

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 11, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal Nos. 2017AP490  
2017AP491**

**Cir. Ct. Nos. 2016TR3046  
2016TR3047**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SIERRA ANN DESING,**

**DEFENDANT-APPELLANT.**

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APPEALS from an order of the circuit court for Walworth County:  
PHILLIP A. KOSS, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.<sup>1</sup> Sierra Ann Desing appeals from an order finding her guilty of first-offense operating a motor vehicle while intoxicated and

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

with a prohibited alcohol concentration (PAC), and she challenges the denial of her motion to suppress evidence on grounds of an unlawful entry and search of her home. Because we conclude that the entry and search were lawful under the community caretaker exception to the warrant requirement, we affirm.

## BACKGROUND

### *The Factual Circumstances*

¶2 On May 28, 2016, at 7:26 a.m., a 911 call was placed in Walworth County, Wisconsin. The 911 caller, who identified himself, stated that a white Chevy Impala had pulled over on the side of State Highway 20. “We stopped, there was a woman on the side of the road in her car and she was hanging out of the side of the door and ... she said she was ok and we took off.” The caller then saw the Impala back on the highway driving recklessly, “all over the road,” and at a high rate of speed. He followed the car to a residence and then left the scene.

¶3 Walworth County dispatch directed Sheriff’s Deputies Alex Torres and Gerald Post to the address, advising that the reckless driver “[l]ooked like she was getting sick on the side of the road.” Torres later wrote in his report that he was “dispatched to a possible drunk driver ... Caller also stated that the driver had pulled over and was vomiting on the side of the road.” Post later wrote in his report that he was dispatched to a “reckless driver” who had “pulled over onto the side of the roadway and the driver was sick.”

¶4 About five minutes after dispatch, Post arrived on scene and saw the Impala parked in the driveway. He began knocking on the front door “pretty hard” and announced “sheriff’s department” in a voice that “progressively got

louder.” Post did not hear anything and did not see anyone until Torres arrived moments later.

¶5 Upon arrival, Torres saw that Post had already arrived and was knocking on the front door. Torres noted that the Impala was still warm. He went to the back of the residence, saw the back screen and glass patio door wide open, and a dog running loose and barking at him. Familiar with the upscale neighborhood, Torres found this to be unusual, particularly for early in the morning. He loudly identified himself as a sheriff’s deputy. He received no response. Because of the 911 call, the report that the driver may have been sick, the open back door, and the loose dog, Torres decided to enter the residence to check on the condition of the driver.

¶6 While Post was knocking, he saw through a front window that Torres was inside and he could hear Torres announcing his presence. Post went to the back to assist him.<sup>2</sup> Post was also concerned about Desing’s well-being, knowing about the report of sickness, having received no response from anyone inside, and having now been told by Torres about the wide open door.

¶7 Not finding anyone on the first floor, Torres went downstairs and located one female in bed, who was later identified as Desing. Torres asked Desing if she was okay and able to stand up and talk with him upstairs. She responded affirmatively. Torres told her about the report of vomiting, to which

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<sup>2</sup> At the evidentiary hearing, Torres testified that, as he entered the residence, he saw no one and then “[a]t that point in time Deputy Post arrived ... and we started searching the house.” Torres later testified that he did not go into the residence until Post came to the back, because “[w]e don’t go [into] a house by ourselves.”

she replied that she was sick and might have food poisoning, but she refused medical care. Desing was arrested and cited for operating a motor vehicle while under the influence of an intoxicant, WIS. STAT. § 346.63(1)(a), and for operating a motor vehicle with a PAC, § 346.63(1)(b).

*The Circuit Court's Denial of Desing's Motion to Suppress*

¶8 After holding an evidentiary hearing on Desing's motion to suppress on grounds of an unlawful entry and search, the circuit court ruled that the deputies properly entered the residence under the community caretaker exception to the warrant requirement. The court made the following findings about the entry:

[T]he officers go to the home. They get there. They knock. They increase the loudness of the knocks and the yelling, and there is no response.

Officer Torres apparently arrives as Post is doing that at the front door. Goes to the back door. It's open. Now, I understand people can leave their doors open. Nothing illegal about that. But it is odd that at 7:30 in the morning, a door is open .... Most people leave the screen door shut.

He goes in. You're right, counsel, it's not clear if he announces before he goes in, as he's walking in, after he's in. But we've already got Post at the front door yelling and knocking and nobody answers.

So they go in without a warrant.

¶9 The court addressed whether the deputies were exercising a community caretaker function:

[W]e've got somebody who for some reason is all over the road, needs to pull to the side.... [W]e would all assume, especially coupled with the driving behavior, that person is sick. Sick enough that she can't maintain control of her vehicle. Sick enough that she can't make it to wherever she needs to be to not pull over and throw up there.

Because I do think that's a reasonable inference. You don't have to prove beyond a reasonable doubt that she was sick, just that it's reasonable.

....

Both are very concerned that this person is sick. It may be by alcohol. It may be, as Ms. Desing said, by food poisoning. But they are going in because that is their concern.

¶10 The court acknowledged that Desing told the 911 caller that she was okay, but it did not find that persuasive:

She did say "I'm okay" to the caller ....

Still, the caller didn't go: Oh, you're okay. And then not call in. They still were concerned enough that they called in after she says that she's okay. They're obviously not accepting of that explanation.

And the world is full of people who get sick who say: I'm okay. Given that her behavior still continued erratically, whether it's from illness or alcohol or both, I think it is proper to go on.

¶11 The court concluded that the community caretaker exception applied and denied the motion. Desing was found guilty on both citations. Desing appeals.

## DISCUSSION

### *Standard of Review*

¶12 When reviewing the denial of a motion to suppress, we will uphold the circuit court's findings of fact unless clearly erroneous. *State v. Maddix*, 2013 WI App 64, ¶12, 348 Wis. 2d 179, 831 N.W.2d 778. Applying constitutional principles to the facts, however, is a question of law that we review de novo. *Id.* Accordingly, we will "independently review whether an officer's community

caretaker function satisfies the requirements of the Fourth Amendment and Article I, Section 11 of the federal and state Constitutions.” *Id.* (citation omitted).

*The Community Caretaker Exception*

¶13 Warrantless searches of private residences are presumptively unreasonable. *State v. Horngren*, 2000 WI App 177, ¶8, 238 Wis. 2d 347, 617 N.W.2d 508. Searches that are undertaken, however, by police as a community caretaker to protect persons and property may be constitutionally permitted without a warrant. *State v. Pinkard*, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592. “An officer exercises a community caretaker function ‘when the officer discovers a member of the public who is in need of assistance.’” *Id.*, ¶18 (citation omitted). This exception is the same under both the state and federal constitutions. *Id.*, ¶14.

¶14 To determine whether a warrantless home entry is permissible under the community caretaker exception, the court must answer the following: (1) whether a search or seizure under the Fourth Amendment has occurred;<sup>3</sup> (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 privacy such that the community caretaker function was reasonably exercised within the context of a home. *Pinkard*, 327 Wis. 2d 346, ¶29.

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<sup>3</sup> There is no dispute, and we see no error, with the circuit court’s finding that a search had occurred.

*The Deputies Were Exercising a Bona Fide Community Caretaker Function*

¶15 In order to be a bona fide community caretaker function, the police must have an “objectively reasonable basis” to believe that a person needs assistance. *State v. Gracia*, 2013 WI 15, ¶17, 345 Wis. 2d 488, 826 N.W.2d 87. When making this determination, we look at the totality of the circumstances at the time of the conduct. *Id.* The officer’s subjective intent is relevant, but is only one factor to consider. *Id.*, ¶21.

¶16 Desing argues that the deputies did not have an objectively reasonable basis to believe that she needed assistance, pointing out the following: the 911 caller never said that Desing was “vomiting” or even “sick”; Desing told the caller that she was okay and drove off; Desing arrived at her home, properly parked the car, and entered the residence without any evidence of medical distress; and the deputies saw no indications outside of the home—like blood or vomit—of a medical emergency.

¶17 We conclude that there was a reasonably objective basis to believe that Desing was in need of assistance. The sight of Desing on the roadside was concerning enough to prompt another driver to stop and check on her. That she said that she was okay, while relevant, belies her circumstances—pulled off the highway and hanging out of her car. The caller’s concern rose to alarm when he saw her weaving on the highway at a high rate of speed, causing him to call 911 and follow her home. That the caller did not use the specific words “vomiting” or “sick” is not pertinent, as his description of the circumstances reasonably implied that Desing was vomiting, sick, or otherwise in distress.

¶18 The deputies knew that they were being dispatched pursuant to an emergency 911 call to a residence of a reckless driver who had showed signs of being ill and possibly vomiting. What they found only heightened their concern. The back patio door was wide open and a dog was loose and barking loudly. No one responded to Post as he continued to knock and call out loudly. These circumstances present a reasonably objective basis to be concerned for Desing's health and safety.

¶19 Desing asserts that the entry and search were unlawful per *State v. Ultsch*, 2011 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505. In that case, an SUV struck a building and drove off. Police found the SUV a couple of miles away at the foot of a quarter-mile-long driveway. The left fender was damaged. The driver had walked up the long snow-covered driveway. A man drove down from the house, identified himself to the officers as the homeowner, and said that the driver was his girlfriend who was in the house "possibly in bed or asleep." He indicated no cause for concern about her well-being. The officers saw no blood on the driveway. After receiving no response to his knocking on the front door, an officer found the door unlocked and entered. In a rear bedroom, the officer found Ultsch sleeping, woke and questioned her, took her to the sheriff's department, determined she was intoxicated, and arrested her.

¶20 Ultsch moved to suppress all evidence obtained from the entry and arrest. The circuit court found that the officers' entry was justified under the community caretaker exception. The court of appeals reversed, concluding that

the officers were not exercising a bona fide community caretaker function. *Id.*, ¶22. The court reasoned as follows:

[T]he condition of the vehicle, viewed alone, was not such as to give rise to concern for Ultsch’s safety. The damage, though significant, was limited to the vehicle’s left front fender. The airbags had not deployed, the windshield was intact, there was no damage to the passenger compartment or to the driver’s side door, and there was no blood or other indication of injury.

*Id.*, ¶19. In addition, Ultsch’s boyfriend had been with her and expressed no worry about her condition. *Id.*, ¶20. But for the fact that she had recently been in a collision, there was “no indication whatsoever that Ultsch might need assistance.” *Id.*, ¶21.

¶21 Desing argues that, as in *Ultsch*, the deputies could not reasonably believe that she needed assistance. They only knew that she had pulled off the highway, leaned out of the car, and drove recklessly home. Otherwise, she parked her car properly and went inside leaving no trace of a medical emergency. Desing equates the boyfriend in *Ultsch* with the 911 caller here. The boyfriend saw Ultsch and did not indicate any need for assistance, undercutting any concern for her safety. The 911 caller stopped to aid Desing, but rather than ask for assistance, Desing told him that she was okay. The caller did not tell the dispatcher that Desing was sick or needed help. These circumstances, Desing asserts, undercuts any concern for her health or safety.

¶22 *Ultsch* does not support Desing’s argument. The only circumstance that caused concern for Ultsch was localized damage to the still-functioning car. Whatever concern arose from that damage dissipated after it was known that Ultsch had walked a long snow-covered driveway and was just checked on by her

boyfriend, who did not indicate any need for help. Whereas Ultsch had never been seen or described as ill or in need of help, Desing had been seen pulled off of the highway and hanging out of her car—an unusual event that evinces urgency and distress. The boyfriend in *Ultsch* expressed no worry; the 911 caller expressed nothing but worry. While there were no factors beyond the car damage to cause concern in *Ultsch*, the concern for Desing heightened with the reckless driving, wide open back door, barking dog running loose, and nonresponsiveness to loud knocking and voices. Finally, had Ultsch needed assistance, the boyfriend could have provided it. Here, no one was home to assist Desing or to talk with the deputies.

*The Deputies Exercised Their Community Caretaker Function Reasonably*

¶23 Having determined that the deputies initiated their entry and search as community caretakers, we now must determine whether they exercised their community caretaker function reasonably. This requires a balancing of interests: whether the public interest outweighs the intrusion upon the individual’s privacy such that police exercised their community caretaker function reasonably within the context of a home. *Pinkard*, 327 Wis. 2d 346, ¶29. In balancing these interests, we consider:

- (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.*, ¶42 (citation and footnote omitted).

¶24 With regard to the first factor, when police cannot ascertain a home occupant's condition and they reasonably conclude that assistance is needed, the public has a substantial interest that police ensure the safety of the occupant. *State v. Matalonis*, 2016 WI 7, ¶59, 366 Wis. 2d 443, 875 N.W.2d 567. Here, the deputies reasonably concluded that their assistance was needed to determine that Desing was all right, i.e., to ensure that she had not fallen, had not aspirated on her own vomit, had not gone unconscious, etc. The situation was exigent. The deputies were not checking out a mere noise or loitering complaint. Desing had just appeared ill or in distress while stopped on the highway, driven home in dangerous fashion, left the back door wide open, let the dog loose, and was unresponsive to Post's loud knocks and announcements.<sup>4</sup> Quick medical assistance may have been needed.

¶25 The factor of attendant circumstances supports the reasonableness of the search. The deputies did not choose the time or location, as they were responding to a 911 call directing them to the residence. The deputies limited their search to finding Desing. We agree with the circuit court: "They're not rummaging through drawers; they're not going through the refrigerator; they're not looking for drugs or weapons. They're wondering where this person is." Given that they conducted their search only to find Desing, the degree of overt authority and force displayed was appropriately minimal. They had knocked and identified themselves several times. There is no evidence that doors were forced open, personal property disturbed or confiscated, or weapons drawn.

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<sup>4</sup> As with the circuit court, which did not rely on the inconsistent testimony as to Torres's entry, we rely only on the testimony regarding Post's efforts.

¶26 With regard to the third factor, the entry and search were of Desing’s home, not her car, so the diminished expectation of privacy of one’s automobile is not involved. See *Ultsch*, 331 Wis. 2d 242, ¶11. But we recognize that, because of the heightened sense of privacy of one’s home, a warrantless search of a residence is “more suspect” than a search of a car. *Id.*, ¶12 (citation omitted).

¶27 The fourth factor to consider is the alternatives to the intrusion made by the deputies. Given the time constraints, a warrant was not feasible. As noted, the situation was exigent. The purpose of the entry and search was to assist Desing immediately. Although the deputies could have tried calling Desing by phone, that option would likely have been ineffective. Because Desing had not responded to loud knocking and the deputies’ voices, there is little reason to believe that she would have responded to a phone call. See *Pinkard*, 327 Wis. 2d 346, ¶58 (because defendant was known to be unresponsive, a phone call would have been a “fruitless exercise”). Also, unlike in *Ultsch*, where the boyfriend was available to speak with the officers, there was no one to whom the deputies could speak with or ask to check on Desing.

¶28 In sum, the circumstances show (1) a significant public interest and an exigent situation, (2) a significant intrusion of a private residence, but one narrowed to the purpose of the intrusion, and (3) few, if any, feasible and effective alternatives. On balance, the deputies’ exercise of their community caretaker function was reasonable because “the public interest in the search outweighed [Desing’s] privacy interests.” *Gracia*, 345 Wis. 2d 488, ¶30.

## CONCLUSION

¶29 We conclude that the deputies were undertaking a bona fide community caretaker function when they entered and searched Desing's home. We further conclude that they performed the entry and search in a constitutionally reasonable manner. We therefore agree with the circuit court's denial of Desing's motion to suppress and affirm the order finding her guilty.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

