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DISTRICT II

February 21, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP759-CR State of Wisconsin v. Erin M. Roy (L.C. # 2013CF1390)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Erin M. Roy appeals from a judgment convicting her of maintaining a drug trafficking place and child neglect.[1] She specifically takes issue with the circuit court's order denying her

[1] Roy was also charged as a party to the crime with possession of THC with the intent to deliver and second-degree recklessly endangering safety. The charges were dismissed and read in at her sentencing hearing.

motion to suppress evidence obtained during a search of a residence she occupied. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[2]

In October 2013, police responded to a call concerning a civil altercation at a residence where Roy stayed with her boyfriend, Jessie Ziegenhagen. Witnesses informed the police that there had been a physical altercation between a man and a woman, and the woman had gone back inside the house. Believing that a woman might be unresponsive inside, the officers elected to enter the premises. Though they did not find anyone injured, they did find marijuana and other evidence of an ongoing drug operation, which led to charges against Roy, Ziegenhagen, and a third person.

All three defendants challenged the search on the ground that the officers searched Roy's residence without a warrant. The circuit court held a joint suppression hearing, where the three officers who responded to the call testified. The officers explained that they were dispatched to investigate a report of a man and woman arguing outside of a residence. Upon arrival, one of the officers spoke to a witness, J.R., who had placed the 911 call. J.R. informed the officer that a man and woman had been involved in a "physical altercation."[3] Several other witnesses corroborated that there had been a "physical altercation" that involved "pushing." J.R. and the other witnesses informed the officers that the man had left the scene, but the woman ran back

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] A second officer spoke with J.R., and J.R. again stated that "a male and a female were involved in an argument."

into the house.[4] Concerned for the safety of the woman—a potential victim of domestic violence—the officers attempted to make contact with her by knocking on several doors and walking around the house. Two of the officers noticed that the front door was partially open, which was extremely unusual and concerning given that the house was in a high-crime area. Faced with what they believed was an unresponsive woman inside, the officers entered the house to locate her. They did not find the woman, but did observe marijuana and drug paraphernalia.

After the denial of the suppression motion, both Roy and Ziegenhagen pled guilty to various charges. Ziegenhagen appealed his convictions to this court in ***State v. Ziegenhagen***, No. 2015AP2005, unpublished slip op. (WI App Aug. 24, 2016), and we affirmed. We specifically addressed the circuit court's denial of the joint suppression motions and concluded that the officers' actions fell under the community caretaker exception to the warrant requirement. ***Id.***, ¶¶1, 10, 17. Roy now appeals her convictions separately, and she raises the same basic argument as Ziegenhagen. She claims that the circuit court erroneously denied her suppression motion and argues that the officers' search of her home did not fall under the community caretaker exception. Though Roy raises alleged concerns with our decision in ***Ziegenhagen***, we see no reason to decide differently, and therefore, we affirm her convictions.

As a preliminary matter, the State asks that we apply our decision in ***Ziegenhagen*** as the law of the case. Roy agrees that the suppression issue has already been decided by this court in ***Ziegenhagen*** "and would properly be considered law of the case for purposes of … appeal."

[4] J.R. apparently gave the officers incomplete information. After the search was completed, she told the officers that the woman had subsequently left the scene as well. Though there was conflicting testimony on this point, the circuit court found that J.R. did not inform the officers that the woman had left until after the search. Roy does not challenge any of the circuit court's factual findings on appeal.

But Roy expresses concern that her ability to appeal the substantive question to the Wisconsin Supreme Court will be lost if we apply ***Ziegenhagen*** as the law of the case. In order to assuage that concern, we substantively address her claim and reach the same outcome here for the reasons we outlined in ***Ziegenhagen***. *See* ***State v. Brady***, 130 Wis. 2d 443, 447, 388 N.W.2d 151 (1986) (courts may disregard the law of the case "in the interests of justice" (citation omitted)).

For the most part, Roy does not muster any argument that this court has not already considered and rejected in ***Ziegenhagen***. Thus, we affirm for the same reasons explained in ***Ziegenhagen*** and need not restate those reasons here. *See* ***Ziegenhagen***, No. 2015AP2005, ¶¶1, 6-17. However, we do address several additional concerns Roy raises as reason to depart from our previous decision.

Roy first points to what she believes are two "incomplete and inaccurate characterizations" of the facts in our decision.[5] Roy complains about our statement that the officers were informed that a man and woman had been involved in a "physical altercation." She concedes the officers received reports of a man and woman fighting and that two of the officers testified that they had received reports of a "physical altercation," but she insists that the

[5] Roy primarily claims that these factual errors provide reasons to disregard ***Ziegenhagen*** as the law of the case.

information concerned nothing more than "pushing."[6] Because "physical altercation" implies something more than shoving in Roy's view, she reasons that characterizing a fight involving pushing as a "physical altercation" is incorrect. This is an argument over semantics, not substance. A fight where one person pushes another is the definition of a physical altercation. At any rate, this court was well aware of the specific testimony concerning pushing, and we see no merit to Roy's argument that the characterization was inaccurate.

Roy also complains that we referred to the door as "open" several times, rather than "ajar." But "ajar" means "slightly *open*." *Ajar*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) (emphasis added). "Ajar" may be the more specific of the two words, but our use of the word "open" was not inaccurate. In addition to describing the door as "open," we also described it as "ajar," "slightly ajar," and "partially open." ***Ziegenhagen***, No. 2015AP2005 ¶¶1, 3, 5. This court was well aware of the specific testimony and the circuit court's factual finding that the door was "ajar"; nothing in the decision suggests any misapprehension of the facts in our legal decision-making.

Roy finally offers one brief argument not addressed in ***Ziegenhagen*** that merits addressing. She claims that "[w]hen police enter a home without a warrant due to a concern that a person in the home is injured, there must be an objectively reasonable basis to conclude that the

[6] Roy appears to suggest that there was nothing "more than a single shove." She largely bases this claim on what J.R. told one of the officers. However, though J.R. told that officer the altercation ended when the man shoved the woman, the officer also testified that J.R. "made it sound like [the man and woman] had been fighting." Another officer testified that the other witnesses told him that there was a "physical fight" involving "shoving." This testimony does not restrict the physical contact to a single instance as Roy suggests, but rather a "physical altercation" (the officers repeatedly used this phrase) involving shoving. But even accepting Roy's selective invocation of the record, a fight ending with a push is a "physical altercation."

person is *seriously* injured." This is incorrect. Officers need only have an objectively reasonable basis for the community caretaker function, not certainty that specific individuals have been seriously injured. *See* ***State v. Matalonis***, 2016 WI 7, ¶48 n.25, 366 Wis. 2d 443, 875 N.W.2d 567. And our courts have never required officers to know the potential level of injury prior to acting. *See, e.g.*, ***State v. Pinkard***, 2010 WI 81, ¶¶1-4, 40, 327 Wis. 2d 346, 785 N.W.2d 592 (officers had objectively reasonable basis for community caretaker function where they received reports of two individuals asleep next to drugs, found an open front door, and received no response upon knocking). The officers here were reasonably concerned that a person might be injured and unresponsive inside the residence. Thus, for the same reasons discussed in our decision in ***Ziegenhagen***, we conclude that the officers' entry into the residence was justified under the community caretaker exception.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals