SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No. 2008 AP 1204-CR

JUIQUIN ANTHONY PINKARD,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, WISCONSIN ON APRIL 27, 2007 AS AMENDED AUGUST 14, 2007 AND A DECISION AND ORDER DENYING POSTCONVICTION RELIEF DATED MARCH 21, 2008, THE HON. M. JOSEPH DONALD, CIRCUIT COURT JUDGE, PRESIDING

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

RICHARD L. ZAFFIRO
Attorney for Defendant-Petitioner
State Bar No. 1005614

P.O. Address:
4261 N. 92nd St.
Wauwatosa, WI 53222-1617
(414) 737-1956
FAX (414) 438-1015
e-mail: richardzaffiro@aol.com

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution against unreasonable search and seizure when it permitted use of evidence from a warrantless search under the "community caretaker" exception based upon an anonymous tip about two individuals sleeping in an open house with cocaine, cash and digital scales?

   Raised in and answered by the trial court: No.
   Briefed to and answered by the court of appeals: No.

STATEMENT OF THE CASE

A three-count criminal complaint charging Defendant with possession of a firearm by a felon, possession of cocaine with intent to deliver (15-40 g) second or subsequent offense, and felony bail jumping was filed on August 29, 2006. (R.2) The Complaint alleges that on August 24, 2006 at approximately 9:00 am, City of Milwaukee Police Officer Jon Osowski (hereinafter Osowski) received information which lead him to go to 2439 S. 7th St., Milwaukee, where he observed Petitioner and a female asleep. (R.2)

On a table next to the bed where Petitioner was sleeping, Osowski observed a large chunk of an off-white substance which appeared to be cocaine, 10 corner cuts of suspected cocaine on the window air conditioner, $969 in small bills, and a baggie suspected to contain marijuana, numerous documents in Petitioner's name, two digital scales with residue. plastic baggies of the type used to package narcotics, and a .40 caliber revolver under a mattress. The cocaine weighed in at 23.98 grams. (R.2)

On November 13, 2006, the defense filed a motion to suppress any and all

evidence seized from his residence. (R. 8; 9) A suppression hearing was held January 12, 2007. (R.31)

Off. Osowski was sworn (R.31:4-7) and testified at this motion hearing. Osowski testified that an Off. Lopez called to say an anonymous caller had called and told him there were two individuals who appeared to be sleeping at the residence, and there was cocaine, money and scales present (R.31:4-25), that the door was wide open, and that he was concerned about them. (R.31:5-12)

Upon arriving at the house, Osowski noted the door to be three-quarters open; he knocked and announced "police". (R.31:5-20) After receiving no response from the occupants inside for 30 to 45 seconds, Osowski determined to enter and check the welfare of the occupants "(t)o make sure that the occupants that the caller had referred us were not the victims of any type of crime; that they weren't injured; that they weren't the victims of like a home invasion, robbery; that they were okay, and to safeguard any life or property in the residence." (R.31:5-25, 6-5)

"Again, announced ourselves as police, loud, in the small bedroom. No one woke up. We actually had to physically shake the defendant, Mr. Pinkard, to wake him up." (R.31:6-15)

On cross-examination, defense counsel brought out that at the door which was three-quarters open, Osowski could not see into the bedroom (R.31:11-12), that as he entered the bedroom he announced "police" a second time "just to see if I could awake them" (R.31:12-2), Osowski did not know who the anonymous caller was or if he had a prior relation with Off. Lopez (R.31:12-19) and that the information was that the people

appeared to be sleeping (R.31:13-1) and did not say the people needed some medical attention (R.31:13-10; 14-1), did not say he was in fear of something which would jeopardize the safety of the people inside (R.31:13-14), and from Osowski's report it indicates he went to the residence because it sounded like a drug house to him. (R.31:13-24)

At the close of testimony, defense counsel argued the case was governed by State v. Ziedonis, 287 Wis.2nd 831, 717 N.W.2nd 565 (2005) and State v. Patterson, 220 Wis.2nd 526, 583 N.W.2nd 190 (Ct. App. 1998) cited by Ziedonis to the effect that the community caretaker function cannot be a guise for something else. (R.31:19-20 to 21-8) Off. Osowski indicated he is from the Intelligence Division, which does not typically go to check on the welfare of people (R.31:14-17 to 15-11; 21-9), and so defense counsel argued that under the guise that something might be the matter and with no information the people inside might need help, he went in to check on Off. Lopez's call that a dope dealer is in the house. (R.31:21-19 to 22-6) Defense counsel argued this was not a bona fide community caretaker function, and that the only reason police went in was to get drugs and guns. (R.31:22-24 to 23-6, 20).

The court found that entry into the residence was within the police role as community caretakers "entering the bedroom to arouse" defendant. (R.31:27-13, 28-2) The court found the gun was the product of a search of the lunge area, "and that is not the intent of the community caretaker function, that they are there to search for evidence or to seize evidence" and so suppressed the gun, "but find that the entry and arrest based on the drugs is appropriate and within the community caretaker function." (R.31:28-6;

29-15)

Based on this ruling, Petitioner entered a change of plea to the drugs and bail jumping charge February 27, 2007; the weapons charge was dismissed on motion. (R.32) Sentencing proceeded April 26, 2007, and Petitioner was sentenced to 3 years initial confinement and 5 years extended supervision on count 2, and 2 years initial confinement and 2 years extended supervision on count 3 (R.33) and a judgment of conviction was entered April 27, 2007 (R.18) and amended August 14, 2007. (R.22)

On March 14, 2008, Petitioner filed a postconviction motion. (R.24) Petitioner attached a Milwaukee Police Department supplemental Incident Report to his motion, in which Osowski states,

> "Officer Lopez informed me that a citizen had called him stating that it was just at the location of 2439 S. 7th St. (rear apartment) and the tenants (sp) named "Big Boy" and his girlfriend Amalia appeared to be sleeping and the back door to the residence is open."
>
> "Upon arrival I observed the rear door to the ground floor apartment ¾ open I knocked and announced our presence as "Police" and no response or noise was coming from the unit. I advised the officers on the KSA radio of the situation and that entry and a protective sweep of the residence to check on the welfare of the occupants would be executed."

(R.24-7)

Also attached to the motion was the Milwaukee Police Department supplemental Incident Report of P.O. Michael Lopez:

> "On Thursday, August 24, 2006, at approximately 8:55 a.m., I sqd 246A received a phone call at District 6 from a citizen who wanted to remain anonymous. This citizen reported to me that it was just at the location of 2439 South 7th Street, in the rear apartment. The citizen stated the tenants of the residence, "Big Boy" and his girlfriend "Amalia" appeared to be sleeping and the back door to the residence was open. The citizen further stated that it observed cocaine, money and a scale

> next to the subjects. I was unable to investigate this complaint because of a prior engagement, I subsequently notified Officer John OSOWSKI of the Criminal Intelligence Division, Gang Squad. Officer OSOWSKI stated that he would investigate this complaint."

(R.24-8) Neither of these reports expressed any concern for the safety or welfare of the home's occupants.

Although the motion asked for an evidentiary hearing (R.24), none was granted, and the motion was denied by written order dated March 21, 2008. (R.25) Notice of Appeal was filed March 30, 2008 (R.26), and an appeal followed.

During the pendency of the appeal, the Wisconsin Supreme Court decided the case of State v. Kramer, 2009 WI 14, on January 29, 2009. Correspondence addressing this supplemental authority was filed with the court of appeals January 31, 2009. The court of appeals entered a decision affirming the judgment of conviction April 21, 2009, and a Petition for Review followed.

The Petition for Review was granted by the court on September 11, 2009, and this Brief follows.

ARGUMENT

1. The trial court violated Petitioner's Fourth and Fourteenth Amendment rights against unreasonable search and seizure when it permitted evidence from a warrantless search under the "community caretaker" exception based upon an anonymous tip about two individuals sleeping in an open house with cocaine, cash and digital scales

In its decision, the court of appeals indicates "(m)any of Pinkard's contentions revolve around legitimately debatable concerns before Kramer; however these concerns have now been resolved adversely to him." Petitioner disagrees.

Petitioner disagrees with the court of appeals that the police officers were acting

as community caretakers, or that their work was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute", and disagree that whether the police officer's alleged activity as community caretakers was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" is no longer a valid basis to reject the community caretaker exception to the Fourth Amendment pursuant to Kramer. Id. at section 36.

A full reading of that paragraph in Kramer indicates the "totally divorced" language is out of play only if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function. Id. On the facts of this case, this did not occur.

The totality of circumstances, as set forth in the Statement of the Case above, makes clear that according to the Milwaukee Police Department Supplemental Incident Report of P.O. Michael Lopez, a citizen who wanted to remain anonymous reported that "Big Boy" and his girlfriend "Amalia" appeared to be sleeping and that the back door to the residence was open with cocaine, money and a scale next to them. Off. Lopez was unable to investigate this "complaint" because of a prior engagement, so he subsequently notified Officer John Osowski of the Criminal Intelligence Division, Gang Squad, who said he would investigate this "complaint."

The totality of circumstances indicate the anonymous caller expressed no concern for the safety or welfare of the subjects whatsoever, said they appeared to be sleeping (not hurt), and that they were next to drugs and drug paraphernalia. Surely it is relevant to the totality of circumstances that the involved officers saw this as a "complaint" not as

a rescue, and that Officer Lopez did not call for paramedics but instead called for a member of the Criminal Intelligence Division Gang Squad to investigate this "complaint", hardly a community caretaker situation where police are checking on someone's welfare as in Kramer, supra.

A three-quarters open door to a house at 9:00 in the morning does not suggest people in distress the way that a car parked by the side of a highway at night with emergency flashers on does. In Kramer, supra, the officer's concern only shifted from community caretaker to law enforcement after Kramer spoke; here, the officer was only at the house because of a drug "complaint" so that he started out with a law enforcement function, not a caretaker function.

Petitioner's open door is not the functional equivalent of Kramer's car stalled on a dark highway with its emergency flashers on at night. An open door with people sleeping upstairs next to drugs and drug paraphernalia does not suggest a person in need of assistance so much as a person in need of arrest.

While the officer in Kramer did not shift his concern from community caretaker to law enforcement until after Kramer spoke, here the officer went to the house based on a drug complaint tip, so that he started out with a law enforcement not a community caretaker function.

In Kramer, supra at section 37, the officer had an objectively reasonable basis for deciding that a motorist may have been in need of assistance when he stopped behind Kramer's vehicle. Kramer was parked on the side of a highway after dark with his hazard flashers operating. It was the officer's experience that when a vehicle is parked on the

side of the road with its hazard flashers operating, typically there is a vehicle problem. His first contact with Kramer was to offer assistance. He said, "Hi. Can I help you with something?" and "Just making sure no vehicle problems." Id.

Here, the officer had no objectively reasonable basis for deciding that the sleeping people which an anonymous tipster advised were in proximity to cocaine and attendant paraphernalia may have been in need of assistance when he arrived at the Petitioner's address.

Under Kramer, supra at section 36, if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions. Because the officer in this case has not articulated an objectively reasonable basis for the community caretaker function under the totality of the circumstances but is instead investigating a drug house complaint, he has not met the standard of acting as a bona fide community caretaker; his activity is instead the law enforcement function of investigating a drug house.

The court of appeals decision disregards this subjective drug investigation intent on the part of the investigating police officer in evaluating whether the officer was acting as a bona fide community caretaker. Cf. Kramer, supra at sec. 36. Under the totality of circumstances, the articulated objectively reasonable basis for the warrantless entry and search that people were asleep in close proximity to cocaine and attendant paraphernalia expresses concern for violation of the drug laws and not for the sleeping people's

welfare; this was not a bona fide community caretaker situation, and this court should therefore vacate the judgment of conviction.

"It is important to note that given the multifaceted nature of police work these two functions are not mutually exclusive. Rather, which function is primary may shift during the course of the officer's interaction with members of the public. In the case before us, it was Wagner's community caretaker function of offering assistance to what could have been a motorist stranded in a stalled vehicle after dark that led to the officer's contact with Kramer. After Kramer began to speak with the officer, it was Wagner's law enforcement function that led to Kramer's arrest for driving while intoxicated. The objectively reasonable basis for Wagner making contact with Kramer was totally divorced from his subjective belief that criminal activity could have been taking place. Furthermore, under the totality of the circumstances, Wagner's subjective belief does not negate his objectively reasonable basis for stopping behind Kramer and contacting him to ascertain if Kramer needed assistance. Accordingly, Wagner's contact with Kramer was a bona fide community caretaker function that was totally divorced from his law enforcement function." Kramer, supra at section 39.

Compare Kramer to the facts of this case. The officers here were not at Pinkard's open-doored house to offer assistance to someone who might be in need, but were there to investigate a drug complaint. After they entered Pinkard's bedroom in this manner and found the crime evidence discussed by their tipster, an arrest was made; assisting some-one in need was never part of the equation here.

The objectively reasonable basis for these police to make contact with Pinkard

was totally joined to his subjective belief that criminal activity could have been taking place. Under the totality of circumstances, these officers' subjective belief for contact with Pinkard was one and the same with their objectively reasonable basis: the belief that he was involved in a drug crime, so that their contact with Pinkard was not totally divorced from their law enforcement function but in fact was their law enforcement] function.

Whether a police officer's contact with a defendant is totally divorced from his law enforcement function is still a relevant inquiry under Kramer. Id. Paragraph 36 of Kramer, supra, shows that subjective intent is also still relevant in evaluating whether an officer was acting as a bona fide community caretaker, and the error in the appellate court decision here is that it ignores this subjective intent:

"Therefore, we conclude that a court may consider an officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker; however, if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions. Furthermore, applying an objective standard, while considering subjective concerns, is consistent with our past jurisprudence in determining the reasonableness of an officer's actions in regard to a protective frisk for weapons:

The officer's [subjective] fear or belief . . . is but one factor in the totality of the circumstances that a court may consider in determining whether an [officer's conduct was objectively reasonable].

State v. Kyles, 2004 WI 15, ¶39, 269 Wis. 2d 1, 675 N.W.2d 449"

Kramer, supra at sec. 36.

Although the court may consider the officer's subjective intent, here it did not. Considering subjective concerns is consistent with past jurisprudence in determining

the reasonableness of the officer's conduct, and his subjective fear or belief is one factor in the totality of circumstances that a court may consider in determining whether the officer's conduct was objectively reasonable.

The court of appeals' other error with respect to Kramer, supra, is its complete failure to perform a balancing test:

"Since we have assumed that a Fourth Amendment and Article I, Section 11 seizure occurred, and have concluded that Wagner engaged in a bona fide community caretaker function, we now proceed to consider the third step: whether the officer's exercise of a bona fide community caretaker function was reasonable. Kelsey C.R., 243 Wis. 2d 422, ¶35. We do so by balancing a public interest or need that is furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen.**(10)** Arias, __ Wis. 2d __, ¶32; see Kelsey C.R., 243 Wis. 2d 422, ¶35.

¶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. In balancing these interests, 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.

Kelsey C.R., 243 Wis. 2d 422, ¶36 (quoting Anderson I, 142 Wis. 2d at 169-70)."

Kramer, supra at sections 40 and 41.

It is not enough to recognize that a seizure has occurred; that is conceded here. Nor is it enough to conclude that the police were engaged in a bona fide community caretaker function; that is disputed in this Petition. The court of appeals had to review whether the exercise of community caretaker function was reasonable, which it did not. Id.

Applying the balancing test to the facts of this case:

1. The public has a strong interest in being free from warrantless intrusions into their homes, and there was no apparent exigency in this situation. All the police knew was that people appeared to be sleeping next to drugs and drug paraphernalia.
2. The search took place at 9:00 am, a time when some people are still sleeping, with two uniformed City of Milwaukee police officers entering the bedroom where Petitioner slept with his girlfriend.
3. No automobiles were involved.
4. The police could have telephoned the house or checked with neighbors to determine whether an emergency situation existed while not violating 4th Amendment privacy right.

On balance, even if this court accepts that the police were engaged in a bona fide community caretaker function, it was not reasonable. Whether the search was the result of a warrantless law enforcement function and not a community caretaker function, or was an unreasonable exercise of a bona fide community caretaker function, it was a violation of Petitioner's Constitutional rights under the 4th and 14th Amendments to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution, so this court should vacate the judgment of conviction.

CONCLUSION

For all of the foregoing reasons, Juiquin Anthony Pinkard respectfully requests that the court vacate his judgment of conviction, and remand this case for a new trial without the illegally-obtained evidence.

RICHARD L. ZAFFIRO
Attorney for Defendant-Appellant-Petitioner
State Bar No. 1005614

P.O. Address:
4261 N. 92nd St.
Wauwatosa, WI 53222-1617
(414) 737-1956
FAX (414) 438-1015
e-mail: richardzaffiro@aol.com

APPENDIX

1. Decision and Opinion of Court of Appeals
2. Trial Court's Decision Denying Postconviction Relief
3. Record on Appeal
4. Judgment of Conviction

CERTIFICATION

I certify that this Brief in Support of Petition for Review conforms to the rules contained in Wis. Stats. secs. 809.19(8)(b) and 809.62(4) for a petition produced using the following font: Proportional serif font. Minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body test. The length of this petition is 3498 words.

Dated September 12, 2009.

_____

RICHARD L. ZAFFIRO
Attorney for Defendant-Appellant-Petitioner
State Bar No. 1005614

P.O. Address:
4261 N. 92nd St.
Wauwatosa, WI 53222-1617
(414) 737-1956
FAX (414) 737-1956
e-mail: richardzaffiro@aol.com

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No. 2008 AP 1204-CR

JUIQUIN ANTHONY PINKARD,

Defendant-Appellant-Petitioner.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12) STATS.

I hereby certify that:

1. I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

2. This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

3. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed

Signature

APPENDIX

1. Decision and Opinion of Court of Appeals
2. Trial Court's Decision Denying Postconviction Relief
3. Record on Appeal
4. Judgment of Conviction

COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1204-CR Cir. Ct. No. 2006CF4557

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUIQUIN ANTHONY PINKARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Juiquin Anthony Pinkard appeals from an amended judgment of conviction for possessing cocaine with intent to deliver and felony bail-jumping, and from a postconviction order denying his motion to reconsider the order denying his suppression motion. The issue is whether the

warrantless entry into Pinkard's home was objectively reasonable pursuant to the community caretaker exception to the Fourth Amendment to justify the subsequent seizure of evidence that was in plain view. We conclude that the officer's stated basis for entering Pinkard's home, predicated on an anonymous tip of concern about two individuals evidently sleeping in an open house surrounded by cocaine, cash and digital scales, satisfies the community caretaker exception despite the officer's subjective law enforcement concerns. Therefore, we affirm.

¶2 Acting on an anonymous tip of concern, police entered Pinkard's home without a warrant, entered his bedroom while he appeared to be sleeping, and found cocaine, drug paraphernalia, and $969 in cash on a table at his bedside, and a revolver underneath his mattress. When awakened, Pinkard allegedly stated, "[y]ou guys caught me, I'm done." Pinkard was charged with possessing a firearm as a felon, possessing between fifteen and thirty grams of cocaine with intent to deliver as a subsequent drug offense, and felony bail-jumping.

¶3 Pinkard moved to suppress the evidence. The trial court conducted an evidentiary hearing at which the arresting officer testified. The trial court granted Pinkard's motion to suppress the revolver, and denied the remainder of the motion. Pinkard then pled guilty to the cocaine and bail-jumping offenses. The trial court imposed an eight-year sentence, comprised of three- and five-year respective periods of initial confinement and extended supervision for the cocaine offense, and a four-year concurrent sentence, comprised of two two-year periods of initial confinement and extended supervision for the bail-jumping offense. Pinkard moved for reconsideration of the trial court's suppression ruling, filing two supplemental police reports for the trial court to reconsider its determination that the officer was acting as a community caretaker, rather than investigating a drug house. The trial court summarily denied Pinkard's reconsideration motion.

¶4 Pinkard appeals to challenge the trial court's orders denying his suppression and related reconsideration motions pursuant to WIS. STAT. § 971.31(10). The parties alerted this court to a case pending before the Wisconsin Supreme Court raising an issue regarding the scope of the community caretaker function. *See* ***State v. Kramer***, 2008 WI 115, 310 Wis. 2d 705, 754 N.W.2d 849. The supreme court decided ***Kramer*** on January 29, 2009, and both parties filed correspondence addressing this supplemental authority. *See* ***State v. Kramer***, 2009 WI 14, ___ Wis. 2d ___, 759 N.W.2d 598.

¶5 At the evidentiary hearing on Pinkard's suppression motion, Milwaukee Police Officer Jon Osowski was the sole witness. The following facts are from Osowski's testimony. Osowski was on duty on the date in question and received a telephone call from another officer who "stated [that] an anonymous caller had called him and stated that there were two individuals who appeared to be sleeping at [the identified] residence, and there was cocaine, money, and scales present there.... He said the door was wide open, and he was concerned about them." Osowski then testified about his own actions:

> We arrived at the apartment. It's the rear unit or like the back of a three-family residence, and the back door to that unit accesses the entire first floor of that unit. The door was approximately three-quarters open, and we knocked and announced ourselves as police. After a period of about 30 to 45 seconds, we received no response from any occupants inside, so we made the determination to enter and check the welfare of the occupants.
>
> ....
>
> [We went in t]o make sure that the occupants that the caller had referred us were not the victims of any type of crime; that they weren't injured; that they weren't the victims of like a home invasion, robbery; that they were okay, and to safeguard any life or property in the residence.
>
> ....

> When we went in, there was a bedroom directly to the left when you go in the rear door. That door was open. Two people appeared to be sleeping or laying in the bed. Again, announced ourselves as police, loud, in the small bedroom. No one woke up. We actually had to physically shake the defendant, Mr. Pinkard, to wake him up.
>
> ....
>
> The narcotics and scales that were in plain view [prompted Pinkard's arrest], and then I lifted up the mattress, and there was a revolver underneath the mattress. ... [I seized all these items because t]hey're illegal to possess, as evidence.

On cross-examination, Osowski testified that the other officer told him about the tip, and asked him to respond, telling Osowski that "he couldn't [respond]." Osowski was not told that this was a drug investigation, however he admitted that the situation "sounded like a drug house."

¶6 The trial court determined that "the police were operating within their role and function as the community caretakers" when they entered the residence. The trial court's determination was supported by the officers finding the door open, as reported by the tipster, which lent reliability to the tip. The trial court also determined that the police knocked and announced their presence when they entered the house and again when they entered the bedroom, where they found drugs and scales in plain sight. The trial court suppressed the revolver because that was not within plain sight.

¶7 After Pinkard pled guilty and was sentenced, postconviction counsel moved for reconsideration of that part of the order denying Pinkard's suppression motion, attaching two supplemental police reports indicating that there was indication of drug use and that Osowski responded to investigate "the complaint." Pinkard contends that these reports show that Osowski entered the residence

without a warrant incident to a drug investigation; Osowski's claim that he was acting in his community caretaker role was merely a pretext to attempt to justify his warrantless entry into Pinkard's home and bedroom.

¶8 To justify an exception to the Fourth Amendment pursuant to the community caretaker function, the State bears the burden of proof that: (1) police are engaged in "bona fide community caretaker activity;" and (2) the public interest outweighs the intrusion on an individual's privacy. *See* ***State v. Ziedonis***, 2005 WI App 249, ¶¶14-15, 287 Wis. 2d 831, 707 N.W.2d 565. The issue here is whether police were engaged in "bona fide community caretaker activity," or if instead, they were merely using the community caretaker role as a pretext in the hopes of justifying a drug investigation without a warrant.

¶9 Many of Pinkard's contentions revolve around legitimately debatable concerns before ***Kramer***; however, these concerns have now been resolved adversely to him. ***Kramer*** explains that

> if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions.... "The officer's [subjective] fear or belief ... is but one factor in the totality of the circumstances that a court may consider in determining whether an [officer's conduct was objectively reasonable]."

Id., 2009 WI 14, ¶36 (bracketing and second set of ellipses in original) (quoting ***State v. Kyles***, 2004 WI 15, ¶39, 269 Wis. 2d 1, 675 N.W.2d 449). Consequently, whether the police officers' activity as community caretakers was "'totally divorced from the detection, investigation, or acquisition of evidence relating to

the violation of a criminal statute,'" addressed in ***State v. Anderson,*** 142 Wis. 2d 162, 166, 417 N.W.2d 411 (Ct. App. 1987) (quoting ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973)), is no longer a valid basis to reject the community caretaker exception to the Fourth Amendment pursuant to ***Kramer***. *See* ***Kramer***, 2009 WI 14, ¶36. "[I]n a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns." ***Id.***, ¶30.

¶10 Pinkard's argument after ***Kramer*** essentially becomes either that the police's warrantless entry into his home and then bedroom was not objectively reasonable under the totality of the circumstances as an exercise of the police's community caretaker function, or that Osowski was not engaged in a community caretaker function at all when he entered Pinkard's home. Osowski testified that he was directed to go to an address identified by an anonymous tipster with concern because the house was open, people were apparently asleep in close proximity to cocaine and attendant paraphernalia, which is sufficient pursuant to ***Kramer*** to satisfy an articulation of an objectively reasonable basis to engage in a community caretaker function even if there was a potential to exercise law enforcement functions during that investigation. *See* ***id.*** Likewise, the officers' reports expressing law enforcement concerns about that same situation at Pinkard's house, do not negate the community caretaker function and attendant

exception to the Fourth Amendment. *See* ***id.*** We therefore affirm the suppression and reconsideration rulings.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

STATE OF WISCONSIN | CIRCUIT COURT Branch 2 | MILWAUKEE COUNTY

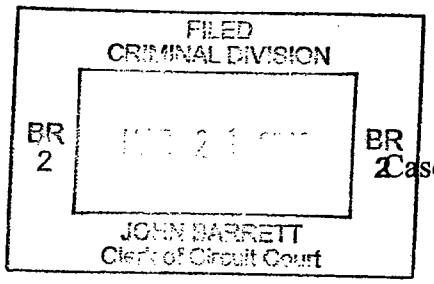
STATE OF WISCONSIN,

Plaintiff,

vs.

JUIQUIN ANTHONY PINKARD,

Defendant.



Case No. 06CF004557

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On March 14, 2008, the defendant by his attorney filed a motion for postconviction relief to reconsider the suppression motion that was heard and denied by the court on January 12, 2007. The court found that police were operating within their role and function as community caretakers when they entered the premises. The defendant has attached two officers' reports which, he claims, demonstrates that officers went inside to commence a drug investigation, not because they were concerned about the occupants as community caretakers.

Officer Osowski was cross-examined about the report he wrote by defense counsel.

Q [Officer Lopez] didn't say that they were in fear of something happening inside the residence that in fact would jeopardize the safety of those people inside?

A No, he didn't relay that to me on the phone, just the information that I told you.

Q He actually indicated to you that it was basically a drug investigation. These people are sound asleep, and there's drugs and scales and guns in there; right?

A He did not say that, no.

Q Well, your report indicates that in fact that's why you went there is because there appeared to be cocaine, money and scales there?

A-1

A That's correct. It appeared to be – sounded like a drug house to me.

Q Officer Lopez did nto indicate to you that there was some emergency with regard to the people at the residence themselves that needed some type of medical attention or were in some need of the Police Department rescuing them; did he?

A No.

(Tr. 1/12/07, pp. 13-14). On redirect, he indicated that officers went there because of his prior experience where houses are left open after crimes have been committed. (Id. at 16).

Based on the testimony, there is nothing new with regard to Officer Osowski's report. He was cross-examined about the very points defendant now raises in his motion. Officer Lopez's report adds nothing to what the court already knew and considered. The court heard the officer's testimony and believed that the police went there as their role as a community caretaker. Nothing the defendant has submitted alters that conclusion, which the court believes is in harmony with State v. Ziedonis, 287 Wis. 2d 831 (Ct. App. 2005).

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief (reconsideration) is **DENIED.**

Dated this 27 day of March, 2008, at Milwaukee, Wisconsin.

BY THE COURT:

M. Joseph Donald
Circuit Court Judge

CLERK OF CIRCUIT COURT
CRIMINAL DIVISION

Milwaukee County

JOHN BARRETT • Clerk of Circuit Court/Court Services Director

SARAH A. GUNN
Administrator

TAMMY KRUCZYNSKI
Assistant Administrator

THOMAS N. OELSTROM
Accountant

JUNE SIMETH
Staff Attorney

MICHAEL GROSSMAN
Staff Attorney

May 28, 2008

J.B. VAN HOLLEN
Attorney General
BY: GREGORY M. WEBER
Assistant Attorney General
Department of Justice
Post Office Box 7857
Madison, WI 53707-7857

JOHN CHISHOLM
District Attorney
BY: KAREN A. LOEBEL
Assistant District Attorney
Safety Building
821 West State Street
Milwaukee, WI 53233

RICHARD L. ZAFFIRO
4261 N 92nd St
Wauwatosa, WI 53222-1617

In re: Case Number 2006CF004557
STATE OF WISCONSIN, Plaintiff -vs- JUIQUIN ANTHONY PINKARD, Defendant

APPEAL NUMBER 2008AP001204CR

Notice is hereby given that the appeal record for the above entitled case has been assembled and is available for inspection. A list of the papers constituting the record is attached.

All examinations of the record and additions thereto, must be completed before the mailing date. The record will be forwarded to the Clerk of the Court of Appeals on JUNE 12,. 2008 per 809.15 (2) and (4).

Sincerely,

JOHN BARRETT
Clerk of Circuit Court/
Court Services Director

Michelle Cywinski

By: Michelle Cywinski

Attachment

THE RECORD ON APPEAL NO. 2008AP001204CR CONSISTS OF THE FOLLOWING:

1 - 6	Judgment Roll
2 - 2	Criminal Complaint
3 - 1	Certified Copy of Bail / Bond Form dated August 31, 2006 from Case No 2006CF002045
4 - 1	Bail / Bond Form dated August 31, 2006
5 - 1	Order Appointing Counsel dated September 6, 2006
6 - 1	Information
7 - 1	Preliminary Hearing Questionnaire and Waiver
8 - 2	Motion to Suppress Evidence dated November 13, 2006
9 - 4	Motion to Suppress Evidence dated November 13, 2006
10 - 1	Order Suppressing the Search and Subsequent Seizure of the Gun dated February27, 2007
11 - 8	Plea Questionnaire and Waiver of Rights dated February 21, 2007 and Attachments
12 - 1	Order for Pre Sentence Investigation Report dated February 27, 2007
13 - 1	Gold Envelope Containing the Pre Sentence Investigation Report
14 - 1	Pre Trial Incarceration Credit dated April 26, 2007
15 - 1	Order for Contribution to Crime Prevention Organization dated April 26, 2007
16 - 1	Notice of Right to Seek Post Conviction Relief dated April 26, 2007
17 - 1	Conviction Status Report dated April 27, 2007
18 - 2	Judgment of Conviction dated April 27, 2007
19 - 2	Notice of Intent to Pursue Post Conviction Relief dated April 27, 2007
20 - 1	Order for Release of Pre Sentence Report dated July 23, 2007
21 - 2	Decision and Order Granting Request for Additional Sentence Credit dated August 8, 2007
22 - 2	Amended Judgment of Conviction dated August 14, 2007
23 - 1	Court of Appeals Order dated February 4, 2008 the Deadline for the Defendant to File a Post Conviction Motion or a Notice of Appeal is Extended
24 - 8	Notice of Motion and Motion for Post Conviction Relief dated March 6, 2008
25 - 2	decision and Order Denying Motion for Post Conviction Relief dated March 21, 2008
26 - 6	Notice of Appeal
27 - 3	Statement on Transcript
28 - 6	Transcript of Reporters Notes dated August 31, 2006–INITIAL APPEARANCE
29 - 5	Transcript of Reporters Notes dated September 7, 2006–WAIVER OF PRELIMINARY HEARING

30	5	Transcript of Reporters Notes dated November 6, 2006–ADJOURNMENT
31	34	Transcript of Reporters Notes dated January 12, 2007–MOTION TO SUPPRESS
32	29	Transcript of Reporters Notes dated February 27, 2007–GUILTY PLEA
33	28	Transcript of Reporters Notes dated April 26, 2007–SENTENCING HEARING
34	3	Certificate of the Clerk

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 02 | MILWAUKEE COUNTY | *For Official Use Only*

State of Wisconsin vs. Juiquin Anthony Pinkard

Date of Birth: 06-24-1984

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Case No.: 2006CF004557

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
2	Possess w/Intent-Cocaine (> 15-40g) [961.48(2) 961-2ND OR SUB]	961.41(1M)(CM)3	Guilty	Felony D	08-24-2006		02-27-2007
3	Bail Jumping-Felony	946.49(1)(B)	Guilty	Felony H	08-24-2006		02-27-2007

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

04-26-2007 : On count 2 defendant is confined to prison for 3 years followed by a period of 5 years extended supervision for total length of sentence of 8 years.

Concurrent with/Consecutive to/Comments: Concurent to 06cf2045, 06cf6421, 06cf6745 with credit for 15 days time served. Imprisonment of 8 years in WSP concurrent to 06cf2045, 06cf6421, 06cf6745 with credit for 15 days time served. Confinement of 3 years and extended supervision of 5 years. Conditons: AODA assessment and follow through with recommended programming. Maintain absolute sobriety with random urine screens. If not a US citizen, deportation is possible. May not possess any firearms. Eligible for he challenge incarceration program and for the earned release program.

04-26-2007 : On count 3 defendant is confined to prison for 2 years followed by a period of 2 years extended supervision for total length of sentence of 4 years.

Concurrent with/Consecutive to/Comments: Concurrent to 06cf4557, 06cf6421, 06cf6745 with credit for 15 days time served. Imprisonment of 4 years in WSP concurrent to 06cf4557, 06cf6421, 06cf6745 with credit for 15 days time served. Confinement of 2 years and extended supervision fo 2 years.

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
2	04-26-2007	Costs		Pay all costs and surchrges from cash bail or if not paid a civil judgment is ordered.	
2	04-26-2007	Contribute crime prevent		Contribute $969.00 to a crime prevention organization.	
2	04-26-2007	License suspended	6 MO	Concurrent	
3	04-26-2007	Costs		See count 1.	

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	40.00			16.00	140.00		

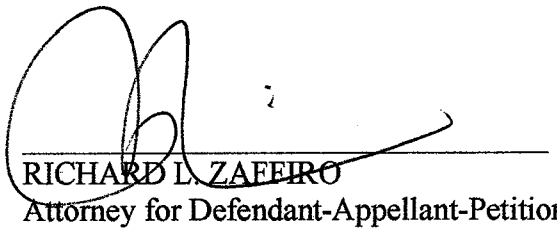
IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff execute this sentence.

CERTIFICATION

I certify that this Brief in Support of Petition for Review conforms to the rules contained in Wis. Stats. secs. 809.19(8)(b) and 809.62(4) for a petition produced using the following font: Proportional serif font. Minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body test. The length of this petition is 3498 words.

Dated September 12, 2009.



RICHARD L. ZAFFIRO
Attorney for Defendant-Appellant-Petitioner
State Bar No. 1005614

P.O. Address:
4261 N. 92nd St.
Wauwatosa, WI 53222-1617
(414) 737-1956
FAX (414) 737-1956
e-mail: richardzaffiro@aol.com

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No. 2008 AP 1204-CR

JUIQUIN ANTHONY PINKARD,

Defendant-Appellant-Petitioner.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12) STATS.

I hereby certify that:

1. I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

2. This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

3. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed

Signature

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2008AP1204-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JUIQUIN ANTHONY PINKARD,
Defendant-Appellant-Petitioner.

ON REVIEW OF A COURT OF APPEALS' DECISION
AFFIRMING A JUDGMENT OF CONVICTION
AND A POSTCONVICTION ORDER
ENTERED IN THE CIRCUIT COURT
FOR MILWAUKEE COUNTY,
HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904
(608) 266-9594 (Fax)
freimuthjm@doj.state.wi.us

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2008AP1204-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUIQUIN ANTHONY PINKARD,

Defendant-Appellant-Petitioner.

ON REVIEW OF A COURT OF APPEALS' DECISION
AFFIRMING A JUDGMENT OF CONVICTION
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ENTERED IN THE CIRCUIT COURT
FOR MILWAUKEE COUNTY,
HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case has already been scheduled for oral argument. As in most cases accepted for review by this court, publication also appears warranted.

STATEMENT OF THE CASE

Original charges.

By criminal complaint filed August 29, 2006, in Milwaukee County Case No. 06-CF-4557, Defendant Juiquin Anthony Pinkard was charged with three crimes: possession of a firearm by a felon, contrary to Wis. Stat. § 941.29(2); possession with intent to deliver cocaine (more than fifteen grams but not more than forty grams), as a repeat drug offender, contrary to Wis. Stat. §§ 961.16(2)(b)1., 961.41(1m)(cm)3., and 961.48; and felony bail jumping, contrary to Wis. Stat. § 946.49(1)(b) (*see* 2).

According to the complaint, on the morning of August 24, 2006, Milwaukee police found Pinkard at his residence in possession of, *inter alia*, "a large chunk" of cocaine and "10 rocks of cocaine base," weighing 23.98 grams, as well as a .40-caliber revolver (2:2). Police also found a baggie of marijuana and two digital scales (2:2). Pinkard previously had been convicted of manufacturing or delivering cocaine, and at the time of the current charged crimes, he was out on bail on a pending felony charge of possession of marijuana as a repeat drug offender (2:2).

Pinkard waived a preliminary hearing (7; 29:3-4), and on September 7, 2006, the State filed an information repeating the three charges of the complaint (6).

Suppression motion.

Thereafter, Pinkard moved to suppress all evidence seized from his residence on August 24, 2006, on grounds of an illegal search and seizure (8; 9). For reasons set forth on the record at the conclusion of an evidentiary hearing on January 12, 2007, Judge M. Joseph Donald denied the motion to suppress with respect to the evidence of cocaine, marijuana, digital scales, and currency, but he

granted the motion to suppress with respect to the revolver (31:24-29; *see also* 10).

Plea agreement.

On February 27, 2007, pursuant to a plea agreement that encompassed three other pending cases against him, Pinkard pled guilty in the present case to possession with intent to deliver cocaine, as a repeat drug offender, and to felony bail jumping (32:2-3, 18-19). The charge of possession of a firearm by a felon was dismissed (32:2, 4). Judge Donald accepted the guilty pleas, relying on the complaints as factual bases (32:21).[1]

On April 26, 2007, Judge Donald sentenced Pinkard in the four cases resolved by the plea agreement (33). In the present case, he sentenced Pinkard on the cocaine conviction to three years' initial confinement and five years' extended supervision (33:23). On the bail-jumping conviction, he sentenced Pinkard to two years' initial confinement and two years' extended supervision (33:23-24). All sentences operate concurrently (33:24). Judgment of conviction in the present case was filed August 14, 2007 (22).[2]

Postconviction motion and appeal.

By postconviction motion filed March 14, 2008, Pinkard sought to revisit the pretrial suppression ruling, ostensibly for purposes of plea withdrawal; alternatively, he sought resentencing on "new factor" grounds (24). By order filed March 21, 2008, Judge Donald denied the postconviction motion (25).

---

[1]In each of the other three cases – Milwaukee County Case Nos. 06-CF-2045, 06-CF-6421, and 06-CF-6745 – Pinkard pled guilty to possession of marijuana as a repeat drug offender, with bail-jumping charges dismissed (32:2-3, 19-20).

[2]On the three marijuana convictions in the other three cases, Judge Donald imposed concurrent sentences consisting of one year initial confinement and two years' extended supervision (33:23-24).

On Pinkard's direct appeal, the court of appeals affirmed the judgment and postconviction order in a per curiam decision – *State v. Juiquin Anthony Pinkard*, No. 2008AP1204-CR (Wis. Ct. App. Dist. I April 21, 2009).

By order of September 11, 2009, this court accepted Pinkard's petition for review of the court of appeals' decision.

STATEMENT OF FACTS

The State outlines the relevant facts in Argument Section B. of this brief and discusses their legal significance in Argument Section D.

ARGUMENT

MILWAUKEE POLICE LAWFULLY SEIZED DRUG-RELATED EVIDENCE IN PLAIN VIEW INSIDE PINKARD'S RESIDENCE AFTER MAKING A LAWFUL WARRANTLESS ENTRY UNDER THE "COMMUNITY CARE-TAKER" EXCEPTION TO THE WARRANT REQUIREMENT.

A. Introduction.

Pinkard's claim. Pinkard seeks to overturn the decisions of the court of appeals and trial court that rejected his motion to suppress evidence of cocaine, marijuana, digital scales, and currency found by Milwaukee police at Pinkard's residence after a warrantless entry there on August 24, 2006 (Pinkard's brief at 5-12).

Although Pinkard pled guilty to the resultant charges of possession with intent to deliver cocaine and felony bail jumping, he can obtain review of the suppression ruling pursuant to Wis. Stat. § 971.31(10).

Ostensibly, Pinkard would pursue plea withdrawal in the trial court if the suppression ruling were reversed.[3]

As discussed below, the trial court concluded that Milwaukee police lawfully entered Pinkard's residence under the "community caretaker" exception to the warrant requirement and thereafter found the evidence of cocaine, marijuana, digital scales, and currency in plain view (31:24-29).

Pinkard asserts that the court of appeals' decision conflicts with this court's recent decision in *State v. Kramer*, 2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598 (*see* Pinkard's brief at 5-12). Specifically, Pinkard argues that the "community caretaker" exception does not apply, because: (1) the police were not engaged in a bona fide community caretaking activity that was totally divorced from the detection, investigation, or acquisition of evidence of a crime when they entered his residence (Pinkard's brief at 5-11); and (2) in any event, the public need and interest in making the warrantless entry are outweighed by the intrusion upon Pinkard's privacy (Pinkard's brief at 11-12).

Summary of State's position. For reasons summarized here and developed in the subsections that follow, this court should reject Pinkard's claims, affirm the admissibility of the evidence in question, and affirm his convictions:

(1) Governing law. The "community caretaker" exception to the warrant requirement may justify a warrantless entry to a residence under circumstances in which the "emergency doctrine" exception to the warrant requirement might not apply. *See* Argument Section C.

[3]Because Pinkard's plea agreement included dismissal of the companion charge of possession of a firearm by a felon, the State has not challenged the trial court's suppression of the revolver that police found (after Pinkard's arrest) under a mattress of the bed in which Pinkard had been lying (31:8, 28-29).

(2) Application.

(a) In the present case, Milwaukee police – acting on an anonymous citizen tip that two people "appeared to be sleeping" in a rear apartment amidst cocaine and money while "the back door to the residence was open" (24:8) – were engaged in "bona fide community caretaker activity" when they: (1) entered Pinkard's residence through an open exterior door after no one answered their knock, and (2) entered the bedroom through an open door after failing to rouse the occupants by loudly announcing their presence and seeing Pinkard and a female lying asleep or unconscious amidst suspected cocaine (31:4-14). The public need and interest in making the warrantless entries outweighed the intrusion on Pinkard's privacy. The warrantless entries, which occurred after 9:00 a.m. on a mid-August morning (2:2; 24:7), were reasonable to ensure that no occupant was in distress from a drug overdose or had been victimized by a crime, and that no new or additional harm would accrue from the prospect of a third party entering the residence – either to the occupants or to the third party, such as a curious child. *See* Argument Section D.1.

(b) To complete the analysis, the evidence of cocaine, marijuana, currency, and digital scales in Pinkard's bedroom was lawfully seized under the "plain view" doctrine. *See* Argument Section D.2.

B. Relevant facts.

Pinkard's suppression motion was addressed at a pretrial (pre-plea) evidentiary hearing at which only Milwaukee Police Officer Jon Osowski testified (31). A summary of his testimony follows.[4]

[4]As part of a *postconviction* motion, Pinkard included two pages of excerpts from Milwaukee police reports of the incident (24:7-8). Additional information from these excerpts is incorporated in the summary of the suppression-hearing testimony.

Anonymous tip.

At approximately 8:55 a.m. on August 24, 2006, Milwaukee Police Officer Michael Lopez received a phone call "from a citizen who wished to remain anonymous" (24:8; 31:4-5). According to Officer Lopez's report, the citizen reported having "just" been at "the rear apartment" at 2439 South 7th Street, where the tenants, "'Big Boy' and his girlfriend 'Amalia' appeared to be sleeping," that "the back door to the residence was open," and that the citizen "observed cocaine, money and a scale next to the subjects" (24:8; *see also* 31:4-5, 12-13).

Officer Osowski testified that Officer Lopez "said the door was wide open, and he was concerned about" the occupants (31:5), but did not identify any medical emergency (31:13, 15). Officer Lopez asked Officer Osowski to investigate the matter (24:8; 31:12). Officer Osowski said the caller's description of the residence "sounded like a drug house to me" (31:13).

Arrival at Pinkard's residence.

At approximately 9:00 a.m., Officer Osowski, a member of the "Gang Crimes Unit" of the "Intelligence Division" of the Milwaukee police department (31:14-15), arrived at the address of concern (24:7), accompanied by four other officers (31:14).

Officer Osowski said he went to the "rear unit" of what was "a three-family residence" (31:5, 8). He said the "back door" to that unit "was approximately three-quarters open" and provided access to "the entire first floor of that unit" (31:5, 11), at "ground-level" (31:9). Officer Osowski said the back entrance consisted of a single door, "just a heavy like aluminum, newer construction door[,] [l]ike a storm door, but no screen or security doors" (31:9-10). He said there was no doorbell or "door chime" (31:10-11).

Officer Osowski said "we knocked" on the open back door "and announced ourselves as police" (31:5). He said that "[a]fter a period of about 30 to 45 seconds, we received no response from any occupants inside, so we made the determination to enter and check the welfare of the occupants" (31:5-6). He further explained his entry as follows:

> To make sure that the occupants that the caller had referred us were not the victims of any type of crime; that they weren't injured; that they weren't the victims of like a home invasion, robbery; that they were okay, and to safeguard any life or property in the residence.

(31:6.)

Entry into the residence and bedroom.

Officer Osowski said he could not see into any bedroom through the open back door (31:11). He said that upon entering the residence through the open back door, "there was a bedroom directly to the left" (31:6). He said the bedroom door was open, allowing him to see two people who "appeared to be sleeping or l[]ying in the bed" (31:6, 11).

He said the officers "announced ourselves as police, loud, in the small bedroom," but that "[n]o one woke up" (31:6, 11-12). He said "[w]e actually had to physically shake" Pinkard to wake him (31:6, 7). He said Pinkard's companion in the bed was a female (31:6).

Officer Osowski said he also made the following observations upon entering the bedroom:

> [I]n plain view at the foot of the bed, there was a small circular disk of a[n] off-white chunky substance of suspected cocaine, and then on the window air conditioner near the head of the bed, there w[ere] 10 rocks of suspected crack cocaine and a quantity

> of green plant-like substance of suspected marijuana also up there, along with a quantity of money.

(31:7.) Officer Osowski also identified "scales" as being "in plain view" (31:8). He said that after managing to rouse Pinkard, he arrested Pinkard for illegal drug possession and "lifted" the mattress of the bed, finding "a revolver" (31:8).

Trial court's ruling.

The prosecutor argued that the drug-related evidence was lawfully seized in plain view, stemming from a lawful police entry to the residence as a "community caretaker situation" (31:17-19). The prosecutor also argued that the gun was lawfully seized as an incident to Pinkard's ensuing arrest (31:19).

Defense counsel argued that the community caretaker justification does not apply, because the warrantless entry was not "'totally divorced from the detection, investigation, or acquisition of evidence relating to a violation of a[] criminal statute'" (31:21; case citation omitted), and because the public need and interest for the entry did not outweigh the intrusion on Pinkard's privacy (31:22-23).

The trial court concluded that the "community caretaker" exception to the warrant requirement justified the officers' entry to the residence upon corroborating the tip of an open door, coupled with a lack of any occupant response to the police knocking and announcing their presence (31:24, 27-28). The court found that "the purpose that the police were there was, in essence, to inquire as to the health and safety of" the occupants, as reported in the citizen tip (31:29). The court concluded that the drug-related evidence was properly seized in plain view, but that the gun found under the mattress exceeded the scope of community caretaker activity (31:28-29).

Court of appeals' decision.

The court of appeals held that "the officer's stated basis for entering Pinkard's home, predicated on an anonymous tip of concern about two individuals evidently sleeping in an open house surrounded by cocaine, cash and digital scales, satisfies the community caretaker exception despite the officer's subject law enforcement concerns." *Pinkard*, slip op. at 2.

En route to this holding, the court of appeals applied *State v. Kramer* to conclude that the officers' entries to Pinkard's residence and bedroom were objectively reasonable under the totality of the circumstances as exercises of the community caretaker function. *Id.* at 5-6.

C. Governing law.

1. General "search and seizure" principles.

The Fourth and Fourteenth Amendments to the federal constitution and Art. I, § 11 of the state constitution guarantee Wisconsin citizens freedom from "unreasonable searches and seizures." *See Kramer*, 315 Wis. 2d 414, ¶ 17 & ns. 4 & 5.

Wisconsin courts consistently follow the United States Supreme Court's interpretation of the search-and-seizure provision of the federal constitution in applying the same provision of the state constitution. *See Kramer*, 315 Wis. 2d 414, ¶ 18. These constitutional provisions also have been codified in Chapter 968 of the Wisconsin Statutes.

Whether a search or seizure has occurred, and if so, whether it passes constitutional muster are questions of law, subject to independent review. *Id.*, ¶ 16. A trial court's underlying findings of evidentiary or historical fact

must be upheld, however, unless they are clearly erroneous. *See State v. Williams*, 2001 WI 21, ¶ 20, 241 Wis. 2d 631, 623 N.W.2d 106.

2. *State v. Kramer* and the "community caretaker" exception to the warrant requirement.

Introduction. "A warrantless search of a home is presumptively unreasonable under the Fourth Amendment" and Art. I, § 11 of the Wisconsin Constitution. *State v. Richter*, 2000 WI 58, ¶ 28, 235 Wis. 2d 524, 612 N.W.2d 29; *Payton v. New York*, 445 U.S. 573, 586 (1980).

The warrant requirement is not absolute, however, and in accordance with the United States Supreme Court, this court has recognized that "in certain circumstances[,] it would be unreasonable and contrary to public policy to bar law enforcement officers at the door." *Richter*, 235 Wis. 2d 524, ¶ 28 (collecting case examples).

Among the constitutionally accepted exceptions to the warrant requirement is the "community caretaker" exception – first recognized by the United States Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), in the context of a vehicle seizure, and first applied in Wisconsin in *Bies v. State*, 76 Wis. 2d 457, 471-72, 251 N.W.2d 461 (1977). *See Kramer*, 315 Wis. 2d 414, ¶¶ 19-20.[5]

The basic "community caretaker" test. As reaffirmed by this court in *Kramer*, the basic test for applying the "community caretaker" exception to the

[5]As discussed in the next subsection of this brief, the "community caretaker" exception has been expanded in Wisconsin to justify not only warrantless *seizures* of the person in cases involving vehicle seizures but also warrantless *searches* in the form of nonconsensual entries into premises.

warrantless *seizure of a person* consists of three conjunctive requirements:

> "(1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, [that] the police conduct was bona fide community caretaker activity; and (3) if so, [that] the public need and interest outweigh the intrusion upon the privacy of the individual."

Kramer, 315 Wis. 2d 414, ¶ 21 (citation omitted; brackets added). "The State bears the burden of proving that the officer's conduct fell within the scope of a reasonable community caretaker function." *Id.*, ¶ 17.

First step – a seizure or a search. When the foregoing three-part test for the community caretaker exception has been applied in Wisconsin to a warrantless police *entry into a residence*, the first step in the test necessarily has been modified from requiring the existence of a "seizure" to requiring the existence of a "search," which is what occurs when police make a warrantless, nonconsensual entry into a residence. *See, e.g.*, *State v. Ziedonis*, 2005 WI App 249, ¶¶ 14-16, 287 Wis. 2d 831, 707 N.W.2d 565.

Second step – bona fide community caretaker activity. The United States Supreme Court said that for the community caretaker exception to apply, the police activity should be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441.

The meaning of "totally divorced," however, engendered legal debate and in *Kramer*, this court recently laid the debate to rest in Wisconsin:

> When evaluating whether a community caretaker function is bona fide, we examine the totality of the circumstances as they existed at the time of the police conduct. . . . In doing so, we conclude that the "totally divorced" language from *Cady* does not mean that if the police officer has any

> subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function. Rather, we conclude that in a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns.

Kramer, 315 Wis. 2d 414, ¶ 30.

This does not mean that the officer's subjective motivations are irrelevant. "[W]hen a search or seizure is not supported by probable cause or reasonable suspicion and it is contended that the reasonableness of police conduct stands on other footing [such as "community caretaker" activity], an officer's subjective motivation is a factor that may warrant consideration." *Id.*, ¶ 27 (brackets added). In effect, "while the subjective intent of the officer may be relevant, it is not dispositive, constituting merely one factor among many to be considered in the totality of the circumstances." *Id.*, ¶ 25.

As to what constitutes an officer's bona fide community caretaker activity, this court observed in *Kramer*:

> [T]he nature of a police officer's work is multifaceted. An officer is charged with enforcing the law, but he or she also serves as a necessary community caretaker when the officer discovers a member of the public who is in need of assistance. As an officer goes about his or her duties, an officer cannot always ascertain which hat the officer will wear – his law enforcement hat or her community caretaker hat. . . . Accordingly, the officer may have law enforcement concerns, even when the officer has an objectively reasonable basis for performing a community caretaker function.

Id., ¶ 32.

In short, so long as a law-enforcement officer "has articulated an objectively reasonable basis under the

totality of the circumstances for the community caretaker function, he [or she] has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." *Id.*, ¶ 36 (brackets added).

Third step – the balancing act. Finally, if the police conduct was bona fide community caretaker activity, then the third step in the analysis requires determining "whether the officer's exercise of a bona fide community caretaker function was reasonable." *Id.*, ¶ 40. This task requires "balancing a public interest or need that is furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen." *Id.* Such balancing entails consideration of the following factors:

> "(1) the degree of the public interest and exigency of the situation; (2) the attendant circumstances surrounding the seizure [or 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., ¶ 41 (citations omitted).

3. The "community caretaker" exception to the warrant requirement may justify a warrantless entry to a residence under circumstances in which the "emergency doctrine" exception might not apply.

Introduction. Before discussing application of the community caretaker exception to the present case, it is worthwhile both to recognize its application in Wisconsin to cases involving warrantless, nonconsensual entries into

residential premises and to distinguish it from two other similar, but distinct exceptions to the warrant requirement – the "emergency doctrine" exception and the "exigent circumstances" exception.

Warrantless, nonconsensual entries into premises. Apparently, the federal circuits are divided on whether the community caretaker exception should be limited to vehicle seizures. *See* Mary Elisabeth Naumann, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 Am. J. Crim. L. 325, 348-52 (1999) (hereafter "Naumann"). The author notes that "state courts . . . extend the [exception] to a wide variety of situations," including warrantless, nonconsensual entries into residential premises. *Id.* at 352 (collecting cases at 352-57). The author agrees that "courts should allow the extension of the doctrine outside of cars to homes and pedestrians to guarantee that police can assist those in need." *Id.* at 365.

In Wisconsin, at least four published opinions have recognized the application of the community caretaker exception to warrantless, nonconsensual entries to residential premises – *Bies*, 76 Wis. 2d at 471-72 (residential garage); *State v. Horngren*, 2000 WI App 177, ¶¶ 2-18, 238 Wis. 2d 347, 617 N.W.2d 508 (apartment and interior rooms); *State v. Ferguson*, 2001 WI App 102, ¶¶ 2-23, 244 Wis. 2d 17, 629 N.W.2d 788 (apartment and interior bedroom and closet); and *Ziedonis*, 287 Wis. 2d 831, ¶¶ 2-34 (house and interior rooms).[6]

"Emergency doctrine" exception. In Wisconsin, the "emergency doctrine" exception to the warrant requirement may justify a warrantless search or seizure under the following two-part objective test:

[6]The facts of *Ferguson* and *Ziedonis* are discussed later in Argument Section D.4. of this briefs. In the present case, Pinkard has not argued for limiting the community caretaker exception to seizures of the person during vehicle stops.

> [if] 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.

State v. Boggess, 115 Wis. 2d 443, 452, 340 N.W.2d 516 (1983). Accordingly, the "emergency doctrine" exception appears to be a subset of the "community caretaker" exception. *See, e.g., People v. Ray*, 981 P.2d 928, 933 (Cal. 1999) (the "emergency aid doctrine" is "a subcategory of the community caretaking exception"); Naumann, 26 Am. J. Crim. L. at 330 ("the community caretaker doctrine is quite broad and encompasses . . . the emergency aid doctrine").

In effect, every application of the emergency doctrine necessarily will satisfy the community caretaker exception, but not every application of the community caretaker exception requires an "actual or threatened physical injury" under *Boggess*, 115 Wis. 2d at 452. Stated another way, the community caretaker exception to the warrant requirement may justify a warrantless, nonconsensual entry to a residence under circumstances in which the "emergency doctrine" exception might not apply.

"Exigent circumstances" exception. The community caretaker exception is to be distinguished, however, from the "exigent circumstances" exception to the warrant requirement which requires "both probable cause and exigent circumstances [to] overcome the individual's right to be free from government interference." *State v. Hughes*, 2000 WI 24, ¶ 17, 233 Wis. 2d 280, 607 N.W.2d 621. Under the "exigent circumstances" exception, the objective test is: "whether a police officer, under the facts as they were known at the time, would reasonably believe that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood

of the suspect's escape." *Id.* at ¶ 24. In effect, unlike the "exigent circumstances" exception, application of the community caretaker exception does not require police to have probable cause of criminal activity.

The present case. In the present case, the prosecutor did not argue, by name, for application of the "emergency doctrine" or "exigent circumstances" exception (31:17-19), and the State did not develop either alternative justification in its brief to the court of appeals or in its response to Pinkard's petition for review.

Respectfully, the State harbors doubt whether the anonymous tip in the present case satisfies probable cause of illegal drug dealing – even though officers corroborated the "open door" aspect of the tip. In any event, for reasons discussed in the next subsection of the brief, the very same circumstances that justify the warrantless, nonconsensual entries into Pinkard's apartment and bedroom under the "community caretaker" exception might also satisfy the narrower "emergency doctrine" subset of the community caretaker exception, even though not required to do so.

D. Application of the foregoing principles to the present case.

1. "Community caretaker" analysis.

For the reasons that follow, all three requirements for application of the community caretaker exception are met in the present case to justify the warrantless, nonconsensual police entries into Pinkard's residence and bedroom.

a. The warrantless entries constitute "searches."

To begin, there is no question in the present case that the warrantless, nonconsensual police entries into Pinkard's apartment and bedroom constitute "searches" under the Fourth Amendment for purposes of applying the community caretaker exception to the warrant requirement. *See, e.g., Ziedonis*, 287 Wis. 2d 831, ¶ 16.

b. Police engaged in "bona fide community caretaker activity."

Need to ensure well-being of occupants. The second requirement for application of the community caretaker exception also is satisfied in the present case. Officer Osowski expressly articulated two legitimate "community caretaker" activities underlying the warrantless entry into Pinkard's residence: (1) to ensure that the occupants were not "injured" and in need of medical assistance, and (2) "to safeguard any life or property in the residence" (31:6). *See, e.g., Ziedonis*, 287 Wis. 2d 831, ¶ 17 (police are engaged in bona fide community caretaker activity when they reasonably seek "'to determine whether there was something wrong with someone in [a] house'").

Moreover, for several reasons, Officer Osowski possessed objectively reasonable grounds for believing that the residence was occupied, that the occupants might be in need of medical assistance, and that the residence needed to be secured.

First, the anonymous tip that initiated the police response was intimately detailed with respect to: who ("Big Boy" and his girlfriend, "Amalia"); what ("appeared to be sleeping" amidst "cocaine [and] money," while "the back door to the residence was open"); when (only a short

time ago, just before 9:00 a.m.); and where (in "the rear apartment" at 2439 South 7th Street in Milwaukee) (24:8).

The reliability of an anonymous tip on which a police officer acts depends on the totality of the circumstances, which "permits a deficiency in indicia demonstrating an informer's veracity to be compensated for by a strong showing concerning the informer's basis of knowledge, or by some other indicia of reliability." *Boggess*, 115 Wis. 2d at 454. Consequently:

> Detail that an informer provides is evidence that the manner in which he obtained his information was reliable, and it enables the recipient of the information to conclude that [the informer] is relying on something more than casual rumor or an accusation based on a person's general reputation.

Id. at 455.

Second, the anonymous tip further explained how the tipster knew the information being provided: the tipster reported having "*just*" been inside the residence (24:8). *See, e.g., Williams*, 241 Wis. 2d 631, ¶ 33 ("the anonymous tipster explain[ed] exactly how she [knew] about the criminal activity she [was] reporting: she [was] observing it").

Third, the anonymous tip also included one significant "predictive" feature that Officer Osowski was able to confirm: that the back door to the rear unit of a three-family residence at the address given by the tipster was three-quarters open (24:8; 31:5). A significant predictive feature of a tip that police confirm further bolsters the tipster's credibility. *See, e.g., Williams*, 241 Wis. 2d 631, ¶¶ 39-40; *Alabama v. White*, 496 U.S. 325, 332 (1990).

Fourth, Officer Osowski's expressed concern for the well-being of the occupants and their property was heightened when – despite the open door to the residence – the officer received no response to his

knocking on the metal door and announcing the police presence, despite waiting thirty to forty-five seconds (31:5-6).

If two occupants were inside the residence, as the tip suggested, and if they had ingested cocaine, as the tip implied, then the absence of any response to the officer's knock-and-announce, coupled with the open door, reasonably warranted the officer entering the residence to ensure that no one was injured and in need of medical assistance.

Given this context, the tipster's report that the two occupants "appeared to be sleeping" (24:8; 31:4-5) does not convincingly eliminate the prospect that the occupants might actually be unconscious due to a drug overdose or as crime victims. Discerning sleep from a more serious state of unconsciousness, such as that attributable to a drug overdose, may not always be straightforward. In some criminal contexts, such as for victims of sexual assault, sleep and unconsciousness are even equated. *See, e.g., State v. Pittman*, 174 Wis. 2d 255, 277-78, 496 N.W.2d 74 (1993); *State v. Curtis*, 144 Wis. 2d 691, 696-96, 424 N.W.2d 719 (Ct. App. 1988).

Nor do the circumstances that confronted the officers outside Pinkard's apartment alleviate concerns that an unscrupulous third party might have taken advantage of the situation and burglarized the residence or that a curious child, up and about at mid-morning on a summer day, might have wandered inside the residence (if not already inside by virtue of relationship to an occupant) and unknowingly ingested cocaine that reportedly was present in plain view. The case law provides the following tragic example of the latter scenario:

> The factual foundation for the indicted charges, set forth at the suppression hearing and at trial, revealed that on the afternoon of June 11, 1987, the defendant's [thirteen-month-old] daughter was visiting with him in his home; that she had been put down for a nap in the bedroom and the defendant

> had also fallen asleep on the couch in the living room; that an undetermined amount of cocaine belonging to the defendant was lying on a coffee table beside the couch; that the child apparently awoke and came into the living room while the defendant was still asleep, ate some of the cocaine and expired from cardiac arrest. When the defendant awoke, [the daughter] was discovered lying on the floor beside the coffee table. Subsequent rescue efforts by medical personnel were to no avail and she was pronounced dead on arrival at a local hospital.

State v. Grunden, 585 N.E.2d 487, 489 (Ohio Ct. App. 1989) (brackets added).

Fifth, in conformance with the tip, Officer Osowski went directly to a small bedroom just inside the back door of the residence, where, through the open bedroom door, he was able to confirm the tipster's report of a male and a female lying in bed, amidst suspected cocaine (31:6, 11). Objectively, this discovery would have increased the officer's concern that the occupants may be in need of medical help, especially since the occupants still failed to respond when the officer again "loud[ly]" announced the police presence only a few feet away (31:6, 11-12).

As the United States Supreme Court has pointedly observed:

> Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they *reasonably believe* that a person within is in need of immediate aid.

Mincey v. Arizona, 437 U.S. 385, 392 (1978) (emphasis added). Such "reasonable relief" for allowing police to make a warrantless entry into a residence as a community caretaker is a less exacting standard than "probable cause." *Maryland v. Buie*, 494 U.S. 325, 336-37 (1990).

Not negated by subjective law enforcement concerns. Further, the objectively reasonable police entries into Pinkard's apartment and bedroom are not negated by the fact that Officer Osowski also subjectively recognized the prospect that the entries might reveal Pinkard's involvement in criminal activity – namely, possession of illegal drugs.

In the present case, Officer Osowski testified that the anonymous tip "sounded like a drug house to me," but also testified that Officer Lopez did not ask him to conduct "a drug investigation" (31:13). Rather, to reiterate, Officer Osowski said, "we made the determination to enter [Pinkard's residence] and check the welfare of the [reported] occupants" (31:6).

The present case is a prime example of "the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences" that concomitantly suggest a likelihood of finding evidence of criminal activity. 3 Wayne R. LaFave, *Search and Seizure*, § 6.6(a) at 452-53 (4th ed. 2004).

As this court recently observed, if an officer "could not engage in a community caretaker function [whenever] he or she had any law enforcement concerns, [it] would, for practical purposes, preclude police officers from engaging in any community caretaker functions, at all." *Kramer*, 315 Wis. 2d 414, ¶ 34. Consistent with this observation, the court of appeals "has cautioned against taking a too-narrow view in determining whether the community caretaker function is present," lest police officers be dissuaded from discharging it. *Ziedonis*, 287 Wis. 2d 831, ¶ 15; *Horngren*, 238 Wis. 2d 347, ¶ 18.

c. The public need and interest in making the entries outweighed the intrusion on Pinkard's privacy.

As the third and final step in the community caretaker analysis, the balancing of interests in the present case properly is struck in favor of the officers' warrantless entries into Pinkard's residence and bedroom, as reflected in the four exemplary factors that weigh in the balance.

First, "'the degree of the public interest and exigency of the situation'" justifying the officers' warrantless entries into Pinkard's apartment and bedroom are substantial on two levels. *Kramer*, 315 Wis. 2d 414, ¶ 41(citation omitted).

Primary concern, as expressed by Officer Osowski, was for the safety and well-being of the reported occupants. An open door to the residence, a lack of response to the knock-and-announce of police, a lack of response to a loud announcement of police presence at the threshold of the bedroom, and a confirmed report of two occupants who were not conscious (whether or not they were asleep) amidst "cocaine [and] money" reasonably add up to the possibility that the occupants may be victims of a drug overdose or criminal activity, for which immediate entry was an objectively reasonable response:

> "[A] concern about the safety and well-being of an individual is certainly a matter of significant public interest and efforts to address such concern [are] . . . of great exigency."

Ziedonis, 287 Wis. 2d 831, ¶ 25 (quoting with favor the State's argument). The present case entails more than just a police response to an open door to a residence.

A related concern, as discussed, was to ensure that a third party did not, or would not, take advantage of the situation by burglarizing the residence or that a curious child had not, or would not, be harmed by unknowingly ingesting the cocaine that reportedly was present in plain view.

Second, "'the attendant circumstances surrounding the seizure [or search], including time, location, the degree of overt authority and force displayed'" militate in favor of the warrantless entries. *Kramer*, 315 Wis. 2d 414, ¶ 41(citation omitted).

In the present case, the police officers acted reasonably in responding to the ambiguous situation, knocking on a heavy aluminum door and announcing their presence, waiting thirty to forty-five seconds before entering when they received no response, proceeding to the bedroom in accordance with the tip, and again "loud[ly]" announcing their presence, still eliciting no response from the two occupants (31:5-6, 9-12). As the trial court's ruling suggests, the reasonableness of the officers' conduct before each entry bespeaks the absence of any ruse by the officers to do an "end run" around the warrant requirement (31:24-29).

Although four officers accompanied Officer Osowski, there is no indication that the officers employed any force or weapons. Indeed, both the back door to the residence and the bedroom door were open (31:5-6). Moreover, the fact that an officer had to shake Pinkard to wake him (31:6, 7) reflects that even a loud knock-and-announce effort from outside the residence and a loud announcement of police presence at the threshold of the bedroom did not ally reasonable concerns about the well-being of the occupants.

Third, although the present case involves a warrantless entry into a residence, rather than a vehicle seizure, *Kramer*, 315 Wis. 2d 414, ¶ 41, the privacy

interest in one's residence pales in comparison to the sanctity of human life.

When, as here, a reasonable possibility exists that one or more occupants of a residence may be victims of a drug overdose or criminal activity, an investigating officer reasonably errs on the side of ensuring the well-being of the occupants: "'The preservation of human life is paramount to the right of privacy protected by search and seizure laws and constitutional guarant[e]es.'" *State v. Hetzko*, 283 So.2d 49, 51 (Fla. Dist. Ct. App. 1973) (citation omitted). Of course, "there is no constitutionally protected interest in possessing contraband." *State v. Arias*, 2008 WI 84, ¶ 22, 311 Wis. 2d 358, 752 N.W.2d 748.

Cocaine statistics bear out the officers' expressed concerns for the well-being of the occupants who, according to the tip, "appeared to be sleeping" (24:8), yet had left the apartment door open while lying amidst suspected cocaine and money and could not be roused either by a police knock-and-announce on an open, heavy aluminum, exterior door or by a loud announcement at the threshold to the bedroom. According to one on-line report:

> Today it is estimated that 22 to 25 million people have tried cocaine at least once. Conservative estimates indicate that there are over two million cocaine addicts in the United States today.
>
> . . . .
>
> Nearly half of all drug related emergency room visits are due to cocaine abuse.
>
> . . . .
>
> From 1997 to 2000[,] cocaine was the most common drug reported in emergency room episodes.

Quoting http://www.drug-statistics.com/cocaine.htm (last viewed 10/2/09).

According to another on-line report, cocaine use in Wisconsin for 2005 was estimated at 200,000, and "treatment admissions with cocaine or crack as the primary drug of abuse" for 2005 was 2,895 (an average of eight new cocaine admissions every day), nearly double the amount for the year 2000. Quoting http://www.stopaddiction.com/index.php/States/Wisconsin/Wisconsin-Cocaine-and-Crack-Drug-Rehab-Facts.html (last viewed 10/2/09).

One law review commentary cites sources that, for 1999, estimate the number of "chronic cocaine users" in the United States at "3.6 million" and the number of deaths in the United States attributable to "overdoses from illegal drugs" at "9,000." Eric Pinkard, T*he Death Penalty for Drug Kingpins: Constitutional and International Implications*, 24 Vt. L. Rev. 1, 10 (1999) (footnote citations omitted).

Moreover, in the present case, the tip's report that the occupants of Pinkard's residence "appeared to be *sleeping*" amidst suspected cocaine (24:8) was doubly concerning in view of the apparent inconsistency between sleeping behavior and the typical, stimulant effects of cocaine use – "[i]ncreased alertness, excitation, euphoria (sometimes followed by a dysphoric 'crash'), increased pulse rate and blood pressure [and] insomnia." Quoting http://www.stopaddiction.com/index.php/Drugs/ (last viewed 10/2/09).

Fourth, "'the availability, feasibility and effectiveness of alternatives'" to making a warrantless entry to the residence were limited for the officers. *Kramer*, 315 Wis. 2d 414, ¶ 41(citation omitted).

The anonymous tip, standing alone, probably provided insufficient probable cause for a search warrant. When the knock on the open, heavy aluminum, door went unanswered, there was no doorbell or "door chime" for the officers to employ (31:10-11). Arguably, the officers could have checked to see if the residence had a phone by

which they might attempt to reach the occupants and inform them of the open back door. Nevertheless, going immediately to the residence enabled the officers to confirm the report of an open back door, and a knock-and-announce at the door presumably would be just as effective as a phone call in alerting the reported occupants to the open back door. Moreover, by going immediately to the residence, the officers would be in better position to ensure the well-being of the reported occupants if – as occurred – the officers' efforts to contact the reported occupants from outside the residence proved ineffectual.

"It is beyond question that the occupant of a house has a right to know why the police seek entry. But the law does not require futile, useless things to be done." *Wayne v. United States*, 318 F.2d 205, 213 (D.C. Cir. 1963).

In a nutshell, the relevant question is: "Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?" *Ray*, 981 P.2d at 937 (Cal. 1999). For the reasons set forth, the answer to this question is "yes" in the present case. Indeed, under the circumstances, the officers' expressed concern for the well-being of the occupants of Pinkard's apartment might also satisfy the narrower "emergency doctrine" subset of the community caretaker exception.

d. Comparable case law.

Although each case must be judged on its own totality of the circumstances, it nevertheless is instructive to find that application of the community caretaker doctrine in the present case comports with applications of this doctrine under similar (or even less compelling) circumstances in other cases.

- In *United States v. Quezada*, 448 F.3d 1005, 1006 (8th Cir. 2006), a deputy went to an apartment to

serve a child-protection order. When the deputy knocked on the door, the door "yielded to the deputy's knock," allowing the deputy to see lights on in the apartment and hear a television playing. *Id.* The deputy "shouted" his presence "several times, but received no response," so he entered. *Id.* Looking down a hallway, the deputy "saw a pair of legs on the ground sticking out from a bedroom," and upon approaching, the deputy found "a man lying on the [floor] with a shotgun protruding from beneath him." *Id.* Neither yelling nor kicking the man's feet prompted a response. *Id.* Only after the deputy grabbed the shotgun did the man begin to stir. *Id.* The man ultimately was arrested for possession of a shotgun as a felon. *Id.* Under these circumstances, the appellate court upheld the deputy's warrantless entry into the apartment under the community caretaker doctrine, observing that "a reasonable officer in the deputy's position could conclude that someone was inside but was unable to respond for some reason." *Id.* at 1008. The firearm, therefore, was admissible under the plain-view doctrine. *Id.*

- In *Hetzko*, 283 So. 2d at 50, two police officers responded to the defendant's residence in response to a report of a disturbance. The door to the residence "was completely open" and loud music emanated from inside. *Id.* The officers could see someone sitting in a chair, but their knock-and-announce effort failed to generate a response. *Id.* "The officers then entered the apartment in order to determine the condition" of the person in the chair. *Id.* Once inside, the officers found marijuana on a kitchen table. *Id.* On this record, the Florida appellate court upheld the warrantless entry, explaining:

> Faced with these circumstances, the officers would have been derelict in their duty had they acted otherwise. Their entry was consistent with the duty of police forces to patrol the community, preserve the peace and maintain law and order as well as consistent with generally accepted crime prevention activities.

Id. at 52.

- In *Stewart v. State*, 688 N.E.2d 1254, 1256 (Ind. 1997), a hotel maid knocked on a hotel room door after checkout time and got no response. The hotel manager's phone call to the room and another knock on the door likewise generated no response. *Id.* When the maid opened the door with a key, a chain lock barred entry, but the maid could see "the defendant asleep on a couch and a candle and a 'white powder substance' on the table in front of the couch." *Id.* When another phone call failed to rouse the defendant, police were called, and when knocks on the door by police went unheeded, the manager unlatched the chain and allowed police to enter. *Id.* Police then roused the defendant and his girlfriend and seized cocaine, marijuana, baggies, a pager, ledger book, calculator, scales, a candle, and a Rolodex file. *Id.* at 1256-57. The Indiana Supreme Court upheld the warrantless police entry into the room, concluding that the foregoing circumstances "could have reasonably suggested that the occupants of the room . . . were in need of medical attention." *Id.* at 1257.

- The present case also compares favorably with *Ziedonis*, 287 Wis. 2d 831, ¶ 2, where officers responded to a complaint of loose dogs at 2:00 a.m. Police efforts to contact the dogs' owner at a nearby residence – by sirens, air horns, and a loud speaker – all failed. *Id.*, ¶ 4. Lights were on in the residence, located in a high-crime area, and officers discovered that the interior back door was ajar "four inches," causing them to suspect that "'there was possibly something wrong with the person [reported to be] inside.'" *Id.*, ¶ 5. One officer then entered the residence after a knock-and-announce likewise was futile, and he found guns and marijuana. *Id.*, ¶¶ 5-7. On this record, the court of appeals concluded that the community caretaker exception justified the warrantless entry. *Id.*, ¶¶ 16-34.

- In *Ferguson*, 244 Wis. 2d 17, ¶¶ 2-3, police officers responded to a report of a fight at an apartment and elicited no response when they knocked on the closed apartment door. An intoxicated teenager, who had been outside when police arrived, then appeared and unlocked

the apartment door from the outside, telling the occupants that police were present. *Id.*, ¶ 3. Officers followed the teenager inside and observed underage drinking. *Id.*, ¶ 4. The teenager said the officers "could take a look around." *Id.* Officers found one intoxicated man lying on the bathroom floor. *Id.* When officers encountered a locked bedroom door, the original teenager said the occupant of the bedroom "had not been to work for several days." *Id.*, ¶ 5. Another teenager told the officers that "three people were in the bedroom." *Id.* When knocks on the door and "yelling for whoever was in the room to come out" yielded no response, the officers jimmied the door open, fearing for the well-being of whoever might be in the bedroom. *Id.* The officers found an unspecified number of "people, including [the defendant] in the bed." *Id.* "Thinking that someone could have been hidden in the closet and passed out, one of the officers opened the closet door and discovered . . . marijuana plants." *Id.*

In *Ferguson*, *id.*, ¶ 7, the issue on appeal concerned the warrantless police entry into the defendant's locked bedroom and bedroom closet. In upholding the police conduct under the "community caretaker" exception, the court of appeals concluded:

> It was only after the police could not eliminate the possibility that [the defendant] was in the bedroom, and after they unsuccessfully attempted to have the occupants come out voluntarily to confirm their well-being, that the police entered the bedroom. Further, it was established that the only purpose in opening the closet door was to confirm that no highly intoxicated person was hiding there.
>
> . . . .
>
> [I]t was reasonable for the police to be concerned about the bedroom occupants' physical conditions, particularly since the police received no response to their knocking and yelling, strongly suggesting that the additional persons in the bedroom were incapacitated.

Id. , ¶¶ 14-15.

Finally, the present case is distinguishable from Wisconsin case law in which the community caretaker exception was found not to apply.

- In *State v. Paterson*, 220 Wis. 2d 526, 529, 583 N.W.2d 190 (Ct. App. 1998), police went to a residence where a neighbor had reported seeing lights "'going on and off.'" The garage door was open, and a pickup truck was parked in the garage. *Paterson*, 220 Wis. 2d at 529. A phone call to the residence went unanswered, but police found "no signs of forced entry into the residence." *Id.* at 530. Police discovered that a basement door was closed but unlocked, so they opened the door and announced their presence, *id.*, but without knocking. *Id.* at 536. They proceeded into the house, checking each room and finding marijuana plants. *Id.* at 530. Ultimately, a young girl appeared upstairs and told police that neither her mother nor her mother's boyfriend was home. *Id.*

Under the foregoing circumstances, the court of appeals in *Paterson* rejected a community caretaker rationale for the warrantless police entry. *Id.* at 533-38. In *Paterson* – unlike the present case – "the information provided by the neighbor did not present an overly worrisome situation," *id.* at 535, there was no door standing open or apparent break-in, *id.*, and police "could have monitored the residence and waited out the situation" or "made attempts to locate the owner." *Id.* at 536.

- The present case also is distinguishable from *State v. Dull*. In *Dull*, 211 Wis. 2d at 655, a deputy took custody of a juvenile for underage alcohol consumption outside a residence. When the juvenile said the only adult at home was an older brother who was asleep, the deputy rejected the juvenile's request to retrieve the older brother. *Id.* at 655-56. Instead, the deputy entered the residence, knocked on the adult brother's bedroom door, and upon receiving no response, opened the bedroom door to find the adult brother in bed with a juvenile girl. *Id.* at 656. Under these non-exigent circumstances – unlike the present case – the officer's entries into the residence and

bedroom were not justifiable under the community caretaker exception. *Id.* at 658-61.

> 2. To complete the analysis, the evidence of cocaine, marijuana, currency, and digital scales in Pinkard's bedroom was lawfully seized under the "plain view" doctrine.

Additional principles. A person "has no reasonable expectation of privacy in an item that is in plain view." *State v. Edgeberg*, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994); *see also Horton v. California*, 496 U.S. 128, 133 (1990).

Under this "plain view" doctrine, "'objects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence.'" *Edgeberg*, 188 Wis. 2d at 345 (citation omitted). A law enforcement seizure of evidence following a "plain view" is "not the product of a search," *id.*, and, thus, no search warrant is required.

To satisfy the "plain view" exception to the warrant requirement, a law enforcement seizure of evidence must meet three requirements:

> The officer must have a prior justification for being in the position from which the "plain view" discovery was made; the evidence must have been in plain view of the discovering officer; and the item seized, in itself or in itself with facts known to the officer at the time, provides probable cause to believe there is a connection between the evidence and criminal activity.

Id.

Application. In the present case, all three requirements are met for applying the "plain view" doctrine to the police seizure of cocaine, marijuana, currency, and digital scales from Pinkard's bedroom.

First, for reasons discussed, the police entries into Pinkard's residence and bedroom lawfully derive from the community caretaker exception to the warrant requirement. Thus, the police possessed "a prior justification for being in the position from which the 'plain view' discovery was made." *Edgeberg*, 188 Wis. 2d at 345.

Second, there apparently is no dispute that the evidence in question was "in plain view of the discovering officer." *Id.* To reprise Officer Osowski's testimony:

> [I]n plain view at the foot of the bed, there was a small circular disk of a[n] off-white chunky substance of suspected cocaine, and then on the window air conditioner near the head of the bed, there w[ere] 10 rocks of suspected crack cocaine and a quantity of green plant-like substance of suspected marijuana also up there, along with a quantity of money.

(31:7.) Officer Osowski also identified "scales" as being "in plain view" (31:8).

Third, Officer Osowski possessed "probable cause to believe there is a connection between the evidence [in question] and criminal activity." *Edgeberg*, 188 Wis. 2d at 345. Cocaine and marijuana are controlled substances that are illegal to possess under Chapter 941 of the Wisconsin Statutes. The proximity of the currency and scales to such contraband provided probable cause to view such evidence as instrumentalities of possible illegal drug dealing. All of this evidence was properly seized and would be admissible against Pinkard at a trial.

CONCLUSION

For the reasons set forth, this court should affirm the court of appeals' decision, thereby also affirming the judgment of conviction and the order denying postconviction relief.

Dated at Madison, Wisconsin: October 9, 2009.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904
(608) 266-9594 (Fax)
freimuthjm@doj.state.wi.us

BRIEF CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 8,955 words.

_____
JAMES M. FREIMUTH

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated October 9, 2009.

_____
JAMES M. FREIMUTH
Assistant Attorney General

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No. 2008 AP 1204-CR

JUIQUIN ANTHONY PINKARD,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, WISCONSIN ON APRIL 27, 2007 AS AMENDED AUGUST 14, 2007 AND A DECISION AND ORDER DENYING POSTCONVICTION RELIEF DATED MARCH 21, 2008, THE HON. M. JOSEPH DONALD, CIRCUIT COURT JUDGE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

RICHARD L. ZAFFIRO
Attorney for Defendant-Appellant-Petitioner
State Bar No. 1005614

P.O. Address:
4261 N. 92nd St.
Wauwatosa, WI 53222-1617
(414) 737-1956
FAX (414) 438-1015
e-mail: richardzaffiro@aol.com

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At no time did the anonymous informant so much as hint that Petitioner or anyone may have been in distress from a drug overdose or had been victimized by a crime, or that new or additional harm might accrue from a third party such as a curious child entering the residence. While evidence of the crime was in "plain view" once the police entered Petitioner's bedroom within his home there was no basis for the warrantless entry. Thus, any evidence of criminal activity observed in "plain view" in the bedroom is fruit of the constitutional violation of the petitioner's reasonable expectation of privacy in his home and bedroom. See Coolidge v. New Hampshire, 403 U.S. 443 (1971)

The court of appeals' decision correctly points out that entry was predicated on an anonymous tip of two individuals evidently sleeping in an open house, surrounded by drugs, a drug scale and drug money. Aside from problems with the anonymous tip, see e.g. State v. Williams, 2001 WI 21 and United States v. Roberson, 90 F.3d 75, 80–81 (3rd Cir. 1996) (the tip here was not a "'fleshless anonymous'" telephone call that could have been that of a "'prankster, rival, or misinformed individual.') "concern" about people possessing drugs in Petitioner's home house is not the type of concern that the "community caretaker" exception addresses.

The community caretaker exception does not apply to searches and seizures within homes. The Supreme Court of the United States first addressed the "community caretaker doctrine" in Cady v. Dombroski, 413 U.S. 433 (1973). In affirming the reasonableness of the search in that case, the Court discussed well-established privacy distinctions between motor vehicles and residences:

"Because of the extensive regulation of motor vehicles and traffic, and also

because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in "plain view" of evidence, fruits, or instrumentalities of crime, or contraband."

Id. at 441-42.

The Supreme Court's emphasis on the distinction between motor vehicle searches and searches of an individual's home makes clear that the community caretaking function used to uphold a vehicle search, such as existed in Cady is not sufficient to justify an intrusion into an individual's home. The fact that circumstances which justify a warrantless search in an automobile may not justify an intrusion into a home or office under the community caretaking function was reiterated in South Dakota v. Opperman, 428 U.S. 364, 367 (1976):

"This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are "effects" and thus within the reach of the Fourth Amendment, Cady v. Dombrowski, 413 U.S. 433, 439 (1973), warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not. Cardwell v. Lewis, 417 U.S. 583, 589 (1974); Cady v. Dombrowski, supra, at 439-440; Chambers v. Maroney, 399 U.S. 42, 48 (1970).

Thus, the Supreme Court has never sanctioned government intrusions into the home under the "community caretaker" doctrine, as distinguished from "emergency aid" or other "exigent circumstances". The search of the Petitioner's bedroom was not totally

divorced from investigating criminal activity and acquiring evidence and, therefore, could not be considered a caretaking function. See, e.g., United States v. Gillespie, 332 F. Supp. 2d 923, 929 (W.D. Va. 2004) (community caretaker exception to the warrant requirement "allows officers who are . . .protecting the safety of persons or property, to make warrantless searches." Under the community caretaker exception, as opposed to the emergency exception, officers may make warrantless searches provided that such searches are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." The community caretaker exception is most often used to justify seizures or searches of automobiles.)

The First, Seventh, Ninth, Tenth, and Eleventh Circuits of the United States Court of Appeals have considered cases regarding the application of the community caretaking doctrine to the warrantless search of residential and commercial properties; each court declined to extend the community caretaking function of law enforcement officers to allow warrantless searches of private homes or businesses. See United States v. McGough, 412 F.3d 1232, 1238 (11th Cir. 2005) (stating, "we have never explicitly held that the community caretaking functions of a police officer permits the warrantless entry into a private home," and holding that officers' warrantless entry was not objectively reasonable when it was not justified by any compelling exigency); United States v. Bute, 43 F.3d 531 (10th Cir. 1994) (refusing to extend community caretaking function to warrantless search of commercial garage); United States v. Erickson, 991 F.2d 529 (9th Cir. 1993) (refusing to extend community caretaking function to warrantless search of private home); United

States v. Pichany, 687 F.2d 204 (7th Cir. 1982) (refusing to extend community caretaking function to warrantless search of warehouse); United States v. Tibolt, 72 F.3rd 965, 969 fn. 2 (1st Cir. 1995) (declining to accept the government's proffered community caretaker rationale for entry into a commercial building as the search did not involve a vehicle); State v. Gill, 755 N.W. 2d 454 (N.D. 2008) (refusing to apply exception to warrantless search of dwelling); and Ortiz v. State of Florida, Case No. 5D08-1653 (5th Dist. Ct. App. Fla. 2009) ("given the high value our society places on the sanctity of an individual's home, we must resolve the question against even a well-intended intrusion into the home by the government").

On the other hand, several cases are purported to extend the exception beyond automobiles. See United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996) (holding officers' warrantless entry into home was reasonable in abating the continuing public nuisance of extremely loud music in the middle of the night: "For the foregoing reasons, we conclude that the Canton police officers' warrantless entry into Defendant's home was justified by *exigent circumstances*") (emphasis added); United States v. Nord, 586 F.2d 1288 (8th Cir. 1978) (holding that, in emergency situation involving an intoxicated individual on the premises, officers had a right to be on premises as part of their community caretaking function. and their warrantless entry into home was constitutionally permissible, see fn. 5: "(P)olice officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance. (Citations omitted.)").

"Exigent circumstances" was not raised by the State here and so is waived; even if considered, there were no exigent circumstances here, and Rohrig is an exigent circumstances case which does not stand for the proposition that the community caretaker exception allows searches of homes. This case likewise differs from Nord, supra, as the anonymous tipster here only said that they were sleeping, not that they were intoxicated or otherwise in some danger.

The Pichany Court, supra, carefully examined the legal rationale for the community caretaker doctrine when it rejected any expansion of the "community caretaker" exception beyond automobiles:

> "In the interests of public safety and as part of what the Court has called "community caretaking functions," Cady v. Dombrowski, supra, at 441 (93 S.Ct. at 2528), automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.
>
> When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobile's contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody, the protection of police against claims or disputes over lost or stolen property, and the protection of the police from potential danger. The practice has been viewed as essential to respond to incidents of theft or vandalism. In addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned.
>
> South Dakota v. Opperman, 428 U.S. 364, 368-69, 96 S.Ct. 3092, 3096-97, 49 L.Ed.2d 1000 (1976) (citations omitted).
>
> None of the factors which the Court found characterized the community caretaking function are present here. First, the police exercised no control or dominion over

the property. In Cady, the court found it incongruous that the police would be required to hold the car but could not search it-even to protect themselves or the owner-without a magistrate's approval. Second, in contrast to Cady the police here were under no obligation to secure the warehouse or to preserve its contents where no threat of damage or theft was immediately present. Their presence on the industrial park grounds did not leave them exposed to claims of liability for lost or stolen property. The officers did not claim to have entered the defendant's warehouse to protect themselves or the public from potential danger. Except for its proximity to the site of the burglary, the physical appearance of the defendant's warehouse did not differ from other surrounding buildings which the officers did not enter. Standing in an isolated and infrequently traveled industrial park, none of the buildings appeared to require some police action to protect them from danger.

Aside from the other differences between Cady and the immediate case, the most obvious difference is that Cady involved the search of an impounded automobile while the present case involves the search of a business warehouse. Accepting the government's argument would require us to ignore express language in the Cady decision confining the "community caretaker" exception to searches involving automobiles. In Cady, the Supreme Court articulated several premises behind its decision which indicate that the holding in the case extended only to automobiles temporarily in police custody. The Court first noted that "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Cady, 413 U.S. at 439, 93 S.Ct. at 2527, quoting Camara v. Municipal Court, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967). Second, the Court stated that this principle applies in all "except ... certain carefully defined classes of cases." Id. Finally, the Court in Cady emphasized that

(o)ne class of cases which constitutes at least a partial exception to this general rule is automobile searches. Although vehicles are "effects" within the meaning of the Fourth Amendment there is a constitutional difference between houses and cars. Chambers v. Maroney, 399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970).

Cady, 413 U.S. at 439, 93 S.Ct. at 2527.3 The Court, moreover, recently reaffirmed these principles in United States v. Ross, --- U.S. ----, ----, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982).

We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in Mincey v. Arizona, 437 U.S. 385, 390 (, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290):

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, 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 (, 88 S.Ct. 507, 514, 19 L.Ed.2d 576) (footnotes omitted)."
>
> The (automobile) exception recognized in Carroll is unquestionably one that is "specifically established and well-delineated."
>
> Consequently, the plain import from the language of the Cady decision is that the Supreme Court did not intend to create a broad exception to the Fourth Amendment warrant requirement to apply whenever the police are acting in an "investigative," rather than a "criminal" function. Cady, 413 U.S. at 453, 93 S.Ct. at 2533 (Brennan, J., dissenting). The Court intended to confine the holding to the automobile exception and to foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses. The defendant has cited-and we have found-no cases extending Cady or the "community caretaking" exception beyond the automobile search context. We cannot justify adding a warehouse exception to the automobile exception."

Id.

The State at page 31 cites State v. Peterson, 220 Wis.2nd 526 (Ct. App. 1998) As in the present case, the information provided by the informant here did not provide an overly worrisome situation except for the suggestion of drug dealing, the garage door was open there as the front door was here, and police could have monitored the residence and waited out the situation or made attempts to locate the owner. Cf. id. at 535-536.

At pages 15 and 16 of its brief, the State also cited a law review article, *"The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*", 26 Am. J. Crim. L. 325 (1999) by Nausmann. One thing cited by some of the State court decisions in the article but missing from the instant case is an objectively reasonable belief that the people inside needed aid, see State v. Blades, 626 A.2nd 273, 280 (Conn. 1993), Terry v. Commonwealth, 474 S.E.2nd 172, 174 (Va. Ct. App. 1996), and State v. Carlson, 548

N.W. 2nd 138, 141-42 (Iowa 1996). Given the doctrine's genesis in Cady, it is not surprising that most of the State cases found in this article deal with automobile searches.

This court cannot reduce the protections afforded citizens by the 4th Amendment to the United States Constitution. The Supremacy Clause is a clear directive to this Court that it is bound by the United States Constitution and its interpretation by the United States Supreme Court:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Art. VI, cl. 2

Even if this court were to go where the United States Supreme Court, the 7th Circuit Court of Appeals and several other appellate courts have refused to go by permitting application of the "community caretaker" exception to residential searches, the police in this case certainly had law enforcement concerns and motivations, but lacked an objectively reasonable basis for performing a community caretaker function. Cf. State v. Kramer, 2009 WI 14, ¶ 32. Thus, the legal analysis should not even get to the balancing test of Kramer.

Petitioner's original brief addressed the balancing test of Kramer, id. at section 21, and will not repeat it here. The Kramer Court could not and did not reduce the 4th Amendment protections set out in Cady, supra, so that the police activity still must be totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute. Id. at 41.

At page 22 of its brief, the State concedes that the police had subjective belief that their entry would reveal evidence of crime. In other words, the State admits their activity here was not "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady, supra at 441. Rather, the investigation here was primarily focused on criminal activity with the possibility of a subjective believe that Petitioner needed assistance.

Had the police more faith in their anonymous tipster, they could have quickly tried to obtain a search warrant. Had they truly believed they were dealing with a possible medical emergency they could have called paramedics. Here, the police did neither, demonstrating that any balance should be struck in favor of Petitioner's carefully guarded 4th Amendment privacy rights over the state's post-textual justifications.

Interestingly, the State quotes an internet site for the proposition that as many as 25 million people have tried cocaine at least once and that there may be over two million cocaine addicts in this country, but do not show what percentage of those 25 million people are in need of medical attention when they appear to be sleeping. There was no indication by the tipster that Petitioner and his girlfriend had ingested cocaine, so the fact of their sleeping is irrelevant. Cf. State brief at page 26.

At no time did the State claim the "emergency doctrine" or "exigent circumstances" exceptions to the Fourth Amendment, and so has waived them for purposes of this review, as conceded at page 17 of its Brief.

Even if there had been a reliable tip, this does not overrule the law of the several federal courts of appeals including our own Seventh Circuit prohibiting "community

caretaker" searches of residents. Ignoring that the tip in this case was a "'fleshless anonymous'" telephone call that could have been that of a "'prankster, rival, or misinformed individual", cf. Roberson, supra, the tipster articulated no fear for the occupants' safety or well-being. If it looks like a zebra and has stripes, one should not assume it is a dolphin; if they looked to the tipster like they were sleeping, then Petitioner and his girlfriend were probably sleeping and not in need of help.

The "unscrupulous third party" or "curious child" examples cited at page 20 of the State's brief came from the attorney general and not from the police officers or tipster actually involved in this search. In any event, such threats or worries could have been eliminated by simply closing the door when no one answered, instead of having five police officers march into Petitioner's home and bedroom.

The State admits lack of probable cause for a search warrant. See State brief at page 26. Lack of probable cause is not justification for a warrantless entry into the home, see Id., but on these facts renders the entry and subsequent search illegal.

Furthermore, the nature of the information in the anonymous tip suggests that the tipster entered Petitioner's home, saw him sleeping, and was himself the one who left the door open, which open door is now the proffered basis of the claimed community caretaker exception. Since there can be no doubt that scheduled narcotics are dangerous, in fact every anonymous tip about a drug house is a call to a community caretaker search under this reasoning, causing the 4th Amendment to evaporate into thin air.

"Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." State v. Douglas, 123 Wis.2nd 13, 17 (1985), and

Welsh v. Wisconsin, 466 U.S. 740, 748 (1984). The warrantless entry by five armed officers into Petitioner's bedroom at 9:00 am was not justified by any "community caretaker" function.

Generally speaking, evidence gained from a fourth-amendment violation may not be used against a defendant at trial. See Mapp v. Ohio, 367 U.S. 643, 654-55 (1961); Weeks v. United States, 232 U.S. 383, 391-93, 398 (1914) On remand, the evidence obtained by the illegal search of Petitioner's residence should be suppressed.

The "community caretaker" exception to the warrant requirement is a narrowly construed exception to the Fourth Amendment warrant requirement. Nothing in this record supports an extension of its application to a warrantless intrusion into Petitioner's bedroom under the circumstances proved in this record, so that reversal is required.

CONCLUSION

For the reasons set forth, this court should reverse the court of appeals' decision, vacate the judgment of conviction and reverse the order denying postconviction relief. This case should be remanded to the trial court with directions to permit Petitioner to withdraw his guilty plea and proceed to trial without any evidence obtained from this unconstitutional search.

Dated at Wauwatosa, Wisconsin this 16th day of October, 2009.

Respectfully submitted,

_____

RICHARD L. ZAFFIRO
Attorney for Defendant-Appellant-Petitioner
State Bar No. 1005614

P.O. Address:
4261 N. 92nd St.
Wauwatosa, WI 53222-1617
(414) 737-1956
FAX (414) 438-1015
email: richardzaffiro@aol.com

CERTIFICATION

I certify that this Reply Brief conforms to the rules contained in Wis. Stats. secs. 809.19(8)(b) and 809.62(4) for a petition produced using the following font: Proportional serif font. Minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body test. The length of this petition is 3508 words.

Dated October 16, 2009.

_____
RICHARD L. ZAFFIRO
Attorney for Defendant-Appellant-Petitioner
State Bar No. 1005614

P.O. Address:
4261 N. 92nd St.
Wauwatosa, WI 53222-1617
(414) 737-1956
FAX (414) 737-1956
e-mail: richardzaffiro@aol.com

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No. 2008 AP 1204-CR

JUIQUIN ANTHONY PINKARD,

Defendant-Appellant-Petitioner.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12) STATS.

I hereby certify that:

1. I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

2. This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

3. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed

Signature