COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP484-CR **Cir. Ct. No. 2009CF409**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ASHLEY M. TOLIVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 BROWN, C.J. Ashley Toliver appeals her judgment of conviction on the basis that the trial court erroneously denied her earlier motion to suppress evidence. She argues that her Fourth Amendment rights were violated on two occasions: when a police officer opened her purse to look for identification after

finding it on the ground in a public area, and when the same officer entered an apartment afterwards, where she co-resided. Both instances occurred in relation to a potential suicide attempt—which, it turns out, involved Toliver's cohabitant. The State argues that Toliver's rights were not violated because the officer was acting in his capacity as a community caretaker in both situations. We agree with the State—the officer's first action was an attempt to find out the identity of the owner of the lost purse and the other action was part of the officer's securing of the residence, which Toliver's cohabitant had asked the officer to do. Accordingly, we affirm.

¶2 At approximately 3:30 p.m. on March 30, 2009, police were dispatched to a duplex regarding a possible suicide attempt. The subject of the call was Toliver's boyfriend, Marfitt. The duplex had a common hallway and outdoor area. On arrival, one officer noticed a woman's purse outside on a concrete slab in front of the door. According to that officer, when he found the purse he looked around but there were no women in sight.

¶3 Other people were tending to Marfitt's needs, so the officer opened the purse to see who it belonged to. He testified that when he opened it, it was nearly empty. Inside, and visible as soon as he opened the purse, was Toliver's identification along with what appeared to be a corner cut of crack cocaine.

¶4 At some point, Marfitt told the officer he lived in the lower unit of the duplex and asked him to lock it up for him. The officer approached the door and knocked on it. When there was no answer, he opened the door and announced his presence. Once the door was open, he could smell dogs and see dog kennels. He could also hear voices coming from inside the residence. Since he knew at least one occupant of the apartment had been distraught and was going to the

hospital, the officer wanted to make sure any pets were not left uncared for, any appliances were off, and any people inside were safe. On his way out, just inside the door of the residence, he saw another plastic baggie that appeared to contain crack cocaine.

¶5 After the officer contacted Toliver, she consented to a search of her home.[1] During the search, the officer found drug paraphernalia, marijuana seeds, and a duffel bag containing apparent crack cocaine. Toliver was charged with possession with intent to deliver cocaine, 15-40 grams, in violation of WIS. STAT. § 961.41(1m)(cm)3 (2007-08).[2] After her motion to suppress was denied, she pled no contest to possession with intent to deliver cocaine, 1-5 grams, in violation of § 961.41(1m)(cm)1r. She appeals.

¶6 Toliver asserts that the search of her purse and the initial entry into her home were both in violation of her Fourth Amendment rights. Citing ***Wong Sun v. United States***, 371 U.S. 471 (1963), she also argues that evidence found after she consented to the search should be suppressed as the fruits of the initial illegal entry. The State argues that Toliver's Fourth Amendment rights were not violated by the search of her purse or entry into her residence because the officer was operating in his capacity as a community caretaker at the time.

¶7 We limit our review to the issues raised by the appellant: whether Toliver's Fourth Amendment rights were violated by the search of her purse or the

[1] Toliver's brief did not raise the issue of voluntariness of her consent to the search, so we do not address it in this opinion.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

initial entry into her home. Both of these issues are identical in terms of our standard of review and applicable law, so we will summarize the law first and then address its application to each of Toliver's issues in turn.

¶8 We have a two-step standard of review for constitutional questions. First, we uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Pinkard***, 2010 WI 81, ¶12, 327 Wis. 2d 346, 785 N.W.2d 592. Then, we review de novo how those facts apply to a constitutional standard. ***Id.***

¶9 Warrantless searches are per se unreasonable, subject to a few limited exceptions. ***Katz v. United States***, 389 U.S. 347, 357 (1967). One such exception is the "community caretaker" exception, applicable when law enforcement authorities' actions are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973); *see also* ***Pinkard***, 327 Wis. 2d 346, ¶31.

¶10 For the community caretaker exception to apply, the State must first prove that the officer was engaged in a "bonafide community caretaker activity." *See* ***State v. Horngren***, 2000 WI App 177, ¶9, 238 Wis. 2d 347, 617 N.W.2d 508. This does not mean an officer may not have any subjective law enforcement concerns; rather, if an officer articulates an "objectively reasonable basis under the totality of the circumstances for the community caretaker function," this first standard is met. ***State v. Kramer***, 2009 WI 14, ¶36, 315 Wis. 2d 414, 759 N.W.2d 598.

¶11 If the State proves that the officer was engaged in a bonafide community caretaker function, then the "public good" involved must be weighed against the level of intrusion on an individual's privacy. *See* ***Horngren***, 238

Wis. 2d 347, ¶9. Factors to be considered in this weighing analysis include: 1) the degree of public interest and the exigency of the situation, 2) the attendant circumstances surrounding the search, including time, location, the degree of overt authority and force displayed, 3) whether an automobile was involved, and 4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished. ***Kramer***, 315 Wis. 2d 414, ¶41.

¶12 First, the search of the purse. When the trial court denied the motion to suppress, it found as fact that the purse was in a common area when the officer saw it, and that when the officer opened the purse, he found the identification along with the suspected crack cocaine. Those findings are not clearly erroneous, and they show the trial court's confidence in the officer's testimony. The officer testified that after finding the purse in a common area, he opened the purse to look for identification and that as soon as the purse was open, he saw what he believed to be drugs. He also testified that when he opened the purse, he did not see any women around and did not want to interrupt the focus of giving Marfitt medical attention. Under those facts, the officer was engaging in a bonafide community caretaker activity.

¶13 Conducting the balancing test, we see a public good in returning a lost purse to the rightful owner. In such circumstance, there will obviously be a small intrusion involved in opening the purse to look for identification. Even a person who is not a law enforcement officer would do the same. Examining the four factors listed in ***Kramer*** and other cases, the only possible countervailing factor would be the last one—the availability and effectiveness of alternatives to the intrusion. Toliver points out that the officer did not ask Marfitt who the purse might have belonged to while Marfitt was receiving medical attention. At that time, the officer had no inkling that the owner of the purse was connected to

Marfitt in any way. We do not see why the officer should have automatically presumed that a purse lying on the concrete outside the duplex was related in some way to Marfitt just because it was in the same area. Besides, Marfitt was busy. He was being attended to. Therefore, when considering all of the factors, the public good of returning a purse to its rightful owner outweighs the limited intrusion involved in opening it up to look for identification.

¶14 Next, we address the officer's initial entry into Toliver's home. The trial court noted that one of the residents of the apartment, Toliver's boyfriend, had asked the officer to lock up. The officer testified that it was not possible to lock the residence from the outside and stated that when he opened the door, he could see and smell evidence of dogs and, because he heard voices, possibly people inside the home. Since he did not know how long the resident would be gone, he decided he needed to look around to make sure everything was secure and no people or pets were in need of assistance. When he was doing that, he saw more possible evidence of drugs.

¶15 It seems obvious to us that the officer's actions under those circumstances were part of a bonafide community caretaker activity. And our conclusion is supported by ***Pinkard***, a recent Wisconsin supreme court case addressing the community caretaker function. In ***Pinkard***, officers acted on an anonymous tip that drugs were located inside an apartment where two people appeared to be sleeping with a door open to the outside. ***Pinkard***, 327 Wis. 2d 346, ¶2. When officers arrived at the scene they found the back door open, and they knocked and announced their presence. ***Id.***, ¶3. When no one answered, they entered to check on the well-being of any people inside. ***Id.***, ¶4. The ***Pinkard*** court held that the officers' entry was justified by the community caretaker exception because, regardless of whether there was a subjective law enforcement

purpose (to find the reported drugs), there was also a possible objective community caretaker motive (to check on the unresponsive residents). *See* ***id.***, ¶40.

¶16 Here, as in ***Pinkard***, the officer was justified in entering to check on anyone who might have been in the house. As in ***Pinkard***, there was a possible law enforcement motive for entering because the officer may have been curious based on the drugs he found in the purse—after ostensibly learning that the identification of the owner of the lost purse listed the apartment as the owner's residence. But also, as in ***Pinkard***, there was a clear community caretaker motive that the officer testified to—ensuring that there were no animals or people in the residence in need of assistance before he locked up the apartment for an unknown amount of time. The ***Pinkard*** court acknowledged that ***Pinkard*** was a close case. ***Id.***, ¶33. This is not. It would have been irresponsible for the officer to lock up without checking the sounds that he heard—which turned out to be a television that was on—and the pets he thought might be present. We are convinced that his conduct under the circumstances was a bonafide community caretaker activity.

¶17 Once again, we must consider the balance of public good versus intrusion, using the four case law factors. *See* ***Kramer***, 315 Wis. 2d 414, ¶41. First, the public interest and exigency in such a situation are both significant—this officer was doing a walk-through of an apartment to check on people and pets after one of its occupants was taken to the hospital for a medical emergency. Second, because of the exigency of the situation and the safety concerns raised by the initial entry into the residence, the second factor—attendant circumstances—also weighs in the officer's favor. The third factor is irrelevant because no automobile was involved. Fourth and finally, the type of intrusion was minimal under the circumstances, and no alternatives were available. There is no

indication that the officer did more than a cursory walk-through before obtaining Toliver's consent. The public good of walking through the apartment to check on possible safety concerns before locking up far outweighed any intrusion associated with doing so.

By the Court.—Judgment affirmed.

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