COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2011AP813-CR
2011AP814

Cir. Ct. Nos. 2010CT424
2010TR4428

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

NO. 2011AP813-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN G. GRACIA,

DEFENDANT-APPELLANT.

NO. 2011AP814

IN THE MATTER OF THE REFUSAL OF JUAN G. GRACIA:

CITY OF MENASHA,

PLAINTIFF-RESPONDENT,

V.

JUAN G. GRACIA,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] Juan G. Gracia appeals from a judgment convicting him of operating a motor vehicle while intoxicated, fourth offense, and an order finding that he unreasonably refused to submit to a test for intoxication. Specifically, he challenges the trial court's denial of his motion to suppress evidence obtained after police officers entered his bedroom over his objections. They did so only after discovering that a vehicle that he had been driving was involved in a traffic accident. A traffic signal pole had been knocked down at the scene of the crash, which led the officers to believe that Gracia might have sustained injuries. We affirm the trial court's decision—the entry was justified by the police community caretaker function. We also affirm the trial court on the second issue Gracia raises—a collateral attack on his 1998 conviction based on his allegedly improper waiver of counsel at that time.

¶2 Because this case involves two issues with completely different relevant facts and law, we will address each issue in turn with its own fact section.[2]

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statute are to the 2009-10 version unless otherwise noted.

[2] This case came to us as one appeal from the refusal order and a second appeal from the judgment of conviction for operating a motor while intoxicated, fourth offense. The State's motion to consolidate the two cases was granted in an order dated September 26, 2011.

Facts—Police Entry into Bedroom

¶3 We begin with the facts from the suppression/refusal hearing[3] in the 2010 case. During the course of his shift on February 26, 2010, an investigating officer with the City of Menasha Police Department came across the aftermath of a traffic accident and observed a traffic signal pole lying in the roadway near an intersection in Menasha. The officer saw a mangled license plate lying next to the downed traffic signal pole. Information linked to the license plate number returned a name and address and identified the vehicle as a 1999 Buick Regal LS. Further investigation yielded information regarding Gracia's location and the officer went there.[4]

¶4 Upon arrival, the officer observed a white Buick Regal parked in front of a trailer home. The investigating officer noted that the vehicle had extensive front end damage; the front of the vehicle was caved in. There was also yellow paint transferred onto the vehicle, which the officer observed was consistent with hitting the yellow traffic signal pole. The officer could also see a pair of eyeglasses and a hat on the passenger's seat inside the vehicle. Accompanied by three assisting officers, the investigating officer "tried to make contact" at the trailer home but no one answered the door.

[3] The trial court held a joint suppression and refusal hearing because the only issue for the refusal hearing was the lawfulness of the police entry into the bedroom.

[4] The license plate number was traced to "Jesus Gracia" and an address on Jefferson Street. Police records had a different address for "Jesus Gracia," on Elm Street. Police went to both addresses but did not find the vehicle. While investigating those two residences, police were told that the Gracias might live on First Street. Then, people living at the First Street address told officers that the driver of the vehicle possibly lived on Wendy Way.

¶5 The officers were about to leave when Gracia's brother arrived on the scene. Gracia's brother identified himself and acknowledged that he lived at the trailer home with Gracia. The officers told the brother about the accident and explained that they were concerned that the driver of the Buick might be injured. The brother confirmed that Gracia normally drives the white Buick Regal and that Gracia was probably inside the trailer home. The officers asked Gracia's brother if they could go inside to ensure that Gracia was "okay" considering the damage to the vehicle. The investigating officer testified that "clearly, someone could have injuries from hitting a pole like that." Gracia's brother said, "[w]ait a minute," and then went inside the trailer home. Gracia's brother then came back out of the trailer home and gave the officers permission to enter the trailer home. Once inside the trailer home, Gracia's brother led the officers toward Gracia's bedroom door.

¶6 Gracia was in his bedroom with the door closed and locked. Gracia was yelling to his brother from inside his bedroom, insisting that people "go away." Without request or suggestion from the officers, Gracia's brother rammed his shoulder through the bedroom door, smashing it open. After the bedroom door was open, the officers went inside the bedroom to check on Gracia and to investigate the reason behind the traffic crash.

¶7 Inside the bedroom, the officers saw Gracia lying on the bed. The investigating officer attempted to speak to Gracia, but had difficulty understanding what Gracia was saying. While in his bedroom, Gracia made statements to the officers indicating that he had driven his vehicle. The investigating officer could smell the strong odor of intoxicants emanating from Gracia's person, and he

testified that he believed Gracia to be highly intoxicated.[5] The officers then arrested Gracia for operating a motor vehicle while intoxicated.

¶8 At the suppression hearing, the State argued that the entry was justified by the community caretaker exception to the prohibition against warrantless entries into residences, and the trial court agreed. Gracia appeals, claiming that the officers' entry into Gracia's bedroom was not conduct arising out of the police community caretaker function or any other exception to the warrant requirement.

Discussion—Police Entry into Bedroom

¶9 When reviewing the trial court's decision on a motion to suppress[6] evidence, we will uphold a trial court's findings of historical fact unless they are clearly erroneous. ***State v. Pinkard***, 2010 WI 81, ¶12, 327 Wis. 2d 346, 785 N.W.2d 592. Then, "we 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.*** In this case, the relevant facts are not in dispute—the only question is whether the police entry into Gracia's bedroom was lawful.

[5] According to Gracia, "[t]he parties essentially stipulated the defendant was intoxicated once contact was made—the only issue was whether the officers had the right to enter that bedroom." We do not, therefore, go into detail as to evidence the police may or may not have had to conclude that Gracia was intoxicated.

[6] The State's burden of persuasion at a suppression hearing is higher than the burden of persuasion at a refusal hearing. *See* ***State v. Wille***, 185 Wis. 2d 673, 681-82, 518 N.W.2d 325 (Ct. App. 1994). Because we affirm the trial court's denial of Gracia's motion to suppress evidence, which carries the higher burden, we need not and do not address the refusal issue separately.

¶10 "Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the Fourth Amendment." ***Id.***, ¶13 (citation omitted). "The United States Supreme Court and courts of this state have recognized that a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures." ***Id.***, ¶14. 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).

¶11 We apply a three-step analysis to the officers' circumstances as they existed at the time of the officers' conduct to resolve whether the officers' conduct lands within the reach of the community caretaker exception to the warrant requirement under the Fourth Amendment. The factors we analyze are:

> (1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (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 the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.

Id., ¶29. When we look at the third factor, whether the officers were reasonable in their exercise of a bona fide community caretaker function, "we balance the public interest or need that is furthered by the officers' conduct against the degree and nature of the intrusion on the citizen's constitutional interest." ***Id.***, ¶41. Four factors are considered when weighing these interests:

> (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.

¶12 Gracia states in his reply brief that his case is like ***State v. Ultsch***, 2011 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505 (2010), where we held that the community caretaker function was not satisfied. In ***Ultsch***, the police were called to the scene of an accident where the wall of a brick building was caved in but the car had driven away. ***Id.***, ¶2. The car was found at the beginning of a one-quarter mile long driveway to a residence, and the driveway was covered in snow. ***Id.***, ¶¶2-3. Police noted that the vehicle had some damage to its front left fender, but no other damage was observed. ***Id***., ¶¶2-3, 19. Police ran into a person leaving the house, who said the driver of the damaged car was his girlfriend and also stated that she was "possibly in bed or asleep." ***Id.***, ¶3. After that person left, police drove up the driveway and entered the house themselves. ***Id***. Before doing so, they saw nothing that would indicate an injury, such as blood in the snow. ***Id.*** Eventually, they walked to a bedroom where they found Ultsch sleeping. ***Id.***, ¶4. For the reasons that follow, ***Ultsch*** is clearly distinguishable from this case.

¶13 Applying the community caretaker factors to this case, no one disputes that the police entry into the bedroom was a search and that the Fourth Amendment was implicated. *See* ***id.***, ¶14. This is likely because, even though the police had consent to enter and consent to go the bedroom door, and even though the brother forced the door open and not the police, it is the police who stepped across the threshold over the objection of the defendant.[7] So, the question

[7] The United States Supreme Court has recognized that when one co-tenant consents to a police search over the objection of a second, present co-tenant, police must heed the objections of the second co-tenant. ***Georgia v. Randolph***, 547 U.S. 103, 114-15 (2006); *see also* ***State v. St. Martin***, 2011 WI 44, ¶4, 334 Wis. 2d 290, 800 N.W.2d 858.

becomes whether the warrantless search was justified by the community caretaker exception, and we go to the second factor in that analysis.

¶14 To decide whether the police were engaged in a bona fide community caretaker function, we must determine whether the officers have articulated an objectively reasonable basis for the community caretaker function based on the totality of the circumstances. *See* ***Pinkard***, 327 Wis. 2d 346, ¶31. In concluding that the second factor was not met, the ***Ultsch*** court noted that the damage to the vehicle was significant, but limited to the front left fender, and there was no evidence that Ultsch was injured. ***Ultsch***, 331 Wis. 2d 242, ¶19. It emphasized that there was no blood in the snow, and the police did not ask the man leaving the residence whether Ultsch needed assistance; nor did he mention that she did. ***Id.***, ¶¶20-21.

¶15 At first glance, this would seem to be an ***Ultsch*** case because the investigating officer's initial reason for trying to find the driver was the same—an accident between a motor vehicle and an immovable object, which accident may have caused significant damage to the vehicle. But that's where the similarity ends. In ***Ultsch***, the officers encountered a man leaving the residence. They did not ask nor did they say that they were concerned with the well-being of the driver. They simply wanted to know where she was and, after the man indicated that the driver was his girlfriend and was probably asleep, he left. Then, the police just barged in.

¶16 Here, however, the investigating officer explained why they were there and also that they were concerned that the driver might be injured. They wanted to find out if that was so. Unlike the police in ***Ultsch***, an officer in this case testified that he asked Gracia's brother right away to check on his condition,

and waited outside until the brother told the police to come in. So, it is obvious that Gracia's brother was concerned enough about Gracia's well-being to invite the police in. He was so concerned that, despite Gracia's appeal that everyone "go away", the brother instead forced the bedroom door open, without any solicitation by police. This shows us that the police were at the bedroom door for a bonafide reason, to see if Gracia was injured, a concern shared by the brother. The police, therefore, had a right to be in the place they were in. They had indicated their concern that the driver of the vehicle might be injured, asked a family member to check on the driver, were granted entry to the trailer home by consent of a family member and were led by the family member to the driver's bedroom door. They did not force the door open. The brother did. The focus therefore was always on checking to see if there was injury; it was done in a sincere, unpretentious manner, much unlike the officers in ***Ultsch***.

¶17 This foregoing discussion also covers part of the third factor analysis of whether the officers were reasonable in their exercise of a bona fide community caretaker function—the attendant circumstances surrounding the search. *See* ***Pinkard***, 327 Wis. 2d 346, ¶¶41-42. The attendant circumstances support the reasonableness of the intrusion.

¶18 In terms of the third factor requirement to balance the public interest against the level of intrusion by looking at the exigency faced by the police and the availability of alternatives to the intrusion,[8] *see* ***id.***, this case is much more like ***Pinkard*** than ***Ultsch***. In ***Pinkard***, officers entered a residence through an open

[8] No automobile was involved in the challenged search in this case, so we need not address that factor.

door "out of concern for the safety of Pinkard and his companion" due to an anonymous tip regarding a possible cocaine overdose. ***Id.***, ¶¶46-47. As the court pointed out, "[i]f Pinkard and his companion had been suffering from a cocaine overdose, a reasonable inference based on these facts, the officers were presented with a significant exigency…." ***Id.***, ¶47. Here, as in ***Pinkard***, the officers entered Gracia's bedroom through an open door out of concern for Gracia's safety, a concern voiced to Gracia's brother from the beginning and a concern obviously shared by his brother. A reasonable police officer, invited into a home by a family member in order to check on another family member's physical condition resulting from a bad accident, should not have to turn down the invitation, should not have to turn away if the family member opens the door for the officer, and should not have to cover his or her eyes and remain motionless when the door is opened. The balance in this case weighs in favor of the intrusion. The police were validly exercising their community caretaker function when they crossed the threshold of Gracia's bedroom.

Facts—1998 Waiver of Right to Counsel

¶19 Next, we recount the facts pertaining to Gracia's second issue—whether his waiver of his right to counsel in a 1998 conviction was knowing, intelligent, and voluntary. In 1998, Gracia entered a no contest plea to an OWI, second offense. At the plea hearing, Gracia acknowledged that he had graduated from high school and that he had attended college for one year. Next, he confirmed his employment and stated that he made $11.50 an hour.

¶20 At that point, the 1998 court made reference to Gracia's choice not to obtain a lawyer at least four times. First, the court stated, "[y]ou were told that because you're charged with something, that you can go to jail for that, you have

the right to have a lawyer represent you?" Gracia replied, "[y]up." The court reaffirmed Gracia's intent: "And, apparently, you decided to go ahead without a lawyer?" Gracia replied, "[y]up." Second, the court discussed the possibility of Gracia hiring a lawyer: "Now, because you make $11.50 an hour, it would be difficult for me to think that you couldn't hire a lawyer, but you may feel that way that you couldn't." Next, the court discussed the possibility of Gracia qualifying for a lawyer: "[Y]ou could see if you qualify for the appointment of a lawyer and if you didn't qualify for a lawyer appointed, then the Court might appoint one for you, but you would have to pay, you know, pay the Court back for that." When asked if Gracia understood these two possibilities, Gracia replied, "[y]es." Lastly, the trial court asked: "And at least, as of the moment, you plan to go ahead on your own, you haven't looked into hiring a lawyer?" Gracia replied, "[n]o, I haven't."

¶21 In 2010, after Gracia moved to collaterally attack his second OWI conviction in order to reduce the penalty stemming from the case at bar, the trial court held an evidentiary hearing. At that hearing, Gracia testified that in 1998 he was caught drinking and driving. The State recommended the minimum jail time, so Gracia told the 2010 court that since he was guilty and the sentence could not be reduced, he believed there was no reason to have an attorney. He was aware that an attorney would have cost him money.

¶22 After the 2010 hearing, the trial court found that Gracia had validly waived his right to counsel, stating that Gracia had "made the conscious decision" not to hire a lawyer. The court pointed to incidents where Gracia indicated that he knew the potential benefits of hiring a lawyer, but declined to do so because of the associated costs. Gracia appeals.

Discussion—1998 Waiver of Right to Counsel

¶23 When the State uses prior convictions for sentence enhancement purposes in an OWI conviction, a defendant may collaterally attack the prior conviction based on an invalid waiver of the right to counsel in the previous case. *See* ***State v. Ernst***, 2005 WI 107, ¶¶2, 22, 283 Wis. 2d 300, 699 N.W.2d 92. The defendant must first make a prima facie showing that his or her right to counsel was violated. ***Id.***, ¶25. For there to be a valid collateral attack, "we require the defendant to point to facts that demonstrate that he or she 'did not know or understand the information which should have been provided' in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel." ***Id.*** (citations omitted). Once the defendant has made a prima facie case, the State has the burden to prove, by clear and convincing evidence, that the waiver was valid. ***Id.***, ¶27. The record must show that an accused was offered counsel, but intelligently and understandingly rejected the offer. ***Id.***, ¶25.

¶24 Here, the parties agree that Gracia made a prima facie case that his right to counsel was violated in the 1998 conviction. This is so because the court in the 1998 proceeding did not use the formal question-and-answer colloquy regarding waiving the right to counsel that is expected under WIS JI—CRIMINAL SM-30. So, the only question we address is whether the record from the 1998 case—including the 2010 hearing—shows that Gracia knowingly, intelligently, and voluntarily waived his Sixth Amendment right to counsel. That is a question of constitutional fact which we review de novo, but with the benefit of the trial court's analysis. ***Ernst***, 283 Wis. 2d 300, ¶10.

¶25 In ***State v. Klessig***, 211 Wis. 2d 194, 205, 564 N.W.2d 716 (1997), our supreme court discussed what is required for a valid waiver of counsel. In order for waiver to be valid, the record must reflect: 1) the defendant's deliberate choice to proceed without counsel, 2) the defendant's awareness of the difficulties and disadvantages of self-representation, 3) the defendant's understanding of the seriousness of the charge or charges, and 4) the general range of possible penalties that may be imposed. ***Id.*** In this case, the 2010 court found that the totality of the circumstances shows that Gracia's waiver of counsel was valid and based on an appropriate cost-benefit analysis of the cost of an attorney, the proposed sentencing recommendation, and his own guilt.

¶26 We agree with the State and the 2010 trial court that Gracia validly waived his right to counsel in 1998. At that time, the 1998 court informed Gracia on the record that he had a right to an attorney and told Gracia that, if he qualified, he could have an attorney appointed for him by the State. He declined. In the 2010 hearing, he attributed his decision to the fact that he thought that since he had in fact been drinking and driving and since the State was recommending the minimum penalties, an attorney could not do anything for him. He also confirmed that he knew an attorney would cost him money. His reasoning clearly shows that he made a deliberate choice and understood the seriousness of the charge as well as the range of penalties.

¶27 Yet, Garcia complains that he was not aware of the difficulties and disadvantages of proceeding pro se because he did not specifically understand in 1998 that an attorney might be able to explore defenses based on police conduct

and other issues unrelated to his guilt or innocence.[9] This is one part of the WIS JI—CRIMINAL SM-30 that the 1998 court did not convey to him. Nevertheless, the law does not require that Garcia had to understand every possible type of defense; the law only requires a general understanding of the difficulties and disadvantages of proceeding pro se. *See* ***Klessig***, 211 Wis. 2d at 205**.** At the 2010 hearing, Gracia acknowledged that he understood that a lawyer could "go to court" for him, and that he had seen lawyers on television and was familiar with the O.J. Simpson trial.[10] We can infer from that testimony that Gracia had an understanding that a lawyer would stand up for him in court and might know more about his case and possible defenses than he did. In other words, Gracia's testimony makes it clear that he understood the role of a lawyer, in general terms. He simply made a cost-benefit analysis that pleading guilty and taking the minimum penalties recommended by the State was a better choice for his pocket book than paying a lawyer. This is exactly what the 2010 court reasoned and we agree. His waiver was valid.

By the Court.—Judgment and order affirmed.

[9] Gracia also points out that the 1998 court did not make an explicit finding as to his competency to proceed pro se. He does not, however, argue that he was not competent to proceed pro se at that time. Looking to the information from the 1998 and 2010 transcripts, we see that Gracia graduated high school and attended some college, does not appear to have a problem understanding and communicating in English, and has no apparent other disabilities that would affect his competence to proceed pro se. *See* ***State v. Klessig***, 211 Wis. 2d 194, 212, 564 N.W.2d 716 (1997). We will not develop Gracia's argument for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987)

[10] While we do not think that seeing lawyers on television is adequate to show valid waiver of the right to counsel, we do think it relevant to our decision that Gracia had a general idea of what a lawyer could do for him.

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