STATE OF WISCONSIN : CIRCUIT COURT : BROWN COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs. Case No. 12 CF 000000

JOHN DOE,
Defendant.

BRIEF IN SUPPORT OF
MOTION TO SUPPRESS EVIDENCE

THE DEFENDANT, John Doe, by his lawyer, Craig Mastantuono, appears specially in that Branch of the Circuit Court presided over by the Honorable Judge ----------, and offers the following legal brief in support of his motion requesting suppression for use as evidence all physical items, statements and derivative evidence obtained as a result of a police search of Mr. Doe's home pursuant to a search warrant.

The evidence is undisputed that police obtained all of the evidence submitted in support of the warrant issued for a search of Mr. Doe's home as a result of a warrantless entry, search, and observations made inside Mr. Doe's home conducted the same night that the warrant was issued. The defense asserts that police conducted this warrantless entry/search and obtained the information used to support the search warrant application and affidavit in this case in violation of Mr. Doe's State and federal constitutional privilege to be free from unreasonable search and seizure. Police therefore failed to provide a lawful and untainted basis to support a search warrant affidavit, rendering the search ultimately performed invalid. *See State v. Carroll*, 2008 WI App 161, 314 Wis. 2d 690.

Legal Argument and Factual Conclusions

"It is axiomatic that the 'physical entry to the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (internal citation omitted). A fundamental safeguard against unnecessary invasions into private

homes is the Fourth Amendment's warrant requirement, imposed on all government agents who seek to enter the home for purposes of search or arrest. *Id.* It is not surprising, then, that the United States Supreme Court has recognized that all warrantless searches and seizures inside a home are presumptively unreasonable. *Id*. at 748-49.

In the present case, the State argues that both exigent circumstances and a valid community caretaker function justified Sgt. Greg Willy's warrantless entry to Mr. Doe's residence and his search of the house. *Motion Hearing Transcript*, p. 49. The State's argument is based on the conclusion that the Sergeant's main concern was for any injured parties. *Id.* However, the evidence introduced at the motion hearing in this case simply does not support that as a reasonable conclusion. By the time Sgt. Willy entered the residence, all information gathered at the scene led to the contrary conclusion: that immediate assistance inside the residence was not required, and that a warrantless police entry to the home was neither justified nor necessary. This conclusion is supported by the following established facts:

1) Prior to his entry, Sgt. Willy's own observations through the windows from the rear of the home were that the female occupant (and subject of the domestic violence call from a third party) was not injured nor in need of medical assistance;[1]

2) Prior to his entry, Sgt. Willy's observations through the windows from the rear of the home were that the other occupants - three children, a teen, and Mr. Doe - were not injured nor in need of medical assistance;[2]

[1] *Mtn. Hg. Transcript at 26-27 (cross examination of Sgt. Willy):* Q: … Now, from the second window, is that the window you observed ultimately who was identified to be Ms. Duller? A: Yes. … Q: Okay. How long did you observe her? A: Five, ten seconds. … Q: And she did not appear injured to you? A: No. Q: She did not show any visible signs of injury? A: No. She was able to move about on her own volition, from what you could tell? A: Yes.

[2] *Mtn. Hg. Transcript at 22-24 (cross examination of Sgt. Willy):* Q: You also observed three small children at that time, did you not? A. Yes. Q: And you described in your report – tell me if you agree with this – that they were walking inside the interior of the duplex? A. Yes. … Q: And you did not observe any injuries on them or observe anything that caused you to believe that they were in immediate need of attention? A: I did not see any injuries on them. Q:…And then from that first window, you also saw Mr. Doe, is that right? A: Yes. … Q: Your observations of Mr. Doe, you did not see him in possession of a weapon; is that correct? A: Correct. Q: And nor did you observe this (sic) drops of blood on the shirt or the torn shirt from the windows in the rear, is that a correct statement? A: Correct.

3) Prior to his entry, Sgt. Willy's own observations through the windows from the rear of the home were that no one inside was attempting to flee the residence;[3]

4) Prior to his entry, Sgt. Willy's own observations through the windows from the rear of the home were that Mr. Doe had opened the door for fellow police officers and was talking to them at the front of the house;[4] and

5) Prior to his entry, Sgt. Willy's own observations through the windows from the rear of the home were not of any contraband, nor of any person inside attempting to destroy contraband. Further on this point, prior to his entry, Sgt. Willy had not received any information that there was contraband inside the home, nor was he dispatched to the home pursuant to a complaint that would involve contraband.[5]

All of the above are undisputed facts, and all were known to Sgt. Willy prior to his entry to the Doe home. The State's position – that a "sweep" into and inside the home was justified to search for injured parties – is not a reasonable conclusion from the evidence.

A. Exigent or Emergency Circumstances.

The police were not presented with exigent circumstances justifying entry. Police bear a heavy burden when trying to establish an urgent need justifying warrantless searches, and the U.S. Supreme Court has recognized only a few such emergency conditions. *See Welsh*, 466 U.S. at 749-50. Four factors constituting exigent circumstances required for warrantless entry are: 1)

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[3] *Mtn. Hg. Transcript at 21-22 (cross examination of Sgt. Willy):* Q … And you, you saw, the first person you saw I believe was a young black male; correct? A: Yes. Q: And that was later identified as Mr. Doe's 15-year old son, is that correct? A: Yes. Q: And you said he ran, you described it as throughout or towards the rear of the house; is that correct? A: Yes. Q: And you did not see him actually hide, for example, go into a closet or leave the residence or flee; is that a fair statement? A: Yes. Q: And he, that, that 15-year old or later turned out to be 15-year old was not by anything you could see injured in any way; is that correct? A: Correct.
Id. at 24: Q: And you did not see Mr. Doe attempt to flee the residence did you? A: No, I did not.
Id. at 28: Q (regarding Ms. Duller): And you did not see her from what you could tell attempt to flee the residence or exit from the rear? A: No. Q: Or hide in any portion of the residence? A: No.

[4] *Mtn. Hg. Transcript at 24 (cross examination of Sgt. Willy):* Q: And did you actually see Mr. Doe make contact with the Officers outside? A: Yes. When I first observed him, he was in the doorway talking with them.

[5] *Mtn. Hg. Transcript at 25 (cross examination of Sgt. Willy):* Q: And from that first window that you looked in, you did not observe from that vantage point anything you determined to be contraband; is that a fair statement? A: Yes.
Id. at 28: Now – oh, and with regard to your observations from the second window, you did not see any of the items that you referenced on direct testimony that you ultimately saw within that bedroom when you were standing inside of it? A: Did I see it when I was outside? Q: Correct. A: No, I did not.

an arrest made in "hot pursuit," 2) a threat to safety of a suspect or others, 3) a risk that evidence will be destroyed, 4) a likelihood that the suspect will flee. *State v. Kiper*, 193 Wis. 2d 69, 90 (1995) (no emergency circumstances existed for warrantless police entry to home to effect arrest warrant for a third party; Brown County conviction reversed). No such factors existed here.

In the present case, police officers were not in hot pursuit of anyone when Sgt. Willy entered Mr. Doe's home. Indeed, the presumed subject of the police dispatch, Mr. Doe himself, had already opened his door and was speaking with fellow officers at the time of the Sergeant's entry, and no one concluded that anyone, he or anyone inside, had committed any crime when entry was made.[6] There was also no reason to conclude that anyone was attempting to destroy evidence or flee, as established by the facts at the motion hearing. The Sergeant, by his own testimony, simply saw no one attempting to flee. Though he, and presumably the State, would argue that Ms. Duller's actions in moving frantically when he observed her through the second rear window made him suspicious, he could not tell what she was doing,[7] and his observations did not justify his immediate entry to the home without a warrant or consent. And, as noted above, the Sergeant was not at the home on a complaint, tip, or suspicion of an offense involving contraband. To justify a warrantless entry for the purpose of preventing destruction of evidence, the State must demonstrate, at a minimum, that there is a fair probability that contraband or evidence of a crime will be found inside. *See State v. Sanders*, 2007 WI App 174 ¶ 30-32 (no emergency circumstances existed for warrantless police entry to home to prevent destruction of evidence where defendant fled into his home after questioning from officers in a high drug crime area, holding folded money and a canister of a type commonly used to conceal illegal substances; Racine County conviction reversed).

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[6] *Mtn. Hg. Transcript at 34 (cross examination of Sgt. Willy)* Q: And you hadn't determined at that point that you entered that either Ms. Doe – excuse me, either Ms. Duller or Mr. Doe had committed a crime; is that a fair statement? A: Correct. Q: Or that either was trying to flee the scene? A: Correct.

[7] *Mtn. Hg. Transcript at 27-28 (cross examination of Sgt. Willy):* Q (regarding Ms. Duller): It was the middle of the night, could you tell if she was getting dressed or trying to move clothes? A: Um, it didn't – I didn't see her move anything specifically. She was moving very quickly like at the floor level. … Q: Sergeant, you couldn't tell what she was doing; could you? A: Not exactly, no.

The last factor in this exigent circumstances analysis is threat to safety of the suspect or others. The State argued at the motion hearing that a check for injured parties, or threat to safety of others, justified the Sergeant's entry. The Wisconsin Supreme Court has stated that the U.S. and Wisconsin Constitutions authorize law enforcement to make a warrantless intrusion into a home when the officer reasonably believes that a person within is in need of immediate aid or assistance, and the government official is actually motivated solely by a perceived need to render immediate aid or assistance, not by a need or desire to obtain evidence for a possible prosecution. *State v. Boggess,* 115 Wis. 2d 443, 450-51 (1983) (*citing State v. Prober*, 98 Wis. 2d 345, 365 (1980)). Unless a reasonable person under the circumstances would have thought an emergency existed, the search is invalid. *Id.* Here, Sgt. Willy observed nothing to make him believe that anyone inside the home was in need of immediate need of aid or assistance. He did not observe anyone injured inside the home, including the woman who was the subject of the initial 911 call, and his observations dispelled any conclusion that there were other injured persons inside the home. For example, he saw no signs of a fight, he heard no cries for help, yelling, arguing, or any evidence to conclude that there was anyone else inside, other than the people he saw from the windows and front of the home.

The State argues that the Sergeant's testimony that he saw drops of blood and a slightly torn shirt, combined with a domestic violence call, established authority for the warrantless entry.[8] This conclusion does not comport with the facts, and is contrary to legal authority. First, the Sergeant's entry was immediate upon his approach to the front of the home. He did not even stop to speak with two fellow officers who were standing with Mr. Doe at the front door of the home.[9] Had Sgt. Willy taken this step, short of entry, he would have been authorized to make further investigative inquiries of Mr. Doe regarding what had happened, how the drops of blood and slight tear got on his shirt, who else was inside, or he could have requested consent to enter the

[8] The Sergeant failed to note in his incident report that he was advised of the drops of blood and slightly torn shirt prior to his entry to the home, and his testimony was impeached at the motion hearing by reference to this omission in the narrative report. *Mtn. Hg. Transcript at 30.*

[9] *Mtn. Hg. Transcript at 29-30 (cross examination of Sgt. Willy).*

home. The Sergeant also did not stop at the door to knock and announce himself, and request any other parties to come outside to determine whether immediate and warrantless entry was necessary. It is unreasonable for the State to argue that officers may ignore investigative steps that they are authorized to take, in order to justify their subsequent warrantless acts. Under these circumstances, to accept the State's argument is to functionally shift the burden from the State to the defendant to prove a lack of exigent circumstances, when "it is actually incumbent upon the government to point to some *affirmative* sign of exigency." *U.S. v. Delgado,* 701 F.3d 1161 (7th Cir. 2012) (reversing conviction and finding lack of exigent circumstances where officers entered apartment without a warrant after report of shots fired in the area and victim of shooting having run into apartment searched). Additionally, to affirm the State's argument would effectively create a situation where police have no reason to obtain a warrant when they want to search a home with any type of connection to domestic violence. *Cf. United States v. Ellis*, 499 F.3d 686, 691 (7th Cir. 2007) (warrantless entry to home found unconstitutional during 'knock-and-talk' operation at door during drug investigation and upon officers' detection of movement within the home).

B. Community Caretaker Function.

The police were not exercising a valid community caretaker function when they entered Mr. Doe' home. In order for an officer to assert community caretaker function as the basis for a warrantless entry to a home, the State bears the burden of proof and a court must determine: 1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; 2) if so, whether the police were exercising a bona fide community caretaker function; and 3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the function was reasonably exercised within the context of a home. *State v. Pinkard,* 2010 WI 81, ¶ 29, 327 Wis. 2d 346, 363-64 (2010) (warrantless entry to home justified under community caretaker function where police received tip that parties were passed out inside open residence next to cocaine, money, and a scale, officers knocked and announced presence outside open door and waited for someone to answer, and ultimately entered to check well-being of residents).

In the present case, first, it is clear that police performed a search and seizure within meaning of the Fourth Amendment. Sergeant Willy and at least one other officer – Deputy Smesh – entered the residence without a warrant or consent. They questioned Ms. Duller inside, asked her for identification, and followed her through the living area, kitchen, down a hallway, and into the bedroom, while Ms. Duller complied with Sgt. Willy's request that she provide identification. A third officer ultimately came in and took Ms. Duller from inside the residence. All of this was done without consent.[10]

Second, the defense asserts that the police were not performing a valid community caretaker function in this case. While the *Pinkard* case departed slightly from a strict requirement that the officer's actions during a caretaker act be totally divorced from law enforcement functions, *id.* at ¶ 31, that Court still determined that the officer's subjective intent was an important factor, and the Court noted that the warrantless home entry in that case was "a close case," *id. at* ¶ 33. In the present case, Sgt. Willy's testimony belies a reasonable conclusion that he was acting upon a perceived need to render aid to a member of the public who is in need of assistance:

> Q: Now, Sergeant, is it fair to say you were suspicious at the time you entered the house about the goings on inside the residence?
> A: Yes.
> Q: And is it fair to say you wanted to investigate those suspicions?
> A: Yes.

Mtn. Hg. Transcript at 35.

Clearly, the Sergeant was acting on suspicion of untoward activity when he entered the home rather than community caretaker concern for someone in need of assistance, and, given the evidence, his suspicion was an inarticulable one, failing to justify his entry. Further on this point, the Sergeant testified that he conducted a protective sweep, but there is no evidence in the record to suggest that he did so immediately upon entry, which would support a finding that he was concerned for the safety of undiscovered persons. The testimony supports the conclusion that he

[10] *Mtn. Hg. Transcript at 36-37.*

entered, saw the children unharmed in the living area, confronted Ms. Duller, and began questioning her, all apparently before performing any type of welfare or safety sweep.[11]

Third, the defense asserts that the public interest does not outweigh the intrusion upon the privacy of the individual such that the function was reasonably exercised within the context of a home in this case. "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." *Id. at* ¶ 41 (*quoting State v. Kramer,* 2009 WI 14, ¶ 41, 315 Wis. 2d 414, 438 (2009)). Here, the public need for protection was not pronounced, or even known to the officers, and did not demand immediate entry. Conversely, the intrusion involved was hardly minimal, involving a warrantless entry to Mr. Doe' home, effected immediately, without a warrant, and without consent.

Lastly, as opposed to the officers in *Pinkard,* Sergeant Willy here did not wait outside the door for any time period, announce himself, and wait for persons to exit. Also as opposed to the facts in *Pinkard*, Mr. Doe came to the door prior to police entry, and was answering questions for fellow officers when the Sergeant entered his home. This weighs against the finding that a reasonable and valid caretaker function justified the warrantless entry in this case.

C. Plain View Doctrine.

The State argues that police saw the evidence used to support the affidavit for the search warrant ultimately issued in this case once Sgt. Willy was in the rear bedroom of the home, where he testified that he smelled the odor of burnt marijuana and saw trace materials of suspected marijuana, a scale, and a suspected marijuana pipe. The testimony is undisputed that the Sergeant made none of these observations prior to his entry to the home, and arrival through the living area, kitchen, hallway, and into that bedroom. A central and common requirement in all plain view cases is that the officer possesses a constitutional justification for his presence in the place where he observes or seizes suspected contraband. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). As outlined above, the defense asserts that Sgt. Willy and fellow officers lacked this justification in the present case, and that the untainted evidence

[11] *Mtn. Hg. Transcript at 35-37.*

contained in their search warrant affidavit thus failed to state requisite and legitimate probable cause.

Conclusion

For the reasons stated above, he defense respectfully requests that this Court enter an order suppressing from use as evidence in the trial of this matter all physical evidence seized and observations made, as well as statements obtained, as a result of the police entry, search, and seizure of Mr. Doe's home in this case.

Dated at Brown County, Wisconsin, this 17th day of January, 2013.

Respectfully submitted,

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