

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2008AP1997-CR

Cir. Ct. No. 2007CM52

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ARIEL E. FITZGIBBONS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Crawford County:
MICHAEL KIRCHMAN, Judge. *Reversed and cause remanded with directions.*

¶1 LUNDSTEN, J.¹ Ariel Fitzgibbons appeals the circuit court's judgment convicting her of possession of drug paraphernalia. The issue is whether

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

a warrantless search resulting in evidence against her was reasonable under the community caretaker exception or the emergency exception to the warrant requirement. I conclude that neither exception applies here. Accordingly, I reverse the judgment and remand to the circuit court to suppress the evidence.

Background

¶2 The sole witness at the suppression hearing was Dale McCullick, a captain and investigator with the Crawford County Sheriff's Department and the officer who searched Fitzgibbons' residence. It is apparent that the circuit court credited Captain McCullick's testimony and, thus, I accept this testimony as true and summarize the most pertinent portions below.

¶3 During the early morning hours of Friday, October 5, 2007, Captain McCullick responded to a domestic disturbance between two people, Chris Hardy and his girlfriend. Dispatch informed McCullick that Hardy's girlfriend was "apparently missing" and that no one knew where she was. McCullick estimated that it would have been approximately twenty or twenty-five minutes before he arrived at the residence.

¶4 When Captain McCullick arrived on the scene, a sheriff, a chief deputy, and the chief of police of Prairie du Chien were already present. Additional officers had surrounded the residence, and a crisis response team was forming at the fire department. McCullick was informed that Hardy was believed to be inside, but that Hardy's girlfriend's location was still unknown. Police also had information that Hardy's girlfriend had gone to a neighbor's house and had reported that Hardy had a gun and had tried to kill her, and that Hardy had fired a shot through the roof of his vehicle that night.

¶5 One of the officers near the residence radioed to Captain McCullick that the officers could hear arguing and items being broken inside. McCullick determined that he would approach the residence and knock on the door. After a few minutes, Hardy answered. McCullick asked Hardy where his girlfriend was. Hardy did not respond to that question, but instead immediately said that McCullick could not go inside. When McCullick told Hardy that he had to enter to make sure there was no one else in the residence, Hardy yelled for Ariel Fitzgibbons to come out, and she did. Neither Hardy nor Fitzgibbons was hurt.

¶6 Captain McCullick agreed under questioning that it was “possible” that Fitzgibbons said something to the effect of “why are you here, we were just fighting.” McCullick also testified, however, that he did not know at the time that Fitzgibbons was Hardy’s girlfriend. According to McCullick, there was very little conversation and Fitzgibbons “wasn’t really in a talking mood with us.”

¶7 Captain McCullick again told Hardy that he needed to enter the residence to make sure nobody else was inside, but both Hardy and Fitzgibbons told him he could not go in the residence. McCullick indicated to them that he would break a window to get in if necessary, but Hardy and Fitzgibbons still refused.

¶8 McCullick arrested Fitzgibbons because he “didn’t know who she was for sure at that point.” He then struck a window twice with his flashlight, after which Fitzgibbons finally agreed that McCullick could enter the residence. Once inside, McCullick found no other individuals, but he did see drug paraphernalia. Based on this discovery, the police obtained a warrant, searched the residence, again found drug paraphernalia in the residence, and seized it.

¶9 The circuit court concluded that Captain McCullick’s warrantless entry into and search of the residence was reasonable. The court explained: “Under the circumstances who knows what was going on here as far as whether Miss Fitzgibbons was the person who was being threatened, whether there were other persons threatened, tied up, or whatever, in the residence.” The court denied Fitzgibbons’ motion to suppress, and Fitzgibbons pled guilty to the charge of possession of drug paraphernalia.

Discussion

¶10 In reviewing a motion to suppress, this court defers to the circuit court’s fact findings and will not overturn those findings unless they are clearly erroneous. *State v. Dull*, 211 Wis. 2d 652, 655, 565 N.W.2d 575 (Ct. App. 1997). Whether the facts, as found, warrant suppression of the evidence, however, is reviewed *de novo*. *See id.*

¶11 The sole dispute before us is the constitutionality of the warrantless entry into and search of the residence. There is no dispute that the warrant for the second search was based on Captain McCullick’s observations during the warrantless entry and search.

¶12 “[S]earches 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.” *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (citation omitted). The State bears the burden of establishing that a warrantless entry into a home occurred pursuant to a recognized exception to the warrant requirement. *State v. Leutenegger*, 2004 WI App 127, ¶12, 275 Wis. 2d 512, 685 N.W.2d 536.

¶13 Two such exceptions are relevant here. The circuit court in its decision cited the community caretaker exception, but I agree with Fitzgibbons that the court’s analysis seems to apply the principles of the emergency exception. The parties have briefed both exceptions, and I will consider both.

Community Caretaker Exception

¶14 The community caretaker exception involves a three-pronged test:

“[W]hen a community caretaker function is asserted as justification for the seizure of a person, the trial court must determine: (1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.”

State v. Kramer, 2009 WI 14, ¶21, ___ Wis. 2d ___, 759 N.W.2d 598 (quoting *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)). The parties dispute the second and third prongs.²

¶15 As to the second prong, Fitzgibbons argues that Captain McCullick could not have been acting as a bona fide community caretaker because the search in question occurred during the course of a criminal investigation and after Fitzgibbons was arrested. Certainly there is at least some case law supporting Fitzgibbons’ view. See *Dull*, 211 Wis. 2d at 659 (suggesting that an officer cannot be acting as a community caretaker once he discovers that illegal activity is afoot and makes an arrest). Moreover, the State appears to assume, incorrectly, that an officer acts as a bona fide community caretaker as long as the officer is

² Although the test as cited refers to a seizure, there is no dispute that the same test applies to an entry into and search of a private residence.

subjectively motivated by a need to render assistance. *See Kramer*, 2009 WI 14, ¶¶25, 36 (concluding that the court may consider an officer’s “subjective intent,” but making clear that the focus of the inquiry is whether there is an objectively reasonable basis for the community caretaker function).

¶16 I choose not to decide whether Captain McCullick was acting as a bona fide community caretaker. Rather, I conclude for the reasons that follow that, even if he was, the warrantless search fails on the third prong of the community caretaker test.

¶17 As indicated, the third prong of the test asks whether the public need and interest outweigh the intrusion upon the privacy of the individual. Relevant considerations include

(1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the [search or] 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.

Anderson, 142 Wis. 2d at 169-70 (footnotes omitted).

¶18 Although neither the circuit court’s opinion nor the State’s brief expressly analyzes the circumstances of this case in light of each of the relevant factors, the view of the circuit court and the State appears to be that the first two factors strongly favor the legality of the search because of the obvious danger to life presented by a domestic disturbance involving a gunshot and alleged attempt to kill the victim. I agree. Any report that a suspect is armed with a gun and may have fired it weighs in favor of police taking action to ensure their own safety and that of any possible victims. But the problem with Captain McCullick’s decision

to enter the residence was that he had been informed only that Hardy had an altercation with his girlfriend and had no reason to think that Fitzgibbons was not Hardy's girlfriend. It follows that McCullick had no reason to think that anyone else was in the residence. Of course, it is frequently possible that there are more people involved in an incident than reports indicate, but McCullick had no facts to suggest that that was more than a mere possibility here.

¶19 It is true that police were told that Hardy's girlfriend had gone to a neighbor's house, was "apparently missing," and that no one knew where she was. By the time Fitzgibbons came to the door and Captain McCullick entered to search the residence, however, the common sense and reasonable inference based on the totality of facts at that time was that Fitzgibbons was Hardy's girlfriend. These facts include that the reported disturbance involved two people, Hardy and his girlfriend; that the police heard fighting and items being broken inside the house after they arrived on the scene (with no suggestion that the fight involved more than two people); that Hardy called Fitzgibbons to come to the door after McCullick asked where Hardy's girlfriend was and McCullick made it clear that he wanted to enter to see who was inside the residence; and that, when McCullick repeated his intention to enter to see who was inside even after Fitzgibbons came to the door, Hardy did not call for additional individuals but simply continued to refuse entry. In addition, McCullick testified that Fitzgibbons possibly said something to the effect of "why are you here, we were just fighting," a statement suggesting that she was indeed Hardy's girlfriend.

¶20 It is not enough that Captain McCullick simply did not know whether anyone else might be inside the residence; what matters is whether McCullick was in possession of at least *some* articulable facts that could lead to the conclusion that someone was inside.

¶21 My analysis finds support in the two cases on which the State relies most heavily, *State v. Ferguson*, 2001 WI App 102, 244 Wis. 2d 17, 629 N.W.2d 788, and *State v. Horngren*, 2000 WI App 177, 238 Wis. 2d 347, 617 N.W.2d 508. In each case, police possessed specific, articulable facts from which they could reasonably infer that someone was in danger inside the area subsequently searched. See *Ferguson*, 244 Wis. 2d 17, ¶¶1, 4-5, 14-15 (officers reasonably searched bedroom and bedroom closet after they observed an extremely intoxicated individual vomiting at an underage drinking party, were informed that people were in the bedroom, and could not get anyone to come out of the bedroom or respond to their knocking and yelling); *Horngren*, 238 Wis. 2d 347, ¶¶2-4, 21 (officers reasonably searched back bedroom of an apartment after they responded to a suicide attempt at the apartment, were informed that the suicidal individual had previously been committed to a mental health facility and had possessed firearms, were forced to struggle with the individual to gain entry to the apartment, and were told by the suicidal individual that there was a girl in the back bedroom).

¶22 Turning to the third and fourth factors of the balancing test, neither favors the State. Plainly, this case does not involve the search of an automobile, but of a private home, the place where the Fourth Amendment's "zone of privacy" is most clearly defined. *Payton v. New York*, 445 U.S. 573, 589 (1980). And, I agree with Fitzgibbons that there were reasonable, less intrusive measures that Captain McCullick could have used before conducting the warrantless entry and search. McCullick could have at least asked Hardy and Fitzgibbons whether Fitzgibbons was Hardy's girlfriend or whether anyone else was inside. Hardy might have lied, but we will never know what information such questioning would have revealed because McCullick, by his own admission, spoke very briefly with

Hardy before entering, and this was after at least thirty minutes had passed since the report of a problem.³

¶23 For the reasons stated, I conclude that the warrantless search cannot be upheld as a reasonable search based on the community caretaker exception.

Emergency Exception

¶24 The emergency exception, as relevant here, requires that ““a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life.”” See *Leutenegger*, 275 Wis. 2d 512, ¶19 (citations omitted).⁴ The State relies on essentially the same facts and reasoning that I have discussed in analyzing the community caretaker exception. I conclude, based on that discussion, that Captain McCullick’s warrantless search cannot be deemed reasonable under the emergency exception. Because police had no specific facts from which to reasonably infer that someone was in the house at the time of the search, it was not reasonable to believe that a delay in obtaining a warrant would place anyone’s life in danger. Cf. *State v. Rome*, 2000 WI App 243, ¶¶17-18, 239 Wis. 2d 491, 620 N.W.2d 225 (police could reasonably believe that entry into home and closet was necessary under emergency exception rule based on

³ Captain McCullick testified that there were other officers on the scene who “probably” knew that Fitzgibbons was Hardy’s girlfriend. It is unclear why this information was not conveyed from the officers to McCullick when other pertinent information was.

⁴ Fitzgibbons concedes that, under at least some case law, the emergency exception does not require probable cause, unlike other warrant exceptions based on exigent circumstances. Also, Fitzgibbons does not argue that probable cause was lacking. Accordingly, I need not address that issue.

information that a child had been left at the home with an abusive and intoxicated adult).

Conclusion

¶25 In sum, the police had reason to believe that Hardy and his girlfriend were engaged in an altercation and that Hardy might be dangerous. But once Hardy and, shortly thereafter, Fitzgibbons, came to the door, the police had no reason to think that Fitzgibbons was not Hardy's girlfriend, no reason to think that a third person remained in the residence, and, thus, no reason to be concerned for the safety of such a person. Therefore, the State has failed to show an applicable exception to the warrant requirement. Accordingly, the circuit court's judgment is reversed and the case is remanded for the circuit court to suppress evidence resulting from the warrantless search.

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

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

