COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2657-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KNOVA K. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Reversed and cause remanded with directions*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Knova K. Green appeals from the judgment of conviction entered following his guilty plea to one count of possession of cocaine with intent to deliver, contrary to WIS. STAT. §§ 961.16(2)(b)1 and 961.41(1m)(cm)1, and the order denying his postconviction motion seeking to

withdraw his guilty plea. On appeal, Green argues that the trial court erred in denying his motion to suppress the cocaine found during a warrantless search of his house. We agree with Green and, therefore, we reverse.

I. BACKGROUND.

¶2 According to Green, in December of 1998, he drove up to his house, parked his car in the driveway and got out. Green did not enter his house. Instead, he decided to visit a friend who lived in an apartment across the street. Green ran across the first two traffic lanes to avoid oncoming traffic and stopped on the median, which separates eastbound and westbound traffic. While standing in the median waiting for traffic on the other side to clear, Green noticed two men approaching him. One of the men ran across the street to the median where Green stood and demanded that Green hand over his car keys. Green denied having any keys, but the man said he knew Green was lying because he had just watched Green get out of his car. Green noticed the handle of a gun protruding from the man's clothes and decided to run. When Green began to run, the man with the gun chased after him.

¶3 Green ran down the street, through a yard and into an alley where the man with the gun caught him and twice hit him with the gun in the back of the head. Green continued to tell the man that he did not have his car keys with him. An altercation ensued during which Green was shot several times. While Green struggled with the first man, the second man arrived, put a gun to Green's head and ordered him to stop struggling. The first man stood up, snatched Green's necklace and ran. The second man then asked for Green's car keys, but when Green told the man he did not have his keys with him, the man grabbed Green's watch and ran away.

¶4 After his attackers ran off, Green yelled for help and called 911 from his cell phone. A neighbor who lived near the alley saw Green make a call on his cell phone, and another neighbor heard Green call 911. As Green called 911, he walked out of the alley telling the 911 dispatcher that some men had tried to take his car and he had been shot. One of the neighbors, Nathaniel Hervey, asked his wife to call 911 as well. After watching Green walk out of the alley, Hervey went out to help Green. Green told Hervey that he lived across the street and that he had been shot.

¶5 Sergeant Michael Ziarnik was dispatched to the scene where he spoke to both Green and Hervey. According to Sergeant Ziarnik, Green told him that he had been shot near his house when "[s]ome guys" tried to take his car keys. However, Sergeant Ziarnik stated that Hervey told him that he heard the gunshots in the alley next to his home and he saw Green leave the alley following the altercation, but he did not see the shooters. Hervey subsequently told another detective that he had heard multiple shots, saw Green walk out of the alley talking on a cell phone, and then he saw Green collapse.

¶6 After Green was taken to the hospital, Sergeant Ziarnik sent several officers to investigate the alley and the area around Green's home. One of the officers returned from the alley and reported that there were several bullet casings in the alley and a blood trail leading from the alley to the spot where Green collapsed. The officers sent to Green's home were told that no one knew whether anyone else besides Green lived in the house. These officers found a set of keys on the lawn in front of Green's house approximately three to five feet from his car. They also found a knit cap on Green's front lawn and another cap in the median. Although the lights were on inside Green's house, the door was locked and there was no answer. The officers did not find any blood near the car or the house; there

was no sign of a struggle there, no damage to the car or the landscaping, and no sign of forced entry into the house.

¶7 Sergeant Ziarnik instructed the officers to secure the area and Green's home. Using the keys they discovered near Green's car, the officers opened the front door, setting off the alarm, and entered his house. After the officers shut off the alarm by disconnecting the wires and searched Green's house, the officers found cocaine in an open bedroom dresser drawer, and more cocaine, as well as other drug paraphernalia, in an open kitchen cupboard. Green was subsequently arrested and charged with possession of cocaine with intent to deliver.

¶8 Green filed a motion to suppress the cocaine found in his home. The trial court denied Green's motion and he pled guilty to the charge. Green then filed a postconviction motion seeking to withdraw his guilty plea. Following a hearing, the trial court denied Green's postconviction motion.

II. ANALYSIS.

¶9 On review of the trial court's denial of a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***State v. Williamson***, 113 Wis. 2d 389, 401, 335 N.W.2d 814 (1983). Whether a search is valid, however, is a question of constitutional law which we review *de novo*. ***State v. Guzman***, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

¶10 "The Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution both protect against unreasonable searches and seizures." ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). The

Fourth Amendment was primarily intended to protect against physical entry into the home, *see* ***id.*** at 195-96, and, therefore, warrantless searches "are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions," ***Katz v. United States***, 389 U.S. 347, 357 (1967) (footnotes omitted). "These exceptions have been 'jealously and carefully drawn,' and the burden rests with those seeking exemption from the warrant requirement to prove that the exigencies made that course imperative." ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983) (citations omitted).

¶11 Thus, a warrant was required to enter into and search Green's home, unless the entry was justified under an exception to the warrant requirement. We can find no exception to the warrant requirement that would permit the officers to enter Green's house without a warrant. Green argues that the officers' warrantless entry does not fit within an exception to the warrant requirement because their entry was not supported by either probable cause, exigent circumstances or an emergency; nor were the officers acting in a community caretaker role. We agree.[1]

¶12 The officers' warrantless entry into Green's home was not supported by probable cause to believe a crime had been committed or that evidence of a crime would be found in the house. "The Fourth Amendment requires probable cause to support every search or seizure in order to 'safeguard the privacy and

[1] The State concedes that the officers were not acting pursuant to their community caretaker role because the officers' actions were not "'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" ***State v. Horngren***, 2000 WI App 177, ¶9, 238 Wis. 2d 347, 617 N.W.2d 508 (citation omitted). We agree and, therefore, we are satisfied that the community caretaker exception to the warrant requirement does not apply to this case.

security of individuals against arbitrary invasions by government officials.'" ***State v. Hughes***, 2000 WI 24, ¶19, 233 Wis. 2d 280, 607 N.W.2d 621. "The quantum of evidence required to establish probable cause to search is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***Id.*** at ¶21.

¶13 We are satisfied that the evidence presented at the suppression hearing did not establish a "fair probability" that evidence of a crime would be found in Green's home. Sergeant Ziarnik testified that he believed there could be additional victims in Green's house or that the assailants themselves could be hiding inside; and the State now argues that this constituted probable cause to search Green's house. We reject this argument. There was no evidence linking Green's home to the commission of a crime. Green's car keys and a knit cap were found on the lawn of his home, but Green was shot in an alley across the street from his house. Finding the car keys and a cap near his home did not suggest that additional victims were in the home or that the assailants entered the home. The fact that the police set off the alarm when they entered the home further supports our conclusion that no additional victims of the assailants were in the home. In order for the assailants to be hiding in the house, they would have had to reset the alarm, lock the door, and then throw the keys back onto the front lawn.

¶14 We conclude that the quantum of evidence presented at the suppression hearing did not establish probable cause to search Green's house. Sergeant Ziarnik explained that he believed there was a conflict between Green's recall of the events and the other witnesses' recall. He ordered the house searched because Green stated he was shot near his home, while several witnesses stated they heard gunshots in the alley next to their homes and across the street from Green's home, and they saw Green emerge from the alley shortly after the shots

were fired. Sergeant Ziarnik's deductions leading to his decision to search the home were not reasonable. The investigation revealed a significant amount of blood in the alley, as well as a blood trail leading from the alley to the spot where Green collapsed. The officers also found several bullet casings in the alley. The officers found no blood, no blood trail, no bullet casings or any sign of a struggle near Green's car or near his house. Green's house was locked and there was no sign of forced entry. Sergeant Ziarnik's testimony that he was concerned there were additional victims who might be inside Green's house was somewhat disingenuous, as no search was conducted of the houses adjacent to the alley where the shooting occurred, and bullet casings and substantial amounts of blood were found in close proximity to these houses. Under the circumstances, it was unreasonable for the police to believe that other victims could be found in the house or that the assailants where hiding there. There was no "fair probability" that evidence of a crime would be found inside the home. No evidence suggested Green's house was involved with this crime. Therefore, we are satisfied that the officers did not have probable cause to search Green's home.

¶15 Moreover, the facts of this case did not present the officers with either exigent circumstances or an emergency to justify a warrantless search of Green's house. Our supreme court has recognized four circumstances which "constitute the exigent circumstances required for a warrantless entry." ***Id.*** at ¶25. "Those circumstances are (1) an arrest made in 'hot pursuit,' (2) a threat to safety of a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee." ***Id.*** None of these circumstances were present here.

¶16 Nor is the emergency doctrine applicable. Under the emergency exception to the warrant requirement, police officers may enter a private residence without a warrant:

> "to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property and provided further, that they do not enter with an accompanying intent to either arrest or search."

State v. Kraimer, 99 Wis. 2d 306, 314, 298 N.W.2d 568 (1980) (citation omitted). Based on the circumstances here, the officers did not have reasonable grounds to believe that such an emergency existed. As noted above, the officers did not find any signs of a struggle near the house — there were no traces of blood, no bullet casings, no damage to the car or the landscaping around the house, and no sign of forced entry into the house. Further, there was no evidence, such as broken windows, to suggest that anyone had been injured while watching the altercation from inside the house.

¶17 For these reasons, we conclude that the officers' search of Green's house was unreasonable and, therefore, that the trial court erred in denying his motion to suppress the evidence secured as a result of the unreasonable search. Accordingly, the trial court's decision is reversed and remanded with directions to vacate the judgment of conviction and grant the motion to suppress.

By the Court.—Judgment and order reversed and cause remanded with directions.

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