonable under the circumstances. ***Id.*** at 446-47, 458. The court's analysis supplemented the ***Prober*** test, describing the reasonableness standard under the objective part of the emergency exception test:

> We hold that the objective test of the emergency rule is satisfied when, under the totality of circumstances, a reasonable person would have believed that: (1) there was an immediate need to provide aid or assistance to a person due to actual or threatened physical injury; and (2) that immediate entry into an area in which a person has a reasonable expectation of privacy was necessary in order to provide that aid or assistance.

Boggess, 115 Wis. 2d at 452. *See also* ***State v. Rome***, 2000 WI App 243, ¶13, 239 Wis. 2d 491, 620 N.W.2d 225 (applying the ***Prober*** and ***Boggess*** tests).

¶10 In ***Brigham City v. Stuart***, 547 U.S. 398 (2006), the United States Supreme Court also considered the emergency exception, finding that "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." ***Id.*** at 403 (citing ***Mincey v. Arizona***, 437 U.S. 385 (1978)). The court was quick to reject a subjective approach, noting that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'"[4] ***Stuart***, 547 U.S. at 404 (alteration in original).

¶11 The procedural question of whether the current emergency exception doctrine consists of only an objective test or remains a two-part test in Wisconsin is not implicated in this case as Noren does not challenge that Nettesheim's search was motivated by his subjective belief that she was in need of aid. Noren disputes only the circuit court's objective finding that the scope of the search of Noren's bedroom was reasonable. We consider only whether the circumstances, viewed objectively, justify the intrusion into Noren's bedroom, wardrobe, and purse.

¶12 An order denying a motion to suppress evidence is a question of constitutional fact. ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857

[4] In ***State v. Leutenegger***, 2004 WI App 127, ¶5, 275 Wis. 2d 512, 685 N.W.2d 536, this court also questioned the application of a subjective component. There, the court determined that the two-part test from ***Prober*** and ***Boggess*** was not appropriate under those circumstances based on our supreme court's decision in ***State v. Richter***, 2000 WI 58, ¶30, 235 Wis. 2d 524, 612 N.W.2d 29, which had applied a purely objective test. ***Leutenegger***, 275 Wis. 2d 512, ¶¶6-7.

N.W.2d 120. A question of constitutional fact is "a two-step inquiry." ***Id.*** "First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts." ***Id.*** (citations omitted).

¶13 The parties agree that the officers' initial entry into Noren's home was justified and reasonable under the circumstances as, under ***Boggess***, "there was an immediate need to provide aid or assistance to a person due to actual or threatened physical injury." ***Boggess***, 115 Wis. 2d at 452; *see also* ***La Fournier v. State***, 91 Wis. 2d 61, 68, 280 N.W.2d 746 (1979) ("A victim of drug overdose clearly presents an emergency of sufficient proportions to render a warrantless entry 'reasonable.'"). Noren's objection to the search goes to whether a reasonable person would believe that entry into her bedroom, "an area in which a person has a reasonable expectation of privacy was necessary in order to provide … aid or assistance." ***Boggess***, 115 Wis. 2d at 452.

¶14 Noren argues that the search was unreasonable because she was found unconscious in the kitchen and the search of her bedroom was outside the immediate area where she was found. According to Noren, the emergency doctrine "does not allow broad searches based on where something might be found." We disagree, and we refuse to limit the emergency exception to a search of the immediate surroundings of the emergency. ***Prober*** requires only that "[t]here must be a direct relationship between the area to be searched and the emergency." ***Prober***, 98 Wis. 2d at 362 (citing ***Mitchell***, 347 N.E.2d at 610).

¶15 In this case, Nettesheim arrived on the scene to find Noren "laying in the kitchen, not responsive, turning blue in color." Nettesheim did not have

medical training to determine if Noren was suffering from a heroin overdose, and he testified that his motivation was "[t]o find out why she was overdosing, to relay it to EMS, so she could get better." Although EMS was on the scene at the time Nettesheim searched Noren's bedroom, the presence of medical personnel did not immediately alleviate the emergency nature or alter the fact that Noren was in imminent danger. Nettesheim explained that in the past, telling medical staff about drugs that he has found at the scene has been helpful to them in treating an overdose victim. Further, the scope of the search was directly related to the emergency as Nettesheim searched an area were it was reasonable to believe that Noren would have kept drugs—her bedroom. Under the circumstances, a reasonable person would have believed that it was necessary for Nettesheim to search Noren's bedroom and purse as an area where information that could aid in her emergency care would be located.

¶16 Noren further argues that "the officers did not need to search the bedroom because they were aware of the cause of Ms. Noren's condition and were able to relay the information to the EMS immediately" and "a search would not have provided officers with more information [than] they already had." We disagree. Nettesheim testified that he had been called to Noren's residence approximately one week prior when Noren overdosed from taking pills. During Noren's previous overdose, the pills were still on the floor, which the officers used to identify and help treat her. During this overdose, Nettesheim was told by Noren's nephew that Noren may have used heroin, but there was no clear evidence, such as heroin, pills, or drug paraphernalia, in the immediate vicinity to substantiate the nephew's statements. Nettesheim testified that he could not "be absolutely sure that [Noren] was suffering a heroin overdose." Under the circumstances, it was reasonable and helpful to Noren's well-being for Nettesheim

to search for the cause of her overdose in order to aid in her emergency care, especially considering his knowledge that her prior overdose was the result of pills, not heroin.

CONCLUSION

¶17 The United States and Wisconsin Constitutions protect against "unreasonable searches and seizures." The search made by Nettesheim was reasonable under the totality of the circumstances, despite the lack of a warrant. Viewed objectively, the search by Nettesheim was made to aid in the emergency care of Noren, rather than to assemble evidence of a crime against her. Law enforcement officers serve dual roles; we usually think of them as crime fighters, but just as often they are the first responders to medical emergencies. Nettesheim's actions were reasonably made in order to save Noren's life—both by administering initial medical care and then by attempting to learn why Noren was unresponsive. Nettesheim made a limited search to find the cause of Noren's overdose and promptly shared that information with EMS. We affirm the circuit court's application of the emergency exception to the constitutional requirement of a warrant.

By the Court.—Judgment affirmed.

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