COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3442-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TERRY L. MARSHALL,

DEFENDANT-APPELLANT.

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

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. Terry Marshall appeals his judgment of conviction for manufacturing marijuana. The issue is whether police, in their role as community caretakers, were lawfully present in the second story of Marshall's home when they discovered the marijuana which formed the basis for his

conviction. We conclude that they were not; and therefore, we reverse the judgment of the circuit court.

BACKGROUND

On April 4, 1997, police arrested Marshall at his home, for disorderly conduct and they took him to jail. After the arrest, the Soldiers Grove Chief of Police and a captain from the Crawford County Sheriff's Department returned to Marshall's[1] home with a camera, but without a search warrant, and entered the residence. The Police Chief explained he had observed that the back door and some windows were open when he had arrested Marshall, that he wanted to shut them, and to "secure the building."[2] Inside, the officers locked the doors and closed the downstairs windows and then went upstairs to close the bedroom window. Once in the bedroom, they observed a quantity of marijuana in plain view.

The officers confiscated the marijuana and the district attorney charged Marshall with the manufacture/delivery of THC, contrary to § 961.41(1)(h)1., STATS. Marshall moved to suppress the evidence on Fourth Amendment grounds. The State argued that the officers' actions were justified under the community caretaker doctrine. After the circuit court sustained the entry

[1] Marshall lived in a two-story apartment that actually belonged to his girlfriend's parents.

[2] The officers were aware that Marshall's girlfriend was out of town at the time.

of Marshall's residence under the emergency doctrine,[3] Marshall entered a guilty plea, reserving the right to appeal the adverse decision on the suppression motion.

DISCUSSION

Standard of Review.

When we review the denial of a motion to suppress evidence obtained as the result of an allegedly unlawful search, we will uphold the circuit court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS.; ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, we will independently determine whether the facts found by the circuit court pass muster under the statutes and applicable constitutional provisions. ***State v. Ellenbecker***, 159 Wis.2d 91, 94, 464 N.W.2d 427, 429 (Ct. App. 1990).

Community Caretaker Function.

The Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. ***State v. Drogsvold***, 104 Wis.2d 247, 264, 311 N.W.2d 243, 251 (Ct. App. 1981). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home[4] and there be free from unreasonable governmental intrusion."

[3] The emergency doctrine authorizes law enforcement officials to enter private premises without a warrant to preserve life or property when they have reasonable grounds to believe that there is an urgent need for such assistance, provided that they do not enter with an intent to search. ***State v. Kraimer***, 99 Wis.2d 306, 314, 298 N.W.2d 568, 572 (1980). Because the State concedes that there was no urgency in this case, we do not address the argument further.

[4] A resident of a premises need not be the legal owner to have a reasonable expectation of privacy in the home in which he is residing. ***Minnesota v. Olson***, 495 U.S. 91, 96-97 (1990). Accordingly, the State does not contest that Marshall has standing to raise Fourth Amendment claims.

Payton v. New York, 445 U.S. 573, 589-90 (1980) (citation omitted). "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent" who may be caught up in the "competitive enterprise of ferreting out crime." ***Johnson v. United States***, 333 U.S. 10, 14 (1948). Thus, the warrantless search of one's residence is presumptively unreasonable. ***Welsh v. Wisconsin***, 466 U.S. 740, 749-50 (1984).

Although warrantless searches are strongly disfavored, "our laws recognize that, under special circumstances, it would be unrealistic and contrary to public policy to bar law enforcement officials at the doorstep." ***State v. Smith***, 131 Wis.2d 220, 228, 388 N.W.2d 601, 605 (1986). Therefore, a handful of exceptions have been "jealously and carefully drawn," to balance the interests of the individual with those of the State. ***State v. Gonzalez***, 147 Wis.2d 165, 168, 432 N.W.2d 651, 652 (Ct. App. 1988) (citation omitted). For instance, police action may be justified when officers are performing a community caretaker function. ***State v. Anderson***, 142 Wis.2d 162, 167, 417 N.W.2d 411, 413 (Ct. App. 1987), *rev'd on other grounds*, 155 Wis.2d 77, 454 N.W.2d 763 (1990). When a community caretaker function is asserted as justification for the entry, a court must consider:

> (1) the degree of the 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 is involved; and (4) the availability and effectiveness of alternatives to the type of intrusion actually accomplished.

State v. Paterson, No. 97-2066-CR *3 (Wis. Ct. App. 1998), *citing* ***Anderson***, 142 Wis.2d at 169-70, 417 N.W.2d at 414.

Bona fide community caretaker activities include police conduct which is motivated, at least in part, by police duties apart from the detection, investigation, or acquisition of evidence relating to a potential crime. ***Paterson***, at *6 n.1. The balancing test requires an objective analysis of the reasonableness of the police conduct in light of the totality of the circumstances.

We begin our analysis by noting that the removal of marijuana from Marshall's home without consent clearly constituted a Fourth Amendment seizure. We also accept the circuit court's factual findings that the Chief of Police intended to secure the doors at the time of the arrest, but that the defendant's conduct diverted him, and that the police chief's purpose in returning to the building was in fact to secure it, not to search it. Because closing windows and locking doors are activities totally apart from the investigation of crime, we conclude that such conduct could fall within the ambit of a police officer's role as a community caretaker.

The police admitted that Soldiers Grove is a low crime area where people leave their doors unlocked, and that there was no reasonable risk that someone could have gotten into Marshall's house through the upstairs window. It was by all accounts a pleasant April day, with no indication of imminent rain. Marshall was in custody, yet no one asked whether he wanted his windows closed and doors locked, and if so, whom he wanted to do that. In short, the officers were not faced with any immediate threat to either a person or property, and any public interest in having the residence of an arrested person be secured was minimal. In contrast, Marshall's interest in maintaining the privacy of his own home was great. Certainly the average citizen would not consider it reasonable for officers to enter any house or apartment where they observed open windows and unlocked doors. And, even if it were marginally reasonable for police to attempt to lock the doors,

Marshall's privacy interests far outweighed any public need to close second story windows which posed no security risk. Therefore, we conclude the officers were not lawfully in Marshall's second floor bedroom when they saw the marijuana in plain view. The seizure was a violation of Marshall's Fourth Amendment right to be free of unreasonable searches and seizures.

CONCLUSION

Because the warrantless search and seizure of evidence from Marshall's home did not fall within the community caretaker exception, it was unreasonable *per se* under the Fourth Amendment. Accordingly, we conclude that the trial court erred in denying Marshall's motion to suppress the challenged evidence; therefore, the judgment of conviction is reversed.

By the Court.—Judgment reversed and cause remanded.

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