COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2005-CR **Cir. Ct. No. 2013CF1407**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSIE GUSTAVE ZIEGENHAGEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EUGENE A. GASIORKIEWICZ, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. This case concerns whether a warrantless search is constitutional under the community caretaker exception. Several witnesses informed police that a man and woman had been involved in a physical altercation in front of Jessie Ziegenhagen's house. The witnesses also relayed that the woman

had gone back inside. After looking around the house, noticing a door slightly ajar, and calling for the woman to no avail, the officers entered the home. Though they did not find the woman, the officers did see marijuana in plain sight. Following a warrant and seizure of the contraband, Ziegenhagen was charged with various crimes. Ziegenhagen complains the initial search violated his Fourth Amendment rights and—because the warrant for the subsequent search was based on information obtained during the first search—he moved to suppress the evidence. The circuit court disagreed, denied his motion to suppress, and concluded that the warrantless entry was justified under the community caretaker exception. We affirm.

Background

¶2 On October 4, 2013, a neighbor, J.R., called 911 and reported that a man and woman were arguing outside of Ziegenhagen's residence. Officers Jason Rich, Ted Batwinski and Joshua Diederich arrived on the scene.[1] The officers testified that J.R. informed them in a brief initial in-person conversation there had been a physical altercation and the man left while the woman ran back into the house. J.R. was not sure whether the woman had been injured. Batwinski and Rich spoke with several other witnesses outside who corroborated a "physical altercation in front of [the] house" involving "pushing." The witnesses similarly informed the officers that the man left the scene and the woman "ran up in the house."

[1] Rich arrived first, followed by Batwinski and Diederich.

¶3 Diederich crossed the street and approached the house; he knocked loudly on all three doors but received no response. Diederich informed Batwinski that he could not make contact with anyone inside. Batwinski also knocked but received no response. The officers then walked around the residence trying to find any sign of the woman. Rich and Batwinski testified that they noticed one of the doors was partially open, an extremely unusual occurrence in that area. According to Batwinski, "it was obvious that there could be someone injured inside the house if there was a physical altercation." The officers notified dispatch that they intended to search the house. Upon entering the house, they were greeted not by the woman, but by the odor of marijuana.[2] Once inside, they observed what appeared to be marijuana and various related drug paraphernalia.

¶4 The search for the woman was unsuccessful. The officers then obtained a warrant to search and seize the marijuana and drug paraphernalia. Police later identified Ziegenhagen as the man from the dispute and the owner of the house. The State charged Ziegenhagen with possession with intent to deliver or manufacture THC, maintaining a drug trafficking place, second-degree endangering safety, and child neglect, all as party to a crime.[3]

¶5 Ziegenhagen moved to suppress the evidence obtained from the officers' search of his house. Despite contrary testimony from J.R., the court found that the officers were told in their initial conversation that the woman was inside the house. While J.R. did apparently communicate that the woman left in a

[2] Rich testified "as soon as the door was opened, even … before we opened the door, we could … smell what seemed to be raw marijuana." Batwinski and Diederich testified that they smelled it as they entered.

[3] The latter two charges stemmed from Ziegenhagen's care of his six-year-old daughter.

car and had not gone back inside the house, the court found—crediting the officers—that this communication did not occur until a second conversation and after the initial search. Additionally, although only two of the three officers testified the door was ajar, the court found that it was open.[4] Based in part on these facts, the circuit court denied Ziegenhagen's motion. He subsequently pled no contest to maintaining a drug trafficking place and child neglect. He now appeals.

Discussion

¶6 Both the United States Constitution and the Wisconsin Constitution protect citizens from "unreasonable" searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11.[5] Although a warrantless search of a home is presumptively unreasonable, a warrantless entry is reasonable under certain circumstances, including when police act in their capacity as community caretakers. ***State v. Pinkard***, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592; ***State v. Kramer***, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598. We review de novo whether the officers' exercise of their community caretaker function meets constitutional demands. ***Pinkard***, 327 Wis. 2d 346, ¶14.

¶7 When we review the circuit court's denial of a motion to suppress, we defer to the court's findings of fact unless they are clearly erroneous. ***Id.***, ¶12. Ziegenhagen—though raising factual disputes to cast doubt on the circuit court's

[4] Diederich testified that the door was merely unlocked, not ajar.

[5] The provisions are substantively identical, and we interpret the Wisconsin provision consistently with the Fourth Amendment. ***State v. Richter***, 2000 WI 58, ¶27, 235 Wis. 2d 524, 612 N.W.2d 29.

decision—makes no credible argument that the findings are without support. Therefore, we accept the circuit court's findings in this case.

¶8 We apply a three-part test to determine whether the community caretaker exception applies. We must determine (1) whether a Fourth Amendment search has occurred, (2) whether police were exercising a bona fide community caretaker function, and (3) whether the officers' exercise of their community caretaker function was reasonable. ***Id.***, ¶¶29, 41. The State bears the burden to prove that a warrantless search is justified under the community caretaker exception. ***State v. Matalonis***, 2016 WI 7, ¶31, 366 Wis. 2d 443, 875 N.W.2d 567. Here, the State concedes that a search occurred. Thus, our inquiry only involves the second and third parts of the test.

The Officers Acted In Their Capacity As Community Caretakers

¶9 An officer is acting as a community caretaker when he or she "discovers a member of the public who is in need of assistance." ***Kramer***, 315 Wis. 2d 414, ¶¶23, 32. The mere presence of subjective law enforcement concerns does not preclude officers from acting as community caretakers. ***Id.***, ¶36. The test is whether an objectively reasonable basis exists for the community caretaker function. ***Id.***, ¶30. We evaluate what the officers knew at the time of the search, not what is known in hindsight. ***Matalonis***, 366 Wis. 2d 443, ¶35.

¶10 The officers here had an objectively reasonable basis to believe a member of the public was in need of assistance. The officers were told that a woman had been involved in a physical altercation and ran inside the house. They were understandably concerned she might be injured. Her apparent unresponsiveness did not alleviate, but reasonably escalated that concern. Two of the officers also noticed a door was partially open in a neighborhood where this

was unusual, further suggesting something was amiss. *See* ***Pinkard***, 327 Wis. 2d 346, ¶37 (observing that an open door may indicate that the occupants are unable to close it because they are incapacitated). It is true the officers lacked any report of specific injuries, but police need not have definitive evidence of injury before inquiring into the well-being of a citizen. *See* ***State v. Blatterman***, 2015 WI 46, ¶¶50, 58, 362 Wis. 2d 138, 864 N.W.2d 26; *see also* ***State v. Gracia***, 2013 WI 15, ¶22, 345 Wis. 2d 488, 826 N.W.2d 87.

¶11 Our supreme court upheld a similar warrantless search in ***Pinkard***. The officers received a tip that the occupants of a house were asleep next to drugs, money, and paraphernalia, and that the rear door of the house was open. ***Pinkard***, 327 Wis. 2d 346, ¶32. The officers arrived and found the door open. ***Id.*** Although they repeatedly knocked and announced their presence, no response was forthcoming. ***Id.*** Concerned for the health and safety of those inside, the officers entered the house. ***Id.***, ¶¶1, 32. The court concluded that these facts formed an objectively reasonable basis for the officers' community caretaker function. ***Id.***, ¶¶35-38. The court noted that the officers "could reasonably be concerned" that the occupants had overdosed on drugs or were the victims of a crime, and the lack of a response "heightened" the concern. ***Id.***, ¶¶35, 38. Furthermore, the open door "suggest[ed] that something untoward may have occurred inside the house and that the occupants may require assistance." ***Id.***, ¶37. Just as in ***Pinkard***, we

conclude the officers in the case at bar had an objectively reasonable basis to act as community caretakers.[6]

The Officers' Exercise Of Their Community Caretaker Function Was Reasonable

¶12 Having found that the officers were exercising a bona fide community caretaker function, the final inquiry is whether the officers' actions were reasonable. This inquiry involves balancing the public interest in the search against the degree and nature of the intrusion. ***Id.***, ¶41. "The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable." ***Kramer***, 315 Wis. 2d 414, ¶41. When balancing the public interest we consider the following factors:

> (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. (quoting ***State v. Kelsey C.R.***, 2001 WI 54, ¶36, 243 Wis. 2d 422, 626 N.W.2d 777).

[6] Ziegenhagen counters that the officers were not exercising their community caretaker function, but investigating suspected criminal activity because they smelled marijuana. Even if an officer has some subjective law enforcement concerns, he or she is still acting as a community caretaker "if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function." ***State v. Kramer***, 2009 WI 14, ¶36, 315 Wis. 2d 414, 759 N.W.2d 598. The officers here had an objectively reasonable basis to exercise their community caretaking function. The possibility that the marijuana smell sparked some collateral interest in criminal investigation does not change this fact.

¶13 Here, the degree of exigency and public interest weigh in favor of the search. The officers were faced with pressing circumstances—the possibility of an injured and unresponsive woman. Additionally, as Ziegenhagen concedes, the public has a substantial interest in police ensuring the safety of citizens who may be crime victims.

¶14 The attendant circumstances likewise indicate that the search was reasonable. The officers did not control the time or place of the search. That was dictated by the 911 call. Although an intrusion into a home is significant, the degree of force used by the officers was entirely appropriate to serve their community caretaking function. *See* ***Matalonis***, 366 Wis. 2d 443, ¶62. The officers did not break down the door and barge in; they walked around the house and made several attempts to get the attention of anyone inside first. It was only after this, and in concern for the woman's safety, that they entered through the already open door and searched the house.

¶15 It is true that this search involved a home rather than a vehicle. This, however, is only relevant to show that Ziegenhagen had a "heightened privacy interest in preventing intrusion into [his] home." *See* ***Pinkard***, 327 Wis. 2d 346, ¶56. The mere fact that a search involves a residence does not invalidate it. *See* ***id.***

¶16 Although the officers could have obtained a warrant or interviewed the witnesses further, neither option would have been feasible. The officers briefly questioned the neighbor who made the 911 call and talked to witnesses outside. These conversations raised concerns of an injured woman. There is no requirement or reason to conclude that witnesses must be examined in depth before attempting to help a potentially injured person. Based on the information

they had, a search was the most reasonable course of action. *See* ***id.***, ¶58 (explaining that pursuing other options was not feasible "in light of the exigency perceived by the officers").

¶17 Balancing these factors, we conclude that the officers exercised their community caretaker function in a reasonable manner. The officers were presented with the possibility of an injured and unresponsive woman inside Ziegenhagen's house. The officers' options were to delay, risking injury to the woman, or act quickly to determine her status. They reasonably chose the latter. If the officers had delayed entering, "the community would have understandably viewed the officers' actions as poor police work." ***Id.***, ¶59.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5..